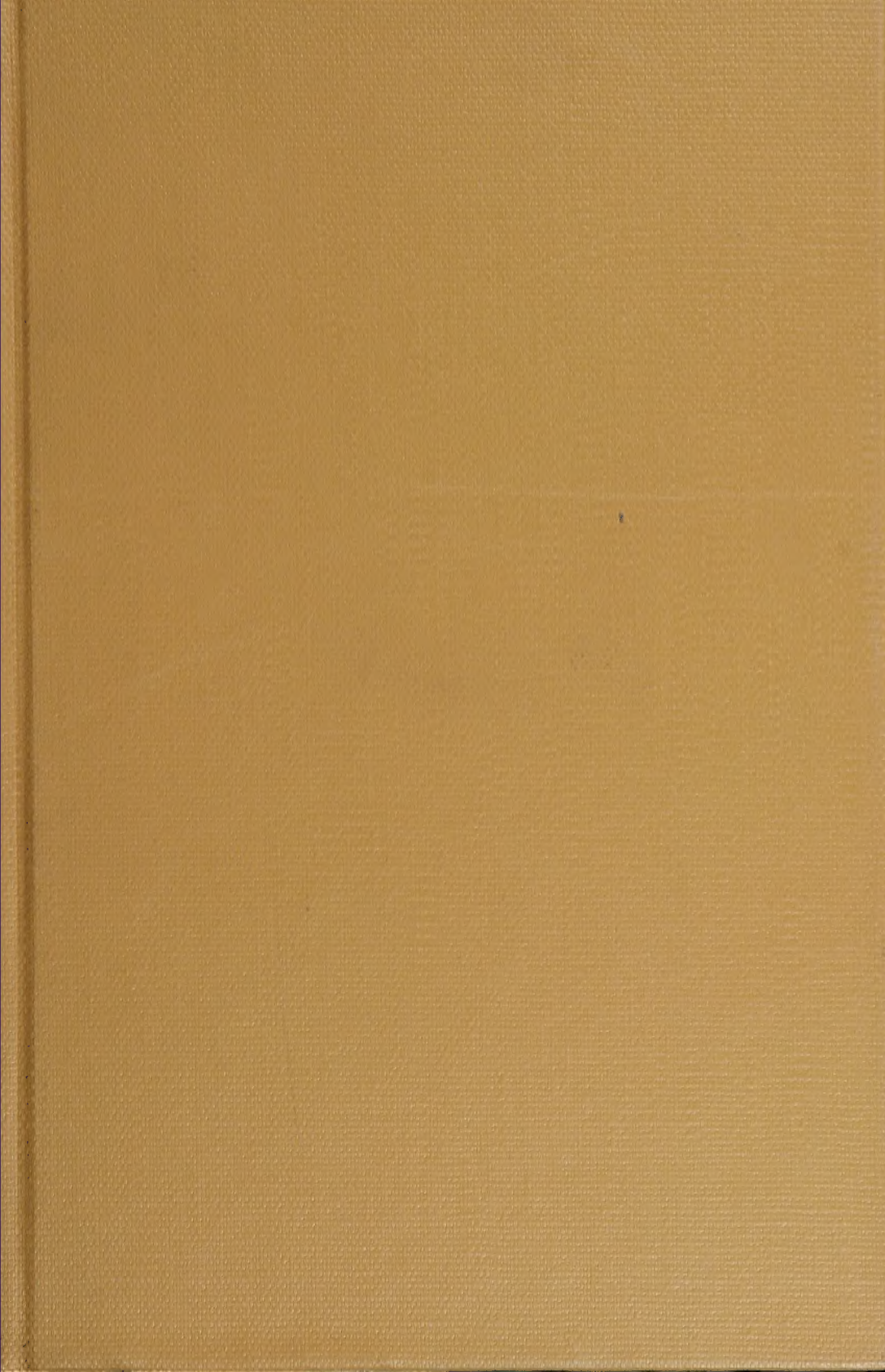
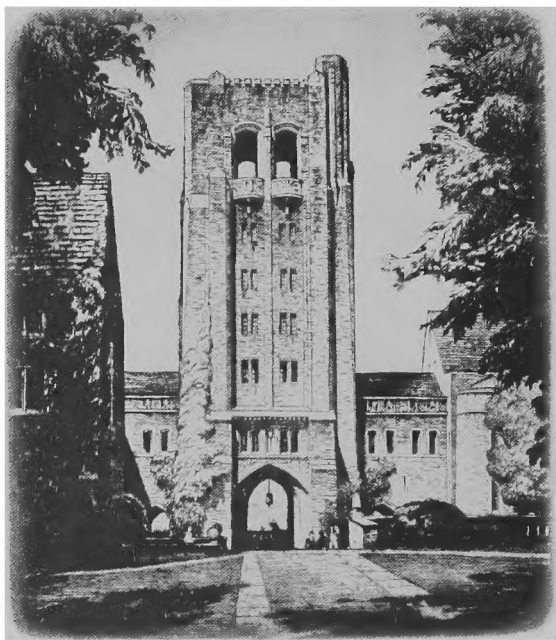




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THE LAW OF CONTRACTS

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PART III.

OTHER FORMS OF CONTRACT.

CHAPTER XXXII.

FORMAL CONTRACTS.—CONTRACTS OF RECORD.

§544. Nature of formal contract.

The formal contract is an obligation which owes its validity not to consideration, nor in some cases, as in contracts of record, to the agreement of the parties, but solely to the form of the transaction. There is an inclination to explain the contract of record on the theory that the law implies an agreement and presumes a consideration.¹ Such an explanation is of course a gross anachronism. The formal contract at Common Law antedated the executory simple contract, and was enforceable by reason of its form long before consideration was thought of as having any place in the law of contract.² At Common Law primary rights were classed with reference to the form of actions by which they were enforced. Accordingly we find that as the action of debt would lie on a record and the action of covenant on a sealed contract, both were classed as contracts.³ Assumpsit could not be brought on a contract under seal, to

¹ "In an action upon a record or upon a contract under seal, a lawful consideration was presumed to exist and could not be denied." Hilton v. Guyot, 159 U. S. 113, 199.

² See Ch. I.

³ "At Common Law an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. Assumpsit would not lie upon a record or other specialty; but would lie upon any other contract,

whether expressed by the party or implied by law." Hilton v. Guyot, 159 U. S. 113, 199. The statement that covenant and debt were concurrent remedies where a fixed sum of money was due and owing under a sealed instrument was true of the classic period of the Common Law, Black. Com. III. 154, but it was not true at the early Common Law after covenant was differentiated from debt. Pollock and Maitland History of English Law (2d ed.), Vol. II., 219.

recover damages for breach thereof.⁴ The tendency of Modern Law to classify primary rights according to their own inherent nature, and to define contract as an agreement enforceable at law, has excluded the greater number of the so-called contracts of record from the class of true contracts.⁵ They are here included for historical reasons. The formal contract consisted of two great classes: the contract of record and the contract under seal. Each of these will be discussed separately.

§545. Meaning of specialty.

Whether the term "specialty" includes all formal contracts, or only those under seal, excluding contracts of record, is a question upon which there is a conflict of authority. The better authorities define "specialty" as "a writing sealed and delivered, containing some agreement."¹ This was undoubtedly its original and primary meaning. But it has been said in some courts that it is used in a "more comprehensive sense as embracing debts upon recognizances, judgments and decrees, and (in England certainly) debts upon statutes."² In a later case, however, it was said that the term specialty "has no technical meaning that necessarily embraces judgments,"³ and subsequently the Supreme Court of Ohio declined to pass upon the question whether a foreign judgment was a "specialty" or not.⁴ "A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or a specialty."⁵

⁴ Junction R. R. v. Bank, 12 Wall. (U. S.) 226.

⁵ See §§ 13, 14.

¹ Bouvier Law. Dict. "Specialty"; Black. Com. II., 465; Lane v. Morris, 10 Ga. 162, 167; Davis v. Smith, 5 Ga. 274, 285; 48 Am. Dec. 274, 284; Kimball v. Whitney, 15 Ind. 280; Helm v. Eastland, 2 Bibb (Ky.) 193; Frazer v. Tunis, 1 Binn. (Pa.) 254; Probate Court v. Child, 51 Vt. 82.

² Stockwell v. Coleman, 10 O. S. 33, 40. To the same effect see

Seymour v. Street, 5 Neb. 85.

³ Tyler's Executors v. Winslow, 15 O. S. 364, 368.

⁴ Fries v. Mack, 33 O. S. 52.

⁵ Hilton v. Guyot, 159 U. S. 113, 200. See also to the same effect: Walker v. Witter, 1 Dougl. 1; Phillips v. Hunter, 2 H. Bl. 402; Smith v. Nicolls, 7 Scott 147; 5 Bing. N. C. 208; D'Arcy v. Ketchum, 11 How. (U. S.) 165; Mills v. Dur- yee, 7 Cranch (U. S.) 481; Bissell v. Briggs, 9 Mass. 462; 6 Am. Dec. 88.

§546. Judgments classed as contracts of record.

A judgment is the determination and sentence of the law, awarded and pronounced by the court.¹ The code definition of a judgment is "the final determination of the rights of the parties in an action."² At Common Law a judgment was classed as a contract,³ since the action of debt could be maintained thereon.⁴ This view was entertained in many of the early American cases.⁵ In many of these cases the proposition that a judgment is a contract is wholly uncalled for, the real point at issue being decided without reference thereto. Thus where the point actually decided was that a foreign judgment must show that the court rendering such judgment had jurisdiction of the cause of action and of the defendant the court added the obiter: "A judgment for money is a contract of record to pay the amount thereof to the plaintiff. Such a contract, however, is not entered into by the defendant in proper person, but by the court for him . . ."⁶ and a judgment rendered by confession in favor of a bank, without the consent of such bank was held voidable at the bank's election, but on the unnecessary ground of being "a new and different contract."⁷ So a judgment against a *feme covert* was held void, because it was "in the nature of a contract."⁸ A release of "all notes, accounts and demands of every kind and nature" was held to include

¹ Bouvier's Law. Dict. "Judgment"; Black. Com. III., 396; Judson v. Gage, 98 Fed. 540; Gould v. Hayes, 71 Conn. 86; 40 Atl. 930; Blystone v. Blystone, 51 Pa. St. 373.

² Rev. Stat. Ohio, § 5310; Kingman v. Mfg. Co., 170 U. S. 675; *In re* Smith, 122 Cal. 462; 7 L. R. A. 240; 55 Pac. 249; Voisin v. Insurance Co., 123 N. Y. 120; 25 N. E. 325; Cameron v. Workman, 30 O. S. 58; Moore v. Ogden, 35 O. S. 430; Cincinnati v. Steadman, 53 O. S. 312; 45 N. E. 5. This definition of course applies to final judgments at Common Law.

³ Black. Com. III., 158.

⁴ Williams v. Jones, 13 M. & W. 628.

⁵ Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538; Reed v. Eldredge, 27 Cal. 348; Henry v. Henry, 11 Ind. 236; 71 Am. Dec. 354; Gebhard v. Garnier, 12 Bush. (Ky.) 321; 23 Am. Rep. 721; Sawyer v. Vilas, 19 Vt. 43.

⁶ Gebhard v. Garnier, 12 Bush. (Ky.) 321; 23 Am. Rep. 721.

⁷ Farmers' Bank v. Mather, 301 Ia. 283.

⁸ Morse v. Tappan, 3 Gray (Mass.) 411.

a judgment, on the ground that "a judgment is a demand — a contract of record."⁹ A judgment is often said to be a "contract of record"¹⁰ or "a debt of record."¹¹ Thus it has been said of consent judgments: "They are contracts in the most solemn form sanctioned by the court, and cannot be collaterally attacked."¹²

§547. Judgment not founded on agreement.

It is evident, however, that a judgment does not necessarily have anything to do with agreement. It may, it is true, be based on contract, or it may be entered by agreement; but on the other hand it may be based on tort and may be rendered only after all means of resistance have been exhausted. Furthermore, it possesses certain elements which are inconsistent with the modern idea of a contract.

First, as between the parties thereto the record is conclusive as to matters litigated,¹ and it is equally conclusive as to those claiming under such parties² though it is not conclusive

⁹ Henry v. Henry, 11 Ind. 236; 71 Am. Dec. 354.

¹⁰ Barber v. International Co., 74 Conn. 652; 92 Am. St. Rep. 246; 51 Atl. 857. (Even where held not to be a contract for the purpose of the statute of limitations.)

¹¹ Lynde v. Lynde, 162 N. Y. 405, 417; 76 Am. St. Rep. 332; 48 L. R. A. 679; 56 N. E. 979; Conrad v. Everich, 50 O. S. 476, 481; 40 Am. St. Rep. 679; 35 N. E. 58; Trowbridge v. Spinning, 23 Wash. 48, 64; 83 Am. St. Rep. 806; 62 Pac. 125.

¹² Union Bank v. Board of Commissioners of Oxford, 90 Fed. 7. 12.

¹ Keech v. Beatty, 127 Cal. 177; 59 Pac. 837; Naftzger v. Gregg, 99 Cal. 83; 37 Am. St. Rep. 23; 33 Pac. 757; Lancaster v. Snow, 184 Ill. 534; 56 N. E. 813; Bruce v. Osgood, 154 Ind. 375; 56 N. E. 25; Moy v. Moy, 111 Ia. 161; 82 N. W.

481; Willard v. Ostrander, 51 Kan. 481; 37 Am. St. Rep. 294; 32 Pac. 1092; Gregory v. Pike, 94 Me. 27; 46 Atl. 793; Faber v. Hovey, 117 Mass. 107; 19 Am. Rep. 398; Day v. De Jonge, 66 Mich. 550; 33 N. W. 527; De Camp v. Miller, 44 N. J. L. 617; Mershon v. Williams, 63 N. J. L. 398; 44 Atl. 211; Allen v. Text Book Co., 201 Pa. St. 579; 88 Am. St. Rep. 834; 51 Atl. 323; same case, *sub nom.*, Allen v. Engineers' Co., 196 Pa. St. 512; 46 Atl. 899; Thornton v. Baker, 15 R. I. 553; 2 Am. St. Rep. 925; 10 Atl. 617; King v. Ross, 21 R. I. 413; 45 Atl. 146.

² O'Connell v. Ry. Co., 184 Ill. 308; 56 N. E. 355; Scott v. Hall, 60 N. J. Eq. 451; 46 Atl. 611; reversing 58 N. J. Eq. 42; 43 Atl. 50; Wadsworth v. Murray, 161 N. Y. 274; 76 Am. St. Rep. 265; 55 N. E. 910.

as to strangers;³ as to a party suing in a different capacity,⁴ or as to nominal parties without real interest.⁵ It is not conclusive as to issues not passed upon,⁶ or as to rights not litigated.⁷ It is, of course, not conclusive if the court rendering the judgment has no jurisdiction to render such judgment,⁸ or, it has been held, if the petition shows affirmatively that no cause of action against defendant exists.⁹

Second, the validity of a judgment cannot be attacked collaterally if the court rendering it had jurisdiction of the subject matter and the person of the defendant against whom it is rendered,¹⁰ but if the judgment is void it is liable to collateral

³ *Garland County v. Hot Springs County*, 68 Ark. 83; 56 S. W. 636; *Cloverdale v. Smith*, 128 Cal. 230; 60 Pac. 851; *Going v. Society*, 117 Mich. 230; 75 N. W. 462; *Seymour v. Wallace*, 121 Mich. 402; 80 N. W. 242; *Selleck v. Janesville*, 104 Wis. 570; 76 Am. St. Rep. 892; 47 L. R. A. 691; 80 N. W. 944; *Hart v. Moulton*, 104 Wis. 349; 76 Am. St. Rep. 881; 80 N. W. 599; *Hood v. Dorer*, 107 Wis. 149; 82 N. W. 546.

⁴ *Pollock v. Cox*, 108 Ga. 430; 34 S. E. 213.

⁵ *Walker v. Philadelphia*, 195 Pa. St. 168; 78 Am. St. Rep. 801; 45 Atl. 657.

⁶ *Beronio v. Lumber Co.*, 129 Cal. 232; 61 Pac. 958.

⁷ *Smith v. Rountree*, 185 Ill. 219; 56 N. E. 1130; affirming 85 Ill. App. 161; *Bacon v. Schepflin*, 185 Ill. 122; 56 N. E. 1123; affirming 85 Ill. App. 553; *Weeks v. Edwards*, 176 Mass. 453; 57 N. E. 701; *Rossman v. Tilleny*, 80 Minn. 160; 83 N. W. 42; *American, etc., Co. v. Macdonnell*, 93 Tex. 398; 55 S. W. 737; *Dillard v. Dillard*, 97 Va. 434; 34 S. E. 60.

⁸ *Scott v. McNeal*, 154 U. S. 34; *Hall v. Melvin*, 62 Ark. 439; 54 Am.

St. Rep. 301; 35 S. W. 1109; *McCarty v. Kinsey*, 154 Ind. 447; 57 N. E. 108; *Morgan v. Dodge*, 44 N. H. 255; 82 Am. Dec. 213; *Springer v. Shavender*, 118 N. C. 33; 54 Am. St. Rep. 708; 23 S. E. 976; denying rehearing in 116 N. C. 12; 47 Am. St. Rep. 791; 33 L. R. A. 772; 21 S. E. 397; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746.

⁹ "Where a bill shows no cause of action against the defendants with reference to the subject-matter of the suit, tenders no issue with them but on the contrary shows that there never could be any issue with them, the complaint not even being susceptible of amendment to show an issue, a decree based on such a bill is a nullity, no matter how attacked." *Hall v. Melvin*, 62 Ark. 439, 443; 54 Am. St. Rep. 301, 302; 35 S. W. 1109. (Citing *Munday v. Vail*, 34 N. J. L. 418; *Spoors v. Coen*, 44 O. S. 497; 9 N. E. 132; *Seamster v. Blackstock*, 83 Va. 232; 5 Am. St. Rep. 262; 2 S. E. 36.)

¹⁰ *Van Wagenen v. Carpenter*, 27 Colo. 444; 61 Pac. 698; *Figge v. Rowlen*, 185 Ill. 234; 57 N. E. 195; *Lancaster v. Snow*, 184 Ill. 534; 56 N. E. 813; *Watkins v. Lewis*, 153

attack.¹¹ Jurisdictional facts such as the entering by an attorney of the appearance of a defendant who is not served¹² may be attacked in a direct proceeding for that purpose.

Further, a judgment operates as a merger of the cause of action on which it is rendered, so that after its rendition no liabilities exist except by reason of the judgment.¹³ By statute a judgment operates under certain circumstances as a lien on realty; and a judgment may be enforced by execution. A subsequent suit thereon is not necessary in the jurisdiction in which it was rendered.

§548. Judgments held not to be contracts.

Accordingly, there is a decided tendency at Modern Law to exclude judgments from the class of contracts,¹ "The theory that a foreign judgment imposes or creates a duty or obligation is a remnant of an ancient fiction, assumed by Blackstone, saying that 'upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it.' 3 Bl. Com. 159. That fiction which embraced judgment upon default or for torts cannot

Ind. 648; 55 N. E. 83; J. B. Watkins, etc., Co. v. Mullen, 62 Kan. 1; 61 Pac. 385; reversing 8 Kan. App. 705; 54 Pac. 921; Benjamin v. Early, 123 Mich. 93; 81 N. W. 973; Bengtson v. Johnson, 75 Minn. 321; 78 N. W. 3; State *ex rel.* Lacy v. Brandhorst, 156 Mo. 457; 56 S. W. 1094; McKeen v. Converse, 68 N. H. 173; 39 Atl. 435; Dauberman v. Hain, 196 Pa. St. 435; 46 Atl. 442.

¹¹ McAllister v. Johnson, 108 Ia. 42; 78 N. W. 790; Kager v. Vickery, 61 Kan. 342; 78 Am. St. Rep. 318; 49 L. R. A. 153; 59 Pac. 628; Duxbury v. Dahle, 78 Minn. 427; 81 N. W. 198; Sackett v. Montgomery, 57 Neb. 424; 73 Am. St. Rep. 522; 77 N. W. 1083; Lefferts v. Bell, 57

Neb. 248; 77 N. W. 680; Elmen-dorf v. Elmendorf, 58 N. J. Eq. 113; 44 Atl. 164; O'Malley v. Fricke, 104 Wis. 280; 80 N. W. 436.

¹² Mullins v. Rieger, 169 Mo. 521; 92 Am. St. Rep. 651; 70 S. W. 4.

¹³ See § 1353.

¹ Louisiana v. New Orleans, 109 U. S. 285; Freeland v. Williams, 131 U. S. 405; Morley v. Ry., 146 U. S. 162; Smith v. Harrison, 33 Ala. 706; Larrabee v. Baldwin, 35 Cal. 155; Rae v. Hubert, 17 Ill. 572; O'Brien v. Young, 95 N. Y. 428; 47 Am. Rep. 64; Wyoming National Bank v. Brown, 9 Wyom. 153; 61 Pac. 465; denying rehearing, 7 Wyom. 494; 75 Am. St. Rep. 935; 53 Pac. 291.

convert a transaction wanting the assent of the parties into one which necessarily implies it.”² So a judgment was held not to be a contract with reference to the liability of a trustee of a corporation who has become liable for the “debts” of the corporation by failing to file a report of the corporation as required by law.³

§549. Judgments as affected by impairment of obligation of contract.

The cases in which it now is material whether a judgment is a contract or not are generally cases involving the impairment of the obligation of contracts, the period of limitations, the rule as to necessary parties to actions, and other questions arising where the legislature has made different provisions for actions on contract from those for actions generally.

While there are some decisions to the contrary¹ the weight of authority, supported by decisions of the Supreme Court of the United States, is that a judgment is not a contract within the meaning of the clause in the United States’ Constitution preventing a state from impairing the obligation of contracts. Hence the legislature may interfere with the collection of a judgment based on tort by forbidding the sale of property for an act done during the Civil War,² or by reducing the tax rate in the municipality so that the judgment cannot be collected,³ or

² *Hilton v. Guyot*, 159 U. S. 113 (201).

³ *Chase v. Curtis*, 113 U. S. 452. Thus under a statute making stockholders liable only on contracts entered into by the corporation while they were stockholders, a judgment rendered on a cause of action was held not to be a contract so as to bind a stockholder who bought stock after the cause of action accrued, but before judgment. *Larrabee v. Baldwin*, 35 Cal. 155. *Reed v. Eldredge*, 27 Cal. 346, is really not in point. It holds that a judgment rendered before the passage of the

legal tender act was not a contract for the payment of a debt in gold or silver; hence the court in a suit on such judgment after the passage of such act could not render judgment for the payment of the debt in gold or silver.

¹ *Skinner v. Holt*, 9 S. D. 427; 62 Am. St. Rep. 878; 69 N. W. 595 (change in exemption laws).

² *Freeland v. Williams*, 131 U. S. 405.

³ *Louisiana v. New Orleans*, 109 U. S. 285; *State v. New Orleans*, 38 La. Ann. 119; 58 Am. Rep. 168.

by changing the rate of interest which the judgment bears, accruing after the passage of the act.⁴ But in some cases a statute changing the rate of interest on judgments is held inapplicable to judgments previously rendered.⁵ There is, therefore, a decided conflict of authority on this point. As an additional complication some courts have tried to distinguish cases where the contract provides what rate a judgment rendered thereon shall bear⁶ from all other cases, holding that in such cases a change in the rate of interest of judgments previously rendered would impair the obligation of contracts, but not in other cases. A subsequent statute as to fish-ways may affect a judgment authorizing a dam to be built across a creek, subject to such conditions as the court should impose concerning the obstruction of the passage of fish.⁷

§550. Remedies given on judgments.

It has been often said that "judgments are invariably classed with contracts with reference to remedies upon them."¹ "There are authorities which hold that judgments for some purposes are not contracts; but there is no authority that they are never to be treated as contracts, and all of them recognize the implied obligation of every judgment debtor to pay the judgment, and that for the purpose of actions and remedies upon them they are to be treated as contracts."² At Common Law it was im-

⁴ *Mooley v. Railroad Co.*, 146 U. S. 162; *O'Brien v. Young*, 95 N. Y. 428; 47 Am. Rep. 64; *Wyoming Nat. Bk. v. Brown*, 9 Wyom. 153; 61 Pac. 465; denying rehearing, 7 Wyom. 494; 75 Am. St. Rep. 935; 53 Pac. 291.

⁵ *Texas, etc., Railroad Co. v. Anderson*, 149 U. S. 237; *Sharpe v. Morgan*, 44 Ill. App. 346; *Cox v. Marlatt*, 36 N. J. Law. 389; 13 Am. Rep. 451; *Brauer v. Portland*, 35 Or. 471; 58 Pac. 861; 59 Pac. 117; 60 Pac. 378. "The legislature could not thus alter the rate of interest to which a creditor was

entitled upon his pre-existing judgment." *Butler v. Rockwell*, 17 Colo. 290, 295; 29 Pac. 458.

⁶ *Bond v. Dolby*, 17 Neb. 491; 23 N. W. 351.

⁷ *State v. Gilmore*, 141 Mo. 506; 42 S. W. 817.

¹ *Wattles v. Circuit Judge*, 117 Mich. 662, 665; 72 Am. St. Rep. 590; 76 N. W. 115; *Meyer v. Brooks*, 29 Or. 203; 54 Am. St. Rep. 790; 44 Pac. 281.

² *Gutta Percha, etc., Mfg. Co. v. Houston*, 108 N. Y. 276, 279; 2 Am. St. Rep. 412; 15 N. E. 402.

portant to determine whether a judgment was a contract or not chiefly with reference to the form of action to be brought thereon. At Modern Law the form of action is usually immaterial. Still, where the legislature has divided actions into those in tort and those on contract, a judgment is yet held to be a contract.³ Under a statute authorizing attachment on all contracts express or implied, attachment may be brought on a judgment based on tort,⁴ or on a foreign judgment.⁵ This is generally, but not invariably, true. Thus a judgment is classed as a contract as concerns a statute forbidding arrest on execution in actions on contract;⁶ as to the jurisdiction of a justice of the peace,⁷ as to joinder of causes of action,⁸ or as to the right of counterclaim.⁹ Under a statute authorizing suit against a foreign corporation by another foreign corporation on a "cause of action which arose within the state." An effort was made to maintain an action under such statute upon a judgment rendered in another state upon the theory that it was a contract of record and that failure to pay it was a continuing breach, so that the cause of action arose wherever the judgment debtor was doing business and demand might be made. This theory was held to be unsound.¹⁰

³ Johnson v. Butler, 2 Ia. 535; Moore v. Nowell, 94 N. C. 265.

⁴ Johnson v. Butler, 2 Ia. 535; Gutta Percha, etc., Mfg. Co. v. Houston, 108 N. Y. 276; 2 Am. St. Rep. 412; 15 N. E. 402; Nazro v. Oil Co., 36 Hun (N. Y.) 296; Donnelly v. Corbett, 7 N. Y. 500; First, etc., Bank v. Van Vooris, 6 S. D. 548; 62 N. W. 378.

⁵ Wattles v. Circuit Judge, 117 Mich. 662; 72 Am. St. Rep. 590; 76 N. W. 115; Gutta Percha, etc., Mfg. Co. v. Houston, 108 N. Y. 276; 2 Am. St. Rep. 412; 15 N. E. 402; Meyer v. Brooks, 29 Or. 203; 54 Am. St. Rep. 790; 44 Pac. 281.

⁶ Sawyer v. Vilas, 19 Vt. 43.

⁷ Stuart v. Lander, 16 Cal. 372; 76 Am. Dec. 538.

⁸ Childs v. Mfg. Co., 68 Wis. 231; 32 N. W. 43.

⁹ Taylor v. Root, 4 Keyes (N. Y.) 335. But in Rae v. Hubert, 17 Ill. 572, a foreign judgment was held not included in "contract or agreement, express or implied," in a statute giving the right of set-off.

¹⁰ Anglo-American Provision Co. v. Provision Co., 169 N. Y. 506; 88 Am. St. Rep. 608; 62 N. E. 587. The court said: "Doubtless a judgment as a debt of record is a contract obligation of the highest nature. The cause of action has become merged, and the law implies the obligation and the promise of the defendant to pay; but it is not a contract in the sense of any engagement of the parties with each other."

A statute requiring action on contract to be brought in the name of the real party in interest, has been held not to apply to judgments.¹¹

§551. Judgment as affected by statute of limitations.

Where the limitation of actions is concerned, no question arises as to whether a judgment is a contract if the legislature has made specific provision for judgments.¹ Where no such provision is made, a domestic judgment has been held not to be a written contract or a specialty² but foreign judgments,³ a judgment rendered by a justice of the peace⁴ and findings of fact by a court,⁵ such as a finding of the amount due on foreclosure, there being no prayer for personal judgment,⁶ have been held specialties, or at least contracts of record governed by the statute of limitations which provides for specialties.

§552. Recognizances.

A recognizance, in the correct use of the term, is an obligation of record entered into either before a court of record or

The element of mutuality is wanting; for *judicium redditur in irritum*." . . . "We may concede that an action on a foreign judgment is an action *ex contractu*; but that there is, within the meaning of the statute a cause of action which arose within the state, permits of grave doubt and puts a severe strain on what seems to be plain language." 167 N. Y. 509.

¹¹ *Wolffe v. Eberlein*, 74 Ala. 99; 49 Am. Rep. 809; *Lovins v. Humphries*, 67 Ala. 437.

¹ *Shainwald v. Lewis*, 69 Fed. 487; *Schuyler, etc., Bank v. Bradbury*, 56 Kan. 355; 43 Pac. 254; *Mead v. Bowker*, 168 Mass. 234; 46 N. E. 625; *Whiteside v. Catching*, 19 Mont. 394; 48 Pac. 747.

² *Epling v. Dickson*, 170 Ill. 329;

48 N. E. 1001; reversing 61 Ill. App. 78; *Kimball v. Whitney*, 15 Ind. 280; *Burnes v. Simpson*, 9 Kan. 658; *U. S. Bank v. Dallam*, 4 Dana (Ky.) 574; *Bullard v. Bell*, 1 Mason (U. S. C. C.) 243; *Tyler v. Winslow*, 15 O. S. 364.

³ *Stockwell v. Coleman*, 10 O. S. 33; *Fries v. Mack*, 33 O. S. 52. *Contra*, *Todd v. Crumb*, 5 McLean (U. S. C. C.) 172; *Barber v. International Co.*, 74 Conn. 652; 92 Am. St. Rep. 246; 51 Atl. 857; *Jordan v. Robinson*, 15 Me. 167; *Richards v. Bickley*, 13 Serg. & R. (Pa.) 395.

⁴ *Pease v. Howard*, 14 Johns. (N. Y.) 479.

⁵ *Doyle v. West*, 60 O. S. 438; 54 N. E. 469.

⁶ *Doyle v. West*, 60 O. S. 438; 54 N. E. 469 (*semble*).

before a magistrate authorized by law to take such recognizance, conditioned to be void upon the doing of some specified act, otherwise to be in full force and effect.¹ “A recognizance at Common Law was an obligation entered into before some court of record or magistrate duly authorized with a condition to do some particular act, as to keep the peace or appear and answer to a criminal accusation. It need not be signed by the party entering into it.”² A recognizance thus was in form a judgment by confession, with a clause of defeazance.³ The condition is construed strictly.⁴ On breach of the condition, the recognizance became absolute. The fact that the party on whose appearance in court the recognizance was conditioned remained in the city,⁵ or was recaptured,⁶ did not prevent enforcement of the recognizance. It must be entered of record. “It can exist only of record. It must be proved of record.”⁷ “A recognizance differs from a bail bond merely in the nature of the obligation created. The former is an acknowledgment of record of an existing debt; the latter, which is attested by the signature and seal of the obligor, creates a new obligation.”⁸ A parol recognizance is invalid.⁹ It need not, however, be entered on record upon the day that it was taken.¹⁰

¹ Black. Com. II., 341; *State v. Walker*, 56 N. H. 176; 178; *State v. Kruse*, 32 N. J. L. 313; *State v. Crippen*, 1 O. S. 399.

² *People v. Barrett*, 202 Ill. 287, 297; 95 Am. St. Rep. 230 (238); 67 N. E. 23. Citing *Shattuck v. People*, 4 Scam. (Ill.) 477; 2 Black. Com. 341.

³ *Adair v. State*, 1 Blackf. (Ind.) 200; *Pugh v. State*, 2 Head (Tenn.) 227.

⁴ *State v. Murdock*, 59 Neb. 521; 81 N. W. 447. (A recognizance conditioned to appear at a given term is not binding for appearance at a later term.)

⁵ *Parkman v. Bartlett*, 173 Mass. 475; 53 N. E. 906. (A civil action,

in which such party did not appear, but after default judgment remained in the city until he obtained his discharge in insolvency.)

⁶ *Reed v. Police Court*, 172 Mass. 427; 52 N. E. 633.

⁷ *State Treasurer v. Merrill*, 14 Vt. 64, 65. “Without record there is no recognizance.” *Mendocino County v. Lamar*, 30 Cal. 627, 629; *People v. Huggins*, 10 Wend. (N. Y.) 464.

⁸ *People v. Barrett*, 202 Ill. 287, 297; 95 Am. St. Rep. 230 (238); 67 N. E. 23.

⁹ *Bloomington v. Heiland*, 67 Ill. 278.

¹⁰ *McNamara v. People*, 183 Ill. 164; 55 N. E. 625.

At early Common Law a recognizance was a very common method of securing a debt.¹¹ This is to-day closely paralleled by cases in which a judgment has been confessed for future advances.¹² At Modern Law the use of recognizances is almost wholly confined to criminal or bastardy proceedings.¹³ The binding force of the recognizance arises out of the act of the court; hence a recognizance need not be signed by the recognizer, unless the statute specifically requires it,¹⁴ and if signed, the signature may be treated as surplusage;¹⁵ but if the magistrate or officer is not authorized to take the recognizance,¹⁶ or if taken in any other manner than that prescribed by law,¹⁷ as where it is not conditioned with reference to any criminal charge,¹⁸ it is invalid.

Where a recognizance is required a bond cannot be given as a substitute therefor.¹⁹ A recognizance is sometimes held at modern law to be a true contract.²⁰ The difficulties in making

¹¹ Pollock & Maitland, History English Law, II., 201, 202 (original paging).

¹² Cook v. Whipple, 55 N. Y. 150; 14 Am. Rep. 202; Shenk's Appeal, 33 Pa. St. 371.

¹³ Even here the term recognizance is often misused, where the obligation is not of record, but is merely a bond for appearance and the like. People v. Mellor, 2 Colo. 705; New Haven v. Roger, 32 Conn. 221; *In re* Brown, 35 Minn. 307; 29 N. W. 131. "The bond in question is substantially a recognizance." Vierling v. State, 33 Ind. 218, 219. It is in some cases distinguished from a bond. McMicken v. Commonwealth, 58 Pa. St. 213.

¹⁴ McNamara v. People, 183 Ill. 164; 55 N. E. 625; Gay v. State, 7 Kan. 394; Madison v. Commonwealth, 2 A. K. Mar. (Ky.) 131; Irwin v. State, 10 Neb. 325; 6 N. W. 370; King v. State, 18 Neb. 375; 25 N. W. 519; Porter v. State, 23 O. S. 320.

¹⁵ Irwin v. State, 10 Neb. 325; 6 N. W. 370; King v. State, 18 Neb. 375; 25 N. W. 519.

¹⁶ Clink v. Russell, 58 Mich. 242; 25 N. W. 175.

¹⁷ Irwin v. State, 10 Neb. 325; 6 N. W. 370. (Omission of designation of official character of officer taking recognizance.) State v. Pratt, 148 Mo. 402; 50 S. W. 113. (The statute in effect required the recognizance to be taken and signed in the presence of the officer who is to take it.)

¹⁸ Cannon v. Commonwealth, 96 Va. 573; 32 S. E. 33.

¹⁹ Comfort v. Kittle, 81 Ia. 179; 46 N. W. 988. This is not true in states which treat recognizance and bond as synonymous terms. New Haven v. Rogers, 32 Conn. 221.

²⁰ State v. Weatherwax, 12 Kan. 463. (Holding that a minor's recognizance for his own release is valid as a contract for necessities, and saying that a recognizance, while "more than a contract" at Common

such classification are that in criminal matters at least, the agreement is with the state in its sovereign capacity,²¹ and that the recognizance has the elements of conclusiveness and finality that belong to a judgment.²²

A recognizance was enforceable at Common Law by *scire facias*.²³ Suit may be brought on a recognizance,²⁴ but where the nominal amount of the judgment may be reduced to equal the actual damage, debt will not lie.²⁵

§553. Statute merchant and statute staple.

Statute merchant was an obligation of record analogous to a recognizance. The statute of Acton-Burnel,¹ the first of a series of acts, passed primarily to extend English credit in that mediæval struggle for trade in which England laid the foundation of her commercial greatness, attempted to provide a quick and easy method for securing debts due to merchants. "The merchant which will be sure of his debts shall cause his debtor to come before the mayor of London or of York or Bristol, or before the mayor and a clerk (which the King shall appoint for the same) for to knowledge the debt and the day of payment; and the recognizance shall be entered into a roll with the hand of the said clerk which shall be known." This statute then provided that a writing obligatory was to be made by the clerk, sealed with the seal of the debtor and the seal of the King. If the debtor did not pay at the day limited the

Law, is a contract in Kansas.) State v. Crippen, 1 O. S. 399.

²¹ Anson regards this as excluding it from true contract. Anson Cont. 51 (original paging). In Smith v. Collins, 42 Kan. 259; 21 Pac. 1058, the court said that recognizances are "not contracts within the ordinary significance of the word"; and accordingly held that suits on recognizances were to be classed as penalties rather than as contracts with reference to the jurisdiction of such suit.

²² McNamara v. People, 183 Ill. 164; 55 N. E. 625; State v. Kruise, 32 N. J. L. 313.

²³ Banta v. People, 53 Ill. 434; State v. Dwyer, 70 Vt. 96; 39 Atl. 629.

²⁴ State v. Wheeler, 67 N. H. 511; 41 Atl. 173.

²⁵ State v. Dwyer, 70 Vt. 96; 39 Atl. 629.

¹ 11 or 13 Ed. I.; Statutes at Large, I., 141 (edited by Danby Pickering).

creditor could come before the said mayor and clerk with his bill obligatory; and if it was found by the roll and the bill that the debt had been acknowledged and that the day of payment had expired and that the bill was unpaid, the mayor was forthwith to cause the movables of the debtor to be sold after appraisal until the amount of the debt was paid. Provision was made for levying on movables outside of the jurisdiction of the mayor. Imprisonment of the debtor was provided for if the movables did not bring enough to pay the debt. This statute proved ineffective, and its general principles were re-enacted and extended in the statute *De mercatoribus*.² Before the passage of this act, feudal principles had given rise to the doctrine that real property was not liable for the debts of the owner. This rule had a depressing influence on the credit of English merchants, since their real estate could not be reached in any way. The Statute of Acton-Burnel was also shorn of its force by misinterpretation by the sheriffs, it is said in the preamble to the Statute *De Mercatoribus*, and great injury was thus done to merchants. After specific provisions for recognizance, execution against movables, and imprisonment, of the same general scope as the Statute of Acton-Burnel, but more exact in terms, the Statute *De Mercatoribus* provides for extension of time for a quarter of a year, "And if he do not agree within the quarter (of a year) next after the quarter expired, all the lands and goods of the debtor shall be delivered to the merchant by a reasonable extent, to hold them until such time as the debt is wholly levied." The liability thus created was more than a mere obligation of record; since it created an estate in lands defeasible upon condition subsequent, a chattel interest, but one like a freehold, since it might endure forever if the debtor's estate were a fee and the debt was not discharged.³ Statute Staple was a similar estate created under a later statute.⁴ The Statute of the Staple intended to create

² 13 Ed. I.; St. 3, c. 1; I. Statutes at Large, 236 (edited by Danby Pickering).

³ Black. Com. II. 160.

⁴ 27 Ed. III., St. 2, ch. 9; II. Statutes at Large, 85 (edited by Danby Pickering).

certain market-places in England for wools, leather, wool-fells and lead. There was also a class of obligations of record known as recognizances in the nature of Statute Staples.⁵ No further discussion of these obligations of record is necessary, as they have all been long since obsolete.

§554. Other contracts of record.

Contracts of record other those enumerated are naturally rare. They are not, however, entirely unknown. It has been held that a contract made between the parties to pending litigation in open court, and entered on the journal as a proceeding in the cause, "has all the force and effect of a contract of record."¹ Such a contract has been held not to be within the operation of the statute of frauds.²

⁵ Black. Com. II. 160.

² See § 737.

¹ *Huston v. Ry.*, 21 O. S. 235.

CHAPTER XXXIII.

CONTRACTS UNDER SEAL.

§555. History of the seal.

The use of the seal as a means of authenticating instruments is often said to be due primarily to the ignorance of our ancestors. This is not historically true. Before the Norman conquest we find that seals were used by the Duke of the Normans and possibly a few of his great men. On the other side of the channel, Edward the Confessor carried his love for things Norman to the extent of using a private seal.¹ In the years immediately following the Norman Conquest the use of the seal was distinctive of the king and a few of the great men. Gradually the use of the seal extended downward in the social scale until by the time of Henry II. we find that it was assumed that formal instruments, executed by free men, would be under seal. We know of this change in the general use of the seal better than many more important facts about the history of our law. In a famous case between Abbot Walter and Gilbert de Baillol² we find that the validity of a charter of an earlier reign was attacked on the ground that the charter was unsealed. Richard de Lucy, the justiciar, replied that it was not the ancient custom that every petty knight should have a seal, which was suitable only for kings and pre-eminent personages.³ It is

¹ Pollock & Maitland's History of English Law, I. 72 (original paging); II. 221 (original paging).

² Bigelow Placita, 175; Pollock & Maitland's History of English Law, II. 221 (original paging). Adams & Stephen's Select Documents of English Constitutional History, 9.

³ "Now, since there was nothing

in this statement of the case for prosecution which could be successfully controverted, as the Curia Regis possessed testimony on every point; at the permission of the king, the deeds of purchase and of gift were read in the hearing of all, and also the charters of confirmation. Since the other party had little to

true that the justiciar was sitting in a case in which his brother was deeply interested as plaintiff, and was doing everything in his power to bring about a decision in his brother's favor. His statement of the deterioration of human nature may be challenged. At the same time his statement of the law seems to have been unquestioned. We may thus conclude that soon after the Norman Conquest it was not expected that knights holding by military tenure would have private seals; while by the reign of Henry II. it was assumed that every knight at least will have a seal, and by the end of the thirteenth century it is assumed that every free and lawful man will have a seal as a matter of course.⁴

§556. What constitutes a seal.

Any statement either of what a seal was or of its legal effect is constantly complicated by the fact that the constant tendency of the law, during the last century and a half, has been to abolish technical requirements as to the nature of the seal and as to its legal effect. This has been done in part by judicial decisions, in part by statute. It is, therefore, difficult in discussing different steps in the development of the law to determine whether given cases are merely extending a doctrine at a given stage of development, and adhering to it, though constru-

answer to these, Gilbert de Baillol, that he might not seem to make no objection, answered that he had heard the reading of the deeds given by his predecessors, but he took occasion to note that no seals were affixed to them in attestation. Turning to him, that splendid and wise man Richard de Lucy, the brother of the said abbot, then the Justiciar of the lord king, inquired whether he had a seal. Upon his reply that he had a seal, the illustrious man smiled and said, "The old fashion was not for every little knight to have a seal, but it was customary for only kings and people of conse-

quence to have them, and in the old times spite did not make men pettifoggers or sceptics." (*"Moris antiquitus non erat quemlibet militulum sigillum habere, quod regibus et praecipuis tantum competit personis."* Bigelow Placita, 177.) Abbot Walter v. Gilbert de Baillol; Bigelow's Placita, 175, 177; Adams & Stephen's Select Documents of English Constitutional History, 9, 10; decided in the reign of Henry II.

⁴ Pollock & Maitland's History of English Law, II. 221, 222 (original paging).

ing it more liberally than the earlier cases; or whether they mark a transition to the next stage of development. (1) The Common Law seal consisted originally of a distinct and individual engraved or inscribed stamp with which impressions could be made upon wax or other substance capable of adhering to paper and of receiving impressions. It is in this sense of the word that Glanville and Britton speak of the loss of a seal.¹ The term was, as it still is, an ambiguous one, as it also meant the impression made by such stamp upon such adhesive substance.² "*Sigillum est cera impressa quia cera, sine impressione, non est sigillum.*"³ While Coke speaks of a seal as necessarily an impression in wax, it has been held that any substance may be used, if both capable of receiving an impression and of adhering to the paper.⁴ So an impression on a wafer⁵ or mucilage⁶ was held sufficient. So an impression made directly upon the paper, causing indentations and elevations in its substance, might be a seal.⁷ (2) The next step in breaking down the technical requirements as to the form of a seal was to hold that a piece of wax or a wafer,⁸ a piece of paper⁹ or other extrinsic substance affixed to the instrument and intended as a seal, might be a valid seal, though no distinctive impression of any sort appeared thereon. (3) The next step in breaking down technical requirements as to the form of a seal was to hold that an mark upon the paper intended as a seal would be a valid seal, though no extrinsic substance was affixed to the paper and no impression of any sort was made upon the paper. Where this principle obtains an ink seal,¹⁰ a scrawl with the word seal

¹ Glanville, Book X., ch. XII.; Britton, I. 64b.

² Fish v. Brown, 17 Conn. 341; Warren v. Lynch, 5 Johns. (N. Y.) 239.

³ Co. Inst. Lib. III. 169.

⁴ Pillow v. Roberts, 13 How. (U. S.) 472.

⁵ Tasker v. Bartlett, 5 Cush. (Mass.) 359.

⁶ Gillespie v. Brooks, 2 Redf. (N. Y.) 349.

⁷ Pierce v. Indseth, 106 U. S. 546; Pillow v. Roberts, 13 How. (U. S.) 472; Hendee v. Pinkerton, 14 All. (Mass.) 381; Manchester Bank v. Slason, 13 Vt. 334.

⁸ Hughes v. Debnam, 8 Jones L. (N. C.) 127.

⁹ Turner v. Field, 44 Mo. 382.

¹⁰ Hastings v. Vaughn, 5 Cal. 315.

written within it,¹¹ or printed,¹² a scroll seal,¹³ the word "seal"¹⁴ the word "seal" printed within brackets,¹⁵ the letters "L. S."¹⁶ or an ink mark intended as a seal¹⁷ have been each held sufficient as seals. Many states, however, have not adopted this principle as a Common Law rule, and have held that if no impression is made on the paper, a mark no matter how clearly meant for a seal, such as the word "seal" surrounded by brackets,¹⁸ or a scroll seal,¹⁹ or the word "seal"²⁰ is not sufficient as a seal. Under a statute specifically authorizing an impression upon the paper without the use of wax or wafers, wherever a seal was required, a scroll with the word "seal" written under it is not a valid seal if affixed to a contract which is not required by law to be under seal.²¹ (4) The last step has been statutory and consists in abolishing the private seal.

§557. Adoption of seal.

If the impression or mark upon the paper is of such nature as to be recognized as a valid seal it need not be physically affixed or made by the obligor. He may, if he pleases, adopt as his own a seal already on the instrument,¹ as where the seal is printed on a blank form.² If several obligors execute an instrument it is not necessary that each should affix a separate seal.

¹¹ Bacon v. Green, 36 Fla. 325;
¹⁸ So. 870; Cosner v. McCrum, 40
W. Va. 339; 21 S. E. 739; Putney
v. Cutler, 54 Wis. 66; 11 N. W. 437.

¹² Carlile v. People, 27 Colo. 116;
25 Pac. 48.

¹³ Jacksonville, etc., R. R. v.
Hooper, 160 U. S. 514; Le Roy v.
Beard, 8 How. (U. S.) 451 (Wis.);
San Luis Obispo County v. White,
91 Cal. 432; 24 Pac. 864; 27 Pac.
756; Brown v. Jardhal, 32 Minn.
135; 50 Am. Rep. 560; 19 N. W.
650; Carpenter v. Frazier, 102 Tenn.
462; 52 S. W. 858.

¹⁴ Cochran v. Stewart, 57 Minn.
499; 59 N. W. 543; Cook v. Cooper,
59 S. C. 560; 38 S. E. 218; Whitley
v. Davis, 1 Swan (Tenn.) 333.

¹⁵ Osborn v. Kistler, 35 O. S. 99.

¹⁶ Barnard v. Gantz, 140 N. Y.
249; 35 N. E. 430; Lorah v. Niss-
ley, 156 Pa. St. 329; 27 Atl. 242;
Williams v. Starr, 5 Wis. 534.

¹⁷ Such as a dash. Hacker's Ap-
peal, 121 Pa. St. 192; 1 L. R. A.
861; 15 Atl. 500.

¹⁸ Manning v. Perkins, 86 Me.
419; 29 Atl. 1114.

¹⁹ Hendee v. Pinkerton, 14 All.
(Mass.) 381.

²⁰ Beardsley v. Knight, 4 Vt. 471.

²¹ Providence, etc., Co. v. Engrav-
ing Co., 24 R. I. 175; 52 Atl. 804.

¹ Lorah v. Nissley, 156 Pa. St.
329; 27 Atl. 242.

² Osborn v. Kistler, 35 O. S. 99.

Two or more may adopt a common seal if they wish.² A corporation may adopt such seal as it pleases if it is sufficient in law as the seal of a natural person,⁴ such as a scroll seal⁵ or the seal of a natural person.⁶ So the District of Columbia may adopt the seals of its commissioners.⁷ In order, however, that this principle applies, the seal already on the instrument must be in fact adopted by the obligor whose seal it is claimed to be.⁸ Thus a clause in a conveyance under seal whereby the grantee assumes a mortgage is not the specialty of the grantee.⁹ So a written guaranty of a signature, written on the back of a sealed instrument does not thereby become a sealed guaranty.¹⁰ An unsealed addition to a sealed note is not itself under seal.¹¹ If the seal is omitted by accident and the contract is in all other respects duly executed and valid, equity can supply the omission.¹² The objection that a sealed contract is not dated is "too frivolous to require consideration."¹³

² Ryan v. Cooke, 172 Ill. 302; 50 N. E. 213; affirming 68 Ill. App. 592; Bohannons v. Lewis, 3 T. B. Mon. (Ky.) 376; Bradford v. Randall, 5 Pick. (Mass.) 496; Citizens' Building Association v. Cummings, 45 O. S. 664; 16 N. E. 841; Lambden v. Sharp, 9 Humph. (Tenn.) 224; Rollins v. Humphrey, 98 Wis. 66; 73 N. W. 331.

⁴ G. V. B. Mining Co. v. Bank, 95 Fed. 23; 36 C. C. A. 633; Blood v. Water Co., 113 Cal. 221; 41 Pac. 1017; 45 Pac. 252; Royal Bank v. Depot Co., 100 Mass. 444; 97 Am. Dec. 115; Alfalfa Irrigation District v. Collins, 46 Neb. 411; 61 N. W. 1086; Thayer v. Mill Co., 31 Or. 437; 51 Pac. 202.

⁵ Jacksonville, etc., R. R. v. Hooper, 160 U. S. 514.

⁶ Phillips v. Coffee, 17 Ill. 154; 63 Am. Dec. 357; Porter v. R. R., 37 Me. 349; Mill Dam Foundry Co. v. Hovey, 21 Pick. (Mass.) 417; Stebbins v. Merritt, 10 Cush.

(Mass.) 27; Tenney v. Lumber Co., 43 N. H. 343; Middlebury Bank v. R. R., 30 Vt. 159.

⁷ District of Columbia v. Iron Works, 181 U. S. 453.

⁸ Ridley v. Hightower, 112 Ga. 476; 37 S. E. 733; Hess's Estate, 150 Pa. St. 346; 24 Atl. 676; Taylor v. Forbes's Administrator, 101 Va. 658; *sub nomine*, Taylor v. Forbes's Administratrix, 44 S. E. 888.

⁹ Taylor v. Forbes's Administrator, 101 Va. 658; *sub nomine*, Taylor v. Forbes's Administratrix, 44 S. E. 888. (As to the period of limitations.)

¹⁰ Ridley v. Hightower, 112 Ga. 476; 37 S. E. 733.

¹¹ Sanders v. Bagwell, 32 S. C. 238; 7 L. R. A. 743; 10 S. E. 946.

¹² Trustees of Wadsworthville Poor School v. Bryson, 34 S. C. 401; 13 S. E. 619.

¹³ Seigman v. Streeter, 64 N. J. L. 169, 170; 44 Atl. 888.

§558. Necessity of seal in contract of corporation.

The original rule was that a corporation "acts and speaks only by its common seal. . . . It is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community and makes one joint assent of the whole."¹ Exceptions were made to this rule in cases of trivial or routine business.² When trading and manufacturing corporations became important, it was evident that to require the case of the corporate seal would destroy the practical effectiveness of such corporations, and the exceptions multiplied until it may be said that in the United States they have become the rule, and now a corporation need not affix its seal to a contract,³ except in cases such as deeds,⁴ where a natural person should

¹ Black. Com. I. 475; *Preston v. R. R.*, 17 Beav. 114 (117); *Gooday v. R. R.*, 17 Beav. 132 (136); *Winne v. Bampton*, 3 Atk. 473; *Waller v. Bank*, 3 J. J. Mar. (Ky.) 201; *Garrison v. Combs*, 7 J. J. Mar. (Ky.) 84; 22 Am. Dec. 120.

² *Church v. Imperial, etc., Co.*, 6 Ad. & El. 846; 33 E. C. L. 230; *Diggle v. R. R.*, 5 Exch. 442.

³ *Gottfried v. Miller*, 104 U. S. 521; *First, etc., Bank v. Mining Co.*, 89 Fed. 439; *Crowley v. Mining Co.*, 55 Cal. 273; *Savings Bank v. Davis*, 8 Conn. 191; *B. S. Green Co. v. Blodgett*, 159 Ill. 169; 50 Am. St. Rep. 146; 42 N. E. 176; *Columbia Casino Co. v. Columbian Exposition*, 85 Ill. App. 369; *Globe, etc., Co. v. Reid*, 19 Ind. App. 203; 47 N. E. 947; modified on rehearing, 49 N. E. 291; *Muscatine, etc., Co. v. Lumber Co.*, 85 Ia. 112; 39 Am. St. Rep. 284; 52 N. W. 108; *Commercial Bank v. Mfg. Co.*, 1 B. Mon. (Ky.) 13; 35 Am. Dec. 171; *Fitch v. Mill Co.*, 80 Me. 34; 12 Atl. 732; *Speirs v. Drop-Forge Co.*, 174 Mass. 175; 54 N. E. 497; *National, etc., Asso-*

ciation v. Stone Co., 49 Minn. 220; 51 N. W. 916; *Carey, etc., Co. v. Cain*, 70 Miss. 628; 13 So. 239; *Goodwin v. Screw Co.*, 34 N. H. 378; *Crawford v. Longstreet*, 43 N. J. L. 325; *Western, etc., Co. v. Bank*, 9 N. M. 1; 47 Pac. 721; *Leinkauf v. Calman*, 110 N. Y. 50; 17 N. E. 389; *Hand v. Coal Co.*, 143 Pa. St. 408; 22 Atl. 709; *Gassett v. Andover*, 21 Vt. 342; *Winterfield v. Brewing Co.*, 96 Wis. 239; 71 N. W. 101; *Ford v. Hill*, 92 Wis. 188; 53 Am. St. Rep. 902; 66 N. W. 115. The seal is especially unnecessary where the corporation has no seal. *Omaha, etc., Co. v. Burns*, 49 Neb. 229; 68 N. W. 492; *Stevens v. Ball Club*, 142 Pa. St. 52; 11 L. R. A. 860; 21 Atl. 797; *Turner v. Lumber Co.*, 106 Tenn. 1; 58 S. W. 854.

⁴ *Danville Seminary v. Mott*, 136 Ill. 289; 28 N. E. 54; *Caldwell v. Mfg. Co.*, 121 N. C. 339; 28 S. E. 475; *Thayer v. Mill Co.*, 31 Or. 437; 51 Pac. 202. (Citing *In re St. Helen Mill Co.*, 3 Sawy. (U. S. C. C.) 88.)

affix his seal.⁵ This rule applies to public as well as to private corporations at Modern Law, and a public corporation may make a valid contract without affixing the corporate seal, if it is such a contract that a natural person would not be required to execute it under seal, and if the charter or other statute does not require a seal.⁶ The presence of a corporate seal has still some legal effect in some jurisdictions. An instrument sealed with a corporate seal is treated as *prima facie* the instrument of the corporation,⁷ while if such seal is not affixed authority to execute the instrument must be shown.⁸ In some jurisdictions the absence of a corporate seal prevents the instrument from being a corporate obligation.⁹

In Tennessee it is held that the act abolishing private seals does not change the law as to corporate seals,¹⁰ but the omission of a seal from a corporate deed does not avoid it in equity, but only in law.¹¹ The seal is said to be unnecessary except in case of contract of unusual or extraordinary character.¹² In Canada a contract must be in the form required by the charter or under seal.¹³ In England the courts adhere to the old rule formally, though they have so honey-combed it with exceptions that it is practically obsolete.

Where a seal is proper, it is held in most jurisdictions that any form of mark intended as a seal may be adopted and used by the corporation.¹⁴ Thus it may adopt the private seal of

⁵ Benbow v. Cook, 115 N. C. 324; 44 Am. St. Rep. 454; 20 S. E. 453.

⁶ Gordon v. San Diego, 101 Cal. 522; 40 Am. St. Rep. 73; 36 Pac. 18; affirming in banc 32 Pac. 885; Frankfort Bridge Co. v. Frankfort, 18 B. Mon. (Ky.) 41; Matthews v. Westborough, 134 Mass. 555; Brennan v. Weatherford, 53 Tex. 330; 37 Am. Rep. 758.

⁷ Mills v. Mining Co., 132 Cal. 95; 64 Pac. 122.

⁸ Degnan v. Thoroughman, 88 Mo. App. 62.

⁹ St. Joseph's, etc., Society v.

Church, 3 Pen. (Del.) 229; 50 Atl. 535.

¹⁰ Garrett v. Land Co., 94 Tenn. 459; 29 S. W. 726.

¹¹ Precious Blood Society v. Elsythe, 102 Tenn. 40; 50 S. W. 759.

¹² Diggle v. Ry., 5 Exch. 442; Paine v. Guardians, 8 Q. B. 326; 55 E. C. L. 325.

¹³ Garland, etc., Co. v. Electric Co., 301 Ont. 40.

¹⁴ Blood v. La Serena, etc., Co., 113 Cal. 221; 45 Pac. 252; reversing in banc 41 Pac. 1017; Johnston v. Crawley, 25 Ga. 316; 71 Am. Dec.

one of its officers,¹⁵ or the word "seal,"¹⁶ or "L. S.,"¹⁷ or a scroll seal,¹⁸ or a piece of paper attached by a wafer, without any sort of impression.¹⁹

§559. Delivery of sealed instrument.

The question of the delivery of a sealed instrument presents many of the questions involved in the delivery of a simple written contract. A discussion of the delivery of a sealed contract will therefore be deferred until the discussion of the delivery of a simple written contract.¹

§560. Effect of seal at early Common Law.

When the seal once had come into general use and had become the means of authenticating formal instruments it at once acquired an effect and a sanctity which it is hard to overestimate or even appreciate. If a seal was affixed to an instrument it bound the party whose seal it was without reference to the person by whom it was affixed. If his agent or bailiff affixed it, even without authority, the principal was bound, for he should have provided a better custodian. The law went further than this, however. Glanville says¹ that if the defendant acknowledges the seal to be his own but denies that the charter was made with his assent, "he is bound to warrant the terms of the charter and, in all respects, to observe the compact expressed in the charter as contained in it, without question, and to impute it to his own indiscretion if he incur

173; Porter v. R. R. Co., 37 Me. 349; Tenney v. Lumber Co., 43 N. H. 343; Ransom v. Bank, 13 N. J. Eq. 212; Bank v. Ry. Co., 30 Vt. 160.

¹⁵ Eureka Co. v. Bailey Co., 11 Wall. (U. S.) 488; Gashwiler v. Willis, 33 Cal. 11; 91 Am. Dec. 607; Leinkauf v. Calman, 110 N. Y. 50; 17 N. E. 389.

¹⁶ Jacksonville, etc., Co. v. Hooper, 160 U. S. 514. *Contra*, Caldwell

v. Mfg. Co., 121 N. C. 339; 28 S. E. 475.

¹⁷ G. V. B. Mining Co. v. Bank, 95 Fed. 23; 36 C. C. A. 633; modifying 89 Fed. 439.

¹⁸ Thayer v. Mill Co., 31 Or. 437; 51 Pac. 202.

¹⁹ Mill, etc., Co. v. Hovey, 21 Pick. (Mass.) 417.

¹ See § 577 *et seq.*

¹ Book X., ch. XII. (Beames's edition).

any loss by negligently preserving his own seal.”² This seems to mean that even if his seal is stolen or lost he is bound by it in the hands of any person who may use it. Britton seems to take the same view, but specifies a method whereby one who has lost his seal may, by public announcement of such fact, avoid subsequent liability thereunder. In speaking of defenses, Britton says: “Or he may plead, that this writing ought not to affect him, for at the time of it being made he had lost his seal, and caused it to be cried and published at the churches and markets, so that if anything was made under that seal after a certain day on which it was lost, it ought not to affect him; and in such manner he may deny the deed, and thereupon let the truth be inquired by the neighborhood where the deed is supposed to have been made, and according to the verdict of the country, let him who shall be found to have been guilty of falsehood be adjudged to prison, and punished by fine.”³

§561. Effect of seal on consideration at Common Law.

A sealed instrument was enforceable at Common Law because of its solemnity of form. It needed no consideration, and at law want of consideration was no defense.¹ So a sealed contract for the sale of realty shows consideration sufficiently to comply with the statute of frauds.² So a seal, even if by statute presumptive evidence only of consideration, shows consideration sufficiently to comply with a statute requiring a

² Glanville, Book X., ch. XII. (Beames's edition).

³ Britton, I. 64b (Nichols's edition).

¹ Rendleman v. Rendleman, 156 Ill. 568; 41 N. E. 223; Gourley v. Ry., 96 Ill. App. 68; Bullen v. Morrison, 98 Ill. App. 669; Leonard v. Bates, 1 Blackf. (Ind.) 172; Ruth v. Ford, 9 Kan. 17; Van Valkenburgh v. Smith, 60 Me. 97; Erickson v. Brandt, 53 Minn. 10; 55 N. W. 62; Saunders v. Blythe, 112 Mo. 1; 20 S. W. 319; Newark, etc., Church

v. Bank, 57 N. J. L. 27; 29 Atl. 320; Dorr v. Munsell, 13 Johns. (N. Y.) 430; Cosgrove v. Cummings, 195 Pa. St. 497; 46 Atl. 69; Anderson v. Best, 176 Pa. St. 498; 35 Atl. 194; Carter v. King, 11 Rich. L. (S. C.) 125; Barrett v. Carden, 65 Vt. 431; 36 Am. St. Rep. 876; 26 Atl. 530; Wing v. Peck, 54 Vt. 245; Harris v. Harris, 23 Gratt. (Va.) 737.

² Johnston v. Wadsworth, 24 Or. 494; 34 Pac. 13.

contract to answer for the debt of another to be evidenced by a written memorandum "expressing the consideration."³ It is often said that the seal imports a consideration,⁴ or that it estops the covenantor to deny that there was a consideration,⁵ but this expression of the rule shows a misapprehension of the history of the seal. A sealed contract was enforceable as such at Common Law long before consideration was thought of as an element of a contract. Historically it would be more correct to say that consideration was a substitute for the seal.⁶ To this Common Law rule there were at least two exceptions. Contracts in restraint of trade and marriage are, as has been pointed out elsewhere,⁷ merely void and not illegal. Yet a contract under seal in restraint of marriage would not be enforced, though a similar promise under seal to make a gift, without the consideration of a promise to refrain from marriage, would be enforceable.⁸ So a contract in restraint of trade, even if reasonable and so not even void, but valid as to

³ *Kuener v. Smith*, 108 Wis. 549; 84 N. W. 850.

⁴ *Sivell v. Hogan*, 119 Ga. 167; 46 S. E. 67; *Forthman v. Deters*, — Ill. —; 69 N. E. 97; *Consolidated, etc., Ry. Co. v. O'Neill*, 25 Ill. App. 313; *Wing v. Chase*, 35 Me. 260; *Erickson v. Brandt*, 53 Minn. 10; 55 N. W. 62; *Saunders v. Blythe*, 112 Mo. 1; 20 S. W. 319; *Parker v. Parmele*, 20 Johns. (N. Y.) 130; 11 Am. Dec. 253; *Wester v. Bailey*, 118 N. C. 193; 24 S. E. 9; *Ducker v. Whitson*, 112 N. C. 44; 16 S. E. 854. "The law of *nudum pactum* is inapplicable to instruments under seal. The very fact of having a seal attached imports a consideration." *Brown v. Brown*, 44 S. C. 378, 381; 22 S. E. 412. So *Carter v. King*, 11 Rich. L. (S. C.) 125. "Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of

consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause." *Storm v. United States*, 94 U. S. 76 (84).

⁵ *Smith v. Smith*, 36 Ga. 184; 91 Am. Dec. 761; *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723. "The instrument relied on in this case being under seal, a consideration is imported which the promisors would be estopped to deny." *Black v. Maddox*, 104 Ga. 157, 163; 30 S. E. 723.

⁶ *Walker v. Walker*, 13 Ired. L. (N. C.) 335.

⁷ See §§ 373-381, 424, 510.

⁸ *Baker v. White*, 2 Vern. 215; *Key v. Bradshaw*, 2 Vern. 102; *Lowe v. Peers*, 4 Burr. 2225; *Sterling v. Sinnickson*, 5 N. J. L. 756.

subject-matter, would not be enforced without a valuable consideration, even if the contract was under seal.⁹

§562. In equity.

If the question of the validity of a contract becomes material in equity the existence of a seal does not prevent equity from inquiring whether the instrument is supported by a valuable consideration, and from treating it as unenforceable if it appears that no consideration exists.¹ Thus specific performance will not be given in equity upon a gratuitous promise under seal.² This rule is especially true under a statute authorizing inquiry into the consideration of a contract under seal, to show want of consideration.³

§563. Under modern statutes.

The Common Law effect of the seal as dispensing with the necessity of consideration has been greatly modified by statute in many states. In some states the affixing of a seal has no practical effect unless the instrument is one required by law to be under seal.¹ A seal may be ignored as surplusage if the instrument to which it is affixed is not necessarily under seal, and the addition of the seal would vitiate the instrument, as where the seal is affixed by an agent whose authority is created by parol.² So a contract under seal, made by an unauthorized agent, and not being necessarily under seal, may be ratified

⁹ *Mitchel v. Reynolds*, 1 P. Wms. 181; *Palmer v. Stebbins*, 3 Pick. (Mass.) 188; 15 Am. Dec. 204; *Keeler v. Taylor*, 53 Pa. St. 467; 91 Am. Dec. 221.

¹ *Hervey v. Audland*, 14 Sim. 531; *Hale v. Dressen*, 73 Minn. 277; 76 N. W. 31; *Lamprey v. Lamprey*, 29 Minn. 151; 12 N. W. 514; *Winter v. Ry.*, 160 Mo. 159; 61 S. W. 606.

² *Crandall v. Willig*, 166 Ill. 233; 46 N. E. 755; *Buford v. McKee*, 1 Dana (Ky.) 107; *Bosley v. Bosley*, 85 Mo. App. 424.

³ *Winter v. Ry.*, 160 Mo. 159; 61 S. W. 606.

¹ *Edwards v. Dillon*, 147 Ill. 14; 37 Am. St. Rep. 199; 35 N. E. 135; *Barton v. Gray*, 57 Mich. 622; 24 N. W. 638; *Blewitt v. Boorum*, 142 N. Y. 357; 40 Am. St. Rep. 600; 37 N. E. 119; *McNeal, etc., Co. v. Waltman*, 114 N. C. 178; 19 S. E. 109.

² *Hartnett v. Baker*, — Del. —; 56 Atl. 672; *McIntosh v. Hodges*, 110 Mich. 319, 322; 68 N. W. 158; 70 N. W. 550.

by parol, the seal being ignored.³ These statutes may be grouped under two general classes. (1) Some statutes provide that even though an instrument is under seal, want of consideration may be inquired into.⁴ The same result seems to have been reached in some states without the aid of statute.⁵

Some jurisdictions hold that the purpose of these statutes is merely to allow inquiry into failure of consideration where a valuable consideration was contemplated, but not to make invalid sealed instruments which were intended to be without consideration.⁶ Other jurisdictions treat such statutes as abolishing voluntary promises under seal, and reducing the seal to a mere *prima facie* evidence of consideration which may be rebutted.⁷ While consideration may be presumed from the use of the seal, this presumption does not arise where the language of the contract shows that it had no consideration.⁸ (2) In other jurisdictions the private seal has been abolished by statute.⁹ The effect of such statutes is to reduce all specialties to simple contracts. Even if a seal is affixed to a contract, it is, under such statutes, mere surplusage.¹⁰

§564. Extrinsic evidence in sealed contracts.

The question of what facts and circumstances, outside of the words of a contract under seal, can be considered in connection

³ *Smyth v. Lynch*, 7 Colo. App. 383; 43 Pac. 670; *Bless v. Jenkins*, 129 Mo. 647; 31 S. W. 938.

⁴ *Withers v. Greene*, 9 How. (U. S.) 213; *McCarty v. Beach*, 10 Cal. 461; *Williams v. Haynes*, 27 Ia. 251; 1 Am. Rep. 268; *Coyle v. Fowler*, 3 J. J. Mar. (Ky.) 472; *Baird v. Baird*, 145 N. Y. 659; 28 L. R. A. 375; 40 N. E. 222; *Gray v. Barton*, 55 N. Y. 68; 14 Am. Rep. 181; *Judy v. Louderman*, 48 O. S. 562; 29 N. E. 181; *McLean v. Houston*, 2 Heisk. (Tenn.) 37 (41).

⁵ *Solomon v. Kimmel*, 5 Binn (Pa.) 232; *Swift v. Hawkins*, 1 Dall. (Pa.) 17; *Mattock v. Gibson*, 8 Rich. L. (S. C.) 437.

⁶ *Rendleman v. Rendleman*, 156 Ill. 568; 41 N. E. 223; *Aller v. Aller*, 40 N. J. L. 446. So at equity independent of statute. *Meek v. Frantz*, 171 Pa. St. 632; 33 Atl. 413.

⁷ *Bender v. Been*, 78 Ia. 283; 5 L. R. A. 596; 43 N. W. 216; *Judy v. Louderman*, 48 O. S. 562; 29 N. E. 181.

⁸ *Bender v. Been*, 78 Ia. 283; 5 L. R. A. 596; 43 N. W. 216.

⁹ *Bradley v. Rogers*, 33 Kan. 120; 5 Pac. 374; *Garrett v. Land Co.*, 94 Tenn. 459; 29 S. W. 726; *Murray v. Beal*, 23 Utah 548; 65 Pac. 726.

¹⁰ See *ante*, this section.

with such words, as forming a real part of the contract, is in many respects the same question as that presented in determining what facts and circumstances, outside of the words of a simple written contract, can be considered as a part thereof. The two questions will, therefore, for the most part, be considered together.¹ There are, however, certain special topics in which the law of the sealed contract is different from that of the simple written contract, on account of the peculiar force of the seal. These topics will, therefore, be discussed separately in the following sections. The use of these facts outside of the words of the contract is referred to as "extrinsic evidence." As will be seen later² this is a very poor name to express the idea, as it is rarely evidence in the proper sense, any more than the contract itself is evidence, and it is often not extrinsic to the contract, though it is not contained in the writing. It is used, however, because it is one of the terms commonly employed by the courts in describing such facts and circumstances.³ The effect of a sealed contract as merger of prior rights and liabilities is elsewhere discussed.⁴

§565. Incomplete contracts under seal.

If a contract under seal is incomplete on its face, and some of its terms must be supplied by extrinsic evidence of the oral agreement of the parties, it is clear that such a contract cannot be said to be under seal. The principle is carried so far that even if blanks are purposely left in a sealed instrument and such blanks are, after delivery of the instrument, filled by one having parol authority to fill them, the instrument is without effect as an instrument under seal.¹ This rule is very gen-

¹ See § 1123.

² See § 1189.

³ See § 1189.

⁴ See § 1354.

¹ *Hibblewhite v. M'Morine*, 6 M. & W. 200 (disapproving *Texira v. Evans*, which is referred to in the opinion of the court in 1 Anst. 228). *Ingram v. Little*, 14 Ga. 173; 58

Am. Dec. 549; *Mickey v. Barton*, 194 Ill. 446; 62 N. E. 802; *People v. Organ*, 27 Ill. 27; 79 Am. Dec. 391; *Basford v. Pearson*, 9 All. (Mass.) 387; 85 Am. Dec. 764; *Clark v. Butts*, 73 Minn. 361; 76 N. W. 199; *Williams v. Crutcher*, 5 How. (Miss.) 71; 35 Am. Dec. 422; *Blacknall v. Parish*, 6 Jones. Eq. (N.

erally recognized where the instrument is so incomplete before the blanks are filled as to be without legal effect,² but it is denied in some states where the instrument is merely incomplete before the blanks are filled, but is not wholly inoperative.³ The cases thus far discussed are those in which the contract is required by law to be under seal, and hence the real question is as to the validity of the contract as a sealed contract, since the oral contract, even if complete, does not comply with the requirements of the law. If, however, the contract is one which is valid if not under seal, it is not merged in a subsequent contract under seal if the latter is incomplete or invalid.⁴ Accordingly the validity of a prior simple contract is not affected by a subsequent defective contract under seal.

§566. Adding party to sealed contract by extrinsic evidence.

At Common Law it could not be shown by extrinsic evidence that a contract under seal was intended to bind any party other than those whom it purported to bind since all the terms of a contract under seal, including the nature of the liability imposed and the identity of the parties upon whom such liability is imposed must be gathered from the instrument itself.¹ Hence it cannot be shown that the apparent obligor is merely the agent of an undisclosed principal to enable the obligee to sue such undisclosed principal upon such sealed contract.² In this respect the law of contracts under seal is sharply contrasted with

C.) 70; 78 Am. Dec. 239; Shirley v. Burch, 16 Or. 83; 8 Am. St. Rep. 273; 18 Pac. 351; Preston v. Hull, 23 Gratt. (Va.) 600; 14 Am. Rep. 153.

² Burns v. Lynde, 6 All. (Mass.) 305.

³ Drury v. Foster, 2 Wall. (U. S.) 24; Brown v. Colquitt, 73 Ga. 59; 54 Am. Rep. 867; Swartz v. Ballou, 47 Ia. 188; 29 Am. Rep. 470; South Berwick v. Huntress, 53 Me. 89; 87 Am. Dec. 535; Cribben v. Deal, 21 Or. 211; 28 Am. St. Rep. 746; 27

Pac. 1046; Wiley v. Moor, 17 S. & R. (Pa.) 438; 17 Am. Dec. 696.

⁴ Gray v. Fowler, 1 H. Bl. 462; Robinson v. Bland, 2 Burr. 1077; Thurston v. Percival, 1 Pick. (Mass.) 415.

¹ Beckham v. Drake, 9 M. & W. 79 (93); Morrison v. Bowman, 29 Cal. 337; Nobleboro v. Clark, 68 Me. 87; 28 Am. Rep. 22; New England Dredging Co. v. Granite Co., 149 Mass. 381; 21 N. E. 947; Deluis v. Cawthorn, 2 Dev. Law. (N. C.) 90.

² Nobleboro v. Clark, 68 Me. 87;

the law of ordinary simple contracts in writing.³ So if an agent without authority executes a sealed instrument in the name of his principal, extrinsic evidence is inadmissible to show the agent's intention to be bound personally.⁴ Accordingly the liability of such agent is in tort. Still less can the apparent obligor use extrinsic evidence when sued upon a sealed instrument, for the purpose of showing that by the real understanding of the parties, he was acting merely as agent and was to incur no personal liability.⁵ To do this would be to contradict the plain intention of the parties as shown in the contract. In this respect the law of the contract under seal is the same as that of the simple written contract.⁶

§567. Modification of contract under seal by subsequent agreement.

The original Common Law rule required a discharge by the act of the parties to be of as high a nature as the instrument to be discharged. Applying this rule to the subject of the sealed contract, it made a sealed contract or other sealed instrument essential to the discharge of a contract under seal. A subsequent oral agreement could not discharge or modify a contract under seal before breach thereof.¹ Where the common forms of action and rules of pleading are still in force, and an action is brought in covenant, the entire contract relied upon must be under seal, and a subsequent oral modification of the sealed contract cannot be enforced, even after performance.²

28 Am. Rep. 22; *Briggs v. Partridge*, 64 N. Y. 357; 21 Am. Rep. 617; *Delius v. Cawthorn*, 2 Dev. Law. (N. C.) 90.

³ See § 606.

⁴ *Delius v. Cawthorn*, 2 Dev. (N. C.) 90.

⁵ *Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

⁶ See § 1233.

¹ *Countess of Rutland's Case*, *Coke* (Part 5), 25b; *West v. Blake-way*, 2 M. & G. 729; *Spence v. Hea-*

ley, 8 Exch. 668; *Smith v. Lewis*, 24 Conn. 624; 63 Am. Dec. 180; *Goldsborough v. Gable*, 140 Ill. 269; 15 L. R. A. 294; 29 N. E. 722; *Jones v. Chamberlain*, 97 Ill. App. 328; *Loach v. Farnum*, 90 Ill. 368; *Kendal v. Talbot*, 1 A. K. Mar. (Ky.) 321; *Brown v. Staples*, 28 Me. 497; 48 Am. Dec. 504; *French v. New*, 28 N. Y. 147; *Sherwin v. R. R.*, 24 Vt. 347.

² *Phillips, etc., Co. v. Seymour*, 91 U. S. 646 (decided under Illinois

Even at Common Law a different rule applied after breach of the sealed contract, and the right of action arising therefrom could be discharged by parol.³ The original rule has, however, undergone several modifications in different jurisdictions. If the subsequent oral agreement has been performed it has been held that such performance operates as a discharge of the original contract under seal.⁴ In cases of this sort the oral agreement is used as a defense and is not generally relied on as the basis of an action. The difficulty caused by the technical requirements of the Common Law as to the form of action does not, therefore, arise in such cases. Courts have in some jurisdictions gone farther, and have allowed a contract under seal to be discharged by a subsequent oral contract not under seal, even if not performed⁵ and if still executory.⁶ Here again the oral contract is generally used as a defense and not as a basis of action. Where no technical rule as to form of action is in force, the modern rule is that a contract under seal may be modified by subsequent oral agreement, and that an action may be brought on such contract as thus modified.⁷ This rule is well settled in equity⁸ and is recognized at law.⁹ A written al-

law); *J. C. Winship Co. v. Wine-*
man, 77 Ill. App. 161.

³ *May v. Taylor*, 6 M. & G. 261
(262, note a); *Suydam v. Jones*, 10
Wend. (N. Y.) 180; 25 Am. Dec.
552.

⁴ *Worrell v. Forsyth*, 141 Ill. 22;
30 N. E. 673; *Drury v. Improve-*
ment Co., 13 All. (Mass.) 168; *Sie-*
bert v. Leonard, 17 Minn. 433; *Mc-*
Creery v. Day, 119 N. Y. 1; 16 Am.
St. Rep. 793; 6 L. R. A. 503; 23
N. E. 198; *Davis v. Inscow*, 84 N.
C. 396; *Reed v. McGrew*, 5 Ohio 375.

⁵ *Ryan v. Dunlap*, 17 Ill. 40; 63
Am. Dec. 334; *Adams v. Battle*, 125
N. C. 152; 34 S. E. 245; *McCauley*
v. Keller, 130 Pa. St. 53; 17 Am. St.
Rep. 758; 18 Atl. 607.

⁶ *Kromer v. Heim*, 75 N. Y. 574;
31 Am. Rep. 491.

⁷ *District of Columbia v. Iron*
Works, 181 U. S. 453; *Canal Co. v.*
Ray, 101 U. S. 522; *Platte Land Co.*
v. Hubbard, 12 Colo. App. 465; 56
Pac. 64; *Tuson v. Crosby*, 172 Mass.
478; 52 N. E. 744; *Munroe v. Per-*
kins, 9 Pick. (Mass.) 298; 20 Am.
Dec. 475; *McCreery v. Day*, 119 N.
Y. 1; 16 Am. St. Rep. 793; 6 L. R.
A. 503; 23 N. E. 198; *Homer v.*
Ins. Co., 67 N. Y. 478; *Prouty v.*
Kreamer, 199 Pa. St. 273; 49 Atl.
66.

⁸ *Canal Co. v. Ray*, 101 U. S. 522.

⁹ *District of Columbia v. Iron*
Works, 181 U. S. 453; *Fleming v.*
Gilbert, 3 Johns. (N. Y.) 528; *Le*
Fevre v. Le Fevre, 4 S. & R. (Pa.)
241; 8 Am. Dec. 696; *McCombs v.*
McKenna, 2 W. & S. (Pa.) 216; 37
Am. Dec. 505.

teration in a sealed contract made after delivery with the assent of all the parties thereto is valid and the new provision becomes an essential part of the sealed contract.¹⁰

¹⁰ *Speake v. United States*, 9 *Anderson*, 43 Ill. App. 317; *Collins v. Cranch* (U. S.) 28; *Kneedler v. Anderson*, 51 Miss. 311.

CHAPTER XXXIV.

WRITTEN SIMPLE CONTRACTS NOT REQUIRED TO BE IN WRITING NOR TO BE PROVED BY WRITING.

I. FORM OF CONTRACT.

§568. Written contracts in general.

While the growth of our law has been steadily obliterating the once important distinction between the formal and the simple contract, a new classification of simple written contracts has developed. Simple written contracts are to be divided into three classes: (1) Contracts which are in writing, but which neither need to be in writing nor to be proven by writing; (2) contracts which do not need to be in writing, but must be proven by writing; and (3) contracts which must be in writing. This classification is not one of grade or rank of the various kinds of contract. They are all of the same rank, being all simple contracts, nor is the difference between them in the manner of execution. These three classes of contracts present many resemblances and but few differences in questions arising out of the material on which and with which the contracts are to be written, the method and form of signature, and delivery. The great distinction between these classes of contracts arises on the question of what in law can constitute the contract, for the purpose of determining the terms thereof. They differ from one other upon the question whether part of the contract may be written and part oral, or whether the oral agreement of persons to a written contract may make them parties to such contract without signing it. The first of these classes of contracts to be discussed will be those contracts which the parties have actually put in writing but which are not required by

law either to be in writing or to be proved by writing. If the contract is one which is in whole or in part in writing, but is not required to be proven by a writing, or to be in writing, three classes of questions generally arise. (1) Under the facts, has a contract been entered into, and if so who are the parties thereto; (2) to what extent is extrinsic evidence admissible to show the intention of the parties; (3) under which clause of the statute of limitations does the contract in question come. For convenience and economy of space contracts which are required to be in writing, such as negotiable instruments, and contracts which are in writing but are not required either to be in writing or to be proved by writing, will be discussed in this chapter as far as questions of execution and delivery are concerned. Contracts required to be proved by writing are discussed elsewhere.¹

§569. What materials may be used.

While there is little authority on the point, there seems no reason why a written contract may not be made upon any material which can receive a legible impression of any kind; and there seems to be no reason why any material which is capable of making a legible impression may not be used as a means of writing. Paper is now the common material upon which to write, and ink the common material with which writing is done, whether it is applied by means of a pen or a typewriter. Writing in lead pencil has, however, received the sanction of the court,¹ as where a signature made with a lead pencil has been held valid, even in case of negotiable contracts which must be in writing.² So a signature to a promissory note may be printed,³ as where a signature is lithographed in facsimile and printed on the contract.⁴

¹ See Ch. XXXV.

² *Myers v. Vanderbilt*, 84 Pa. St. 510; 24 Am. Rep. 227; *Reed v. Roark*, 14 Tex. 329; 65 Am. Dec. 127.

³ *Brown v. Bank*, 6 Hill (N. Y.)

443; 41 Am. Dec. 755.

⁴ *Weston v. Myers*, 33 Ill. 424.

⁵ *Pennington v. Baehr*, 48 Cal. 565.

§570. Necessity of signature.

A written contract not required to be in writing or to be proved by writing is valid though not signed if the parties intend it to take effect without signing.¹ Thus if one party signs it and the other acquiesces therein,² as by acting under it³ such contract is binding, both on the party signing,⁴ since the liability of the adversary party is a consideration for his liability, and on the party who does not sign.⁵ Thus a bill of lading,⁶ or a railroad ticket,⁷ or a pass⁸ containing contractual

¹ *Hinote v. Brigman*, — Fla. —; 33 So. 303; *Sellers v. Greer*, 172 Ill. 549; 40 L. R. A. 589; 50 N. E. 246; *Farmer v. Gregory*, 78 Ky. 475; *David Bradley v. Bower* (Neb.), 99 N. W. 490.

² *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; *Vassault v. Edwards*, 43 Cal. 465; *Sellers v. Greer*, 172 Ill. 549; 40 L. R. A. 589; 50 N. E. 246; *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386; *Memory v. Niepert*, 131 Ill. 623; 23 N. E. 431; *Ames v. Moir*, 130 Ill. 582; 22 N. E. 535; *Plumb v. Campbell*, 129 Ill. 101; 18 N. E. 790; *Harlan v. Gas Co.*, 133 Ind. 323; 32 N. E. 930; *Midland Ry. Co. v. Fisher*, 125 Ind. 19; 21 Am. St. Rep. 189; 8 L. R. A. 604; 24 N. E. 756; *New Iberia Rice-Milling Co. v. Romero*, 105 La. 439; 29 So. 876; *Western Ry. Corp. v. Babcock*, 6 Met. (Mass.) 356; *Bacon v. Daniels*, 37 O. S. 279; *Grove v. Hodges*, 55 Pa. St. 504; *Swisshelm v. Laundry*, 95 Pa. St. 367; *Sylvester v. Born*, 132 Pa. St. 467; 19 Atl. 337; *McPherson v. Fargo*, 10 S. D. 611; 66 Am. St. Rep. 723; 74 N. W. 1057; *Lowber v. Connit*, 36 Wis. 176; *Vilas v. Dickinson*, 13 Wis. 488. "Where a party accepts and adopts a written contract, even though it is not signed by him, he shall be deemed to have assented to its terms and

conditions, and to be bound by them." *Forthman v. Deters*, 206 Ill. 159; 69 N. E. 97.

³ *Sellers v. Greer*, 172 Ill. 549; 40 L. R. A. 589; 50 N. E. 246; *McKee v. Cowles*, 161 Ill. 201; 43 N. E. 785; *Vogel v. Pekoc*, 157 Ill. 339; 30 L. R. A. 491; 42 N. E. 386.

⁴ *Whatley v. Reese*, 128 Ala. 500; 29 So. 606; *Lavenson v. Wise*, 131 Cal. 369; 63 Pac. 622.

⁵ *Harts v. Emery*, 184 Ill. 560; 56 N. E. 865; *Edwards v. Gildemeister*, 61 Kan. 141; 59 Pac. 259; *American, etc., Co. v. Walker*, 87 Mo. App. 503; *Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. 951; *Slayden v. Stone*, 19 Tex. Civ. App. 618; 47 S. W. 747.

⁶ *Field v. Ry.*, 71 Ill. 458; *Anchor Line v. Dater*, 68 Ill. 369; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606; 63 N. E. 245; 64 N. E. 647; *Gaines v. Union Transportation Co.*, 28 O. S. 418; *Ryan v. Ry.*, 65 Tex. 13; 57 Am. Rep. 589.

⁷ *Walker v. Price*, 62 Kan. 327; 84 Am. St. Rep. 392; 62 Pac. 1001; *Dangerfield v. Ry.*, 62 Kan. 85; 61 Pac. 405; *Rahilly v. R. R.*, 66 Minn. 153; 68 N. W. 853; *Gregory v. R. R.*, 10 Neb. 250; 14 N. W. 1025; *Abram v. Ry.*, 83 Tex. 61; 18 S. W. 321; *Drummond v. R. R.*, 7 Utah 118; 25 Pac. 733.

⁸ *Quimby v. R. R.*, 150 Mass. 365; 5 L. R. A. 841; 23 N. E. 205.

provisions is valid though unsigned. Thus a treasurer who assents to a bond purporting to be given by him for money received, but does not sign it, is liable thereon.⁹ So, while a guardian's bond which is assented to by the guardian, but not signed by him, is not good as a statutory bond it may be good as a Common Law bond.¹⁰ A gave an order for a mowing machine to B's agent, X. The order was signed by A., and provided for reserving to A "the full benefit of the warranty endorsed hereon." On the back of the order was a printed warranty with vendor's signature printed thereunder, and the blanks unfilled. It was held that such reference made the warranty a part of the written contract, and accordingly the vendor's acceptance of the order made the warranty as binding upon him as if he had signed it.¹¹ If it is the understanding of the parties that a contract is not to be binding upon the person named therein until he signs it, his omission or refusal to sign it will prevent it from being his obligation.¹² The question of the necessity of signature by the parties to a written contract is complicated with the doctrine of mutuality. Written agreements are made which impose obligations on one party, provided the other person will do certain things, but do not, expressly or by implication, require such other person to do such things. Such written agreement is in the nature of a written offer. If the party upon whom obligation is not imposed performs the acts upon which the obligation of the other party was conditioned, this amounts to an acceptance, and the contract is in legal effect a written contract.¹³ Thus, a contract signed by a lumber company to pay a certain amount for water if a water company would extend its mains to the lumber yard, is binding on the lumber company as a written contract if the water company extends the mains in accordance with the con-

⁹ *Senour v. Maschinat* (Ky.), 31 Am. St. Rep. 533; 27 N. W. 579. S. W. 481.

¹² *Meyer v. Labau*, 51 La. Ann.

¹⁰ *Painter v. Mauldin*, 119 Ala. 1726; 26 So. 463.

88; 72 Am. St. Rep. 902; 24 So. 769.

¹³ *Plumb v. Campbell*, 129 Ill. 101;

¹¹ *Grieb v. Cole*, 60 Mich. 397; 1 18 N. E. 790.

dition of such written agreement.¹⁴ A person upon whom obligations are not imposed by such writing, may subsequently accept such written offer orally and agree to perform the conditions therein indicated. This contract is valid as between the parties, but as part of it consists of oral terms, it is for technical purposes treated as an oral contract.¹⁵ The part of it which is in writing falls within the parol evidence rule, however, and can not be contradicted by extrinsic evidence any more than if the entire contract were in writing.

§571. Place of signature.

In the absence of statute specifying in what part of the contract the signature must be written, a signature may be written anywhere upon the contract.¹ While the name must be written with the intention that it shall operate as an execution of the contract in order to constitute a signature, this depends upon a different principle, and has nothing to do with the place at which the name is to be written. Thus a signature may be written in the body of the contract itself.² So, where a written contract contained the provision, "this agreement further continued below," followed by the signatures of the parties, below which were additional terms of the contract, such contract was held to be properly signed.³ If A signs near the lower right-hand corner of the instrument, opposite a seal, and B signs a little to the left and slightly below A's signature, it has been held that this is *prima facie* A's instrument and that B is a witness thereto.⁴ A statute which provides that a contract must be "subscribed," has been held to require a signature at the end of the instrument, and to make invalid a signature in

¹⁴ Muscatine Water Co. v. Lumber Co., 85 Ia. 112; 39 Am. St. Rep. 284; 52 N. W. 108.

¹⁵ Hulbut v. Atherton, 59 Ia. 91; 12 N.-W. 780.

¹ Dickson v. Conde, 148 Ind. 279; 46 N. E. 998; Coddington v. Goddard, 16 Gray (Mass.) 436; Saunders v. Hackney, 10 Lea (Tenn.)

194; Noe v. Hodge, 3 Humph. (Tenn.) 162.

² Noe v. Hodge, 3 Humph. (Tenn.) 162; Fulshear v. Randan, 18 Tex. 275; 70 Am. Dec. 281.

³ Dickson v. Conde, 148 Ind. 279; 46 N. E. 998.

⁴ Steininger v. Hoch, 39 Pa. St. 263; 80 Am. Dec. 521.

the body of the instrument.⁶ A contract required by law to be in writing, as a negotiable instrument, may be signed at any part thereof, as in the body of the note⁶ or on the back.⁷

§572. Form of signature.— Name.

In the absence of statute any visible mark upon the paper, intended by a party to be his signature thereto, is sufficient as his signature. The common and most approved form of signature is for the party to write his full name with his own hand. This is not, however, necessary. If a person signs by a Christian name alone it is sufficient.¹ Thus a mortgage of realty in which the name of the grantor's wife appears in full in the premises and in the acknowledgment, although she signs by her Christian name alone is valid.² So a deed has been held valid where the true name of the grantor appeared in the premises and in the certificate of acknowledgment, although when he signed he wrote his name "Edmund" instead of "Edward."³ So a signature by one's surname alone is sufficient.⁴ A signature may be valid although it is not the true name of the party signing. Thus one who enters into a contract not required by law to be in writing, under an assumed name, he is bound thereby.⁵ Thus, a party to a contract was named William Couture. "Couture" being the French for "seam," he signed his name to the contract "William Seam." Such signature was

⁶ *Globe Accident Co. v. Reid*, 19 Ind. App. 203; 47 N. E. 947; modified, 49 N. E. 291.

⁶ *Taylor v. Dobbins*, 1 Stra. 399.

⁷ *Good v. Martin*, 95 U. S. 90; *Quin v. Sterne*, 26 Ga. 223; 71 Am. Dec. 204; *Allison v. Circuit Judge*, 104 Mich. 141; 62 N. W. 152; *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470; 65 N. W. 363; *Salisbury v. Bank*, 37 Neb. 872; 40 Am. St. Rep. 527; 56 N. W. 727; *Seymour v. Mickey*, 15 O. S. 515; *Bright v. Carpenter*, 9 Ohio 139; 34 Am. Dec. 432; *Provident, etc., So-*

cietv v. Edmonds, 95 Tenn. 53; 31 S. W. 168. See § 1231.

¹ *Walker v. Walker*, 175 Mass. 349; 56 N. E. 601. (Citing *Samborn v. Flagler*, 9 All. (Mass.) 474; *Peck v. Vandemark*, 99 N. Y. 29; 1 N. E. 41.)

² *Zann v. Haller*, 71 Ind. 136; 36 Am. Rep. 193.

³ *Middleton v. Findla*, 25 Cal. 76.

⁴ *Hodges v. Nalty*, 113 Wis. 567; 89 N. W. 535.

⁵ *Scanlan v. Grimmer*, 71 Minn. 351; 70 Am. St. Rep. 326; 74 N. W. 146.

held to be valid.⁶ So a promissory note signed by the maker's initials is valid.⁷ Misspelling the maker's name does not invalidate his signature to a promissory note if he can be identified. Thus a maker signed a note payable to himself and omitted one letter from such signature. He then indorsed it, spelling his name correctly in the indorsement. This was held to be a valid note.⁸

§573. Mark.

In the absence of some statute to the contrary, a signature by mark affixed by the party whose signature it is intended to be, is sufficient.¹ Thus where a grantor signed by mark immediately below a clause which contained his name, and opposite a seal, such signature was held to be sufficient.² It is not necessary that an attesting witness sign in addition thereto.³ Thus a signature to a mortgage by mark, without the signature of any attesting witness thereto is sufficient.⁴ A signature by mark is sufficient, even if the name of the person whose mark is affixed is not added by any one.⁵ The signature to an instrument required by law to be in writing, as a promissory note,⁶ may be made by mark. Thus in a case often cited⁷ an indorsement in lead-pencil of the figures "1. 2. 8.," intended as a signature in a contract of indorsement of a bill of exchange, was held valid.

⁶ Augur v. Couture, 68 Me. 427.

⁷ Weston v. Myers, 33 Ill. 424.

⁸ Bank v. Sherer, 108 Cal. 513; 41 Pac. 415.

¹ Bates v. Harte, 124 Ala. 427; 82 Am. St. Rep. 186; 26 So. 898; Foye v. Patch, 132 Mass. 105; Sanborn v. Cole, 63 Vt. 590; 14 L. R. A. 208; 22 Atl. 716; Finlay v. Prescott, 104 Wis. 614; 47 L. R. A. 695; 80 N. W. 930.

² Devereux v. McMahon, 108 N. C. 134; 12 L. R. A. 205; 12 S. E. 902.

³ Bates v. Harte, 124 Ala. 427;

82 Am. St. Rep. 186; 26 So. 898; Finlay v. Prescott, 104 Wis. 614; 47 L. R. A. 695; 80 N. W. 930.

⁴ Meazels v. Martin, 93 Ky. 50; 18 S. W. 1028.

⁵ Zimmerman v. Sale, 3 Rich. L. (S. C.) 76.

⁶ Handyside v. Cameron, 21 Ill. 588; 74 Am. Dec. 119; Shank v. Butsch, 28 Ind. 19; Staples v. Bank, 98 Ky. 451; 33 S. W. 403; Lyons v. Holmes, 11 S. C. 429; 32 Am. Rep. 483.

⁷ Brown v. Bank, 6 Hill (N. Y.) 443; 41 Am. Dec. 755.

Such signature is valid though no attesting witness signs.⁸ If a note is signed by the maker's mark, his name being written thereto and an attesting witness signs, proof of such witness's signature is sufficient where he is dead at the time of the trial.⁹ Anyone who is a competent witness at law may act as attesting witness to a note. Thus, where by statute the parties and their wives are competent witnesses in an action at law, the wife of the payee¹⁰ may act as attesting witness to a note. The construction of some statutes requires a signature by mark to be attested by the signature of an attesting witness who can write; as this provision is made to obviate the chance of fraud, the payee cannot be such subscribing witness.¹¹ A promissory note signed by the maker by mark in the presence of the payee, no third person being present, is therefore invalid.¹²

§574. Signature by another.

If a stranger to the contract signs the name of a party to the contract in the presence of such person, and with his authority, this is a sufficient signature.¹ Thus where a grantor authorized the acknowledging officer to sign for him, and such signature was made in grantor's presence, it was held to be valid.² The fact that the party to the contract, at the time of such execution, added that she would have nothing to do with the contract, does not affect its validity where not known to the adversary party.³ A surety, who was not at that time in antagonistic relations with his principal, may sign the name of such principal, and the latter is bound thereby.⁴ If a party to an instru-

⁸ *Shank v. Butsch*, 28 Ind. 19; *Staples v. Bank*, 98 Ky. 451; 33 S. W. 403.

⁹ *Sanborn v. Cole*, 63 Vt. 590; 14 L. R. A. 208; 22 Atl. 716.

¹⁰ *Shepard v. Parker*, 97 Me. 86; 53 Atl. 879; *Alexander v. Hanley*, 64 Vt. 361; 24 Atl. 242.

¹¹ *Ex parte Miller*, 49 Ark. 18; 4 Am. St. Rep. 17; 3 S. W. 883.

¹² *Sivils v. Taylor*, 12 Okla. 47; 69 Pac. 867.

¹ *Jansen v. McCahill*, 22 Cal. 563; 83 Am. Dec. 84; *Wyatt v. Guano Co.*, 144 Ga. 375; 40 S. E. 237; *Nye v. Lowry*, 82 Ind. 316.

² *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82; 22 L. R. A. 297; 13 So. 570.

³ *Wyatt v. Guano Co.*, 114 Ga. 375; 40 S. E. 237.

⁴ *Wright v. Forgy*, 126 Ala. 389; 28 So. 198.

ment affixes his mark thereto after another person has signed his name, in his presence, and by his authority, the instrument is valid, if either form of signature complies with the law. Thus, A signed B's name to an instrument in B's presence, and by B's authority, and B then added his mark. The statute required that a mark must be attested by a witness. No attesting witness signed. Such signature, however, was held to be valid.⁵ In a written contract which is not required by law to be proven by writing, or to be in writing, one party to a contract may affix the signature of the other party thereto in his presence and at his request.⁶ If a stranger to a note signs the maker's name thereto in the presence of the maker and at his request, such signature is valid.⁷ At A's request B wrote A's name to a note and A then made his mark thereto. This was held valid as a signature by A for B, even if A's signature by mark was invalid as not complying with the statutory requirement that A's signature by mark must be attested by a witness who could write.⁸ The fact that B then signed the note by B's own name as surety for A did not invalidate this mode of signature. Signature by one duly authorized is sufficient whether in the presence of the maker or not.⁹

§575. Adoption of signature.

In absence of statute a party to a contract may adopt a signature thereto as his own, even if made without authority.¹ Thus delivery of such an instrument may be an adoption of the signature thereon.² So the principal in a power of attorney may adopt the signature thereto, by an acknowledgment of the signature as his own.³ A certificate purporting to be signed by

⁵ Wright v. Forgy, 126 Ala. 389; 28 So. 198.

⁶ Crow v. Carter, 5 Ind. App. 169; 31 N. E. 937.

⁷ Crumrine v. Crumrine, 14 Ind. App. 641; 43 N. E. 322.

⁸ Wright v. Forgy, 126 Ala. 389; 28 So. 198.

⁹ Blankenship v. Ely, 98 Va. 359; 36 S. E. 484.

¹ Bowman v. Rector (Tenn. Ch. App.), 59 S. W. 389.

² Davis v. Cotton Co., 101 Ga. 128; 28 S. E. 612.

³ Munger v. Baldrige, 41 Kan. 236; 13 Am. St. Rep. 273; 21 Pac. 159.

highway commissioners was in fact signed by the clerk. The commissioners afterward made an endorsement on the back of such certificate, and signed such endorsement. This was held to amount to an adoption of the signatures on the face of the instrument.⁴ So a grantor may adopt a signature to a deed as his own.⁵ Even if by mistake he acknowledges a forged deed, thinking it to be one that he had previously signed, he can not deny the validity of such deed against a *bona fide* purchaser.⁶ The maker of a negotiable instrument may adopt the signature thereto as his own.⁷

§576. Effect of omission of revenue stamp.

The act of Congress, approved June 13, 1898, to provide ways and means to meet war expenditures and for other purposes, provided that revenue stamps must be placed on certain kinds of instruments; made omission so to do a misdemeanor, punishable by fine or imprisonment or both; made certain provisions concerning the validity of instruments from which such stamps were omitted, and other provisions concerning the use of such instruments as evidence. The earlier acts of 1862, 1864 and 1866 contained similar provisions. The effect of such omission will therefore be considered without discussion of the specific statute under which the case was decided. The revenue stamp is no part of the instrument.¹ A petition not averring that the instrument is stamped is not demurrable.² The stamp need not therefore be described in an indictment for forging such instrument.³ An unstamped note may be the subject of forgery.⁴

⁴ *Just v. Wise Township*, 42 Mich. 573; 4 N. W. 298.

⁵ *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65; 35 Pac. 1019.

⁶ *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65; 35 Pac. 1019.

⁷ *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240.

¹ *Thomasson v. Wood*, 42 Cal. 416; *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339; *Trull v. Moulton*, 12 All. (Mass.) 396; *Mor-*

ris v. McMorris, 44 Miss. 441; 7 Am. Rep. 695.

² *Ebert v. Gitt*, 95 Md. 186; 52 Atl. 900.

³ *Laird v. State*, 61 Md. 309; *State v. Mott*, 16 Minn. 472; 10 Am. Rep. 152; *Miller v. People*, 52 N. Y. 304; 11 Am. Rep. 706; *Beer v. State*, 42 Tex. Cr. Rep. 505; 96 Am. St. Rep. 810; 60 S. W. 962.

⁴ *King v. State*, 42 Tex. Cr. Rep. 108; 96 Am. St. Rep. 792; 57 S. W.

While the stamp is not technically a part of the instrument, the effect of its omission on the use of the instrument as evidence must be considered. The federal statute of 1898 provides that an instrument not duly stamped shall not be "admitted or used as evidence in any court."⁵ This clause would appear at first glance to make a class of contracts somewhat like those under the statute of frauds — that is, a class of contracts on which no action can be brought, since the contract itself cannot be proved. In spite of the broad language of the statute, however, this has been held to apply only to the United States courts and to have no application whatever to state courts.⁶ This holding is based on the theory that the power of Congress to make rules of evidence for state courts is very doubtful, and that, accordingly, the statute will be construed as having "a meaning which will give it full operation and effect within the recognized scope of the constitutional authority of Congress."⁷ Some courts go farther and base their holdings chiefly on the proposition that whatever the intention of Congress, it had no power to make rules of evidence for the state courts,⁸ while other courts have

840; *Thomas v. State*, 40 Tex. Cr. Rep. 562; 76 Am. St. Rep. 740; 46 L. R. A. 454; 51 S. W. 242; *State v. Peterson*, 129 N. C. 556; 85 Am. St. Rep. 756; 40 S. E. 9.

⁵ Section 14 of Act.

⁶ *Bumpass v. Taggart*, 26 Ark. 398; 7 Am. Rep. 623; *Garland v. Gaines*, 73 Conn. 662; 84 Am. St. Rep. 182; 49 Atl. 19; *Griffin v. Ranney*, 35 Conn. 239; *Small v. Slocumb*, 112 Ga. 279; 81 Am. St. Rep. 50; 53 L. R. A. 130; 37 S. E. 481; *United States Express Co. v. Haines*, 48 Ill. 248; *Bunker v. Green*, 48 Ill. 243; *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339; *Carpenter v. Snelling*, 97 Mass. 452; *Sammons v. Halloway*, 21 Mich. 162; 4 Am. Rep. 465; *Knox v. Rossi*, 25 Nev. 96; 83 Am. St. Rep. 560; 48 L. R. A. 305; 57 Pac. 179 (overruling *Wayman v. Tor-*

reyson, 4 Nev. 124; *Maynard v. Johnson*, 2 Nev. 25); *Cassidy v. St. Germain*, 22 R. I. 53; 46 Atl. 35; *Kennedy v. Roundree*, 59 S. C. 324; 82 Am. St. Rep. 841; 37 S. E. 942; *Ins. Co. v. Estes*, 106 Tenn. 472; 82 Am. St. Rep. 892; 62 S. W. 149; *sub nomine*, *Southern Ins. Co. v. Estes*, 52 L. R. A. 915; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633; *Miller v. Morrow*, 5 Heisk. (Tenn.) 689 (reversing on rehearing *Miller v. Morrow*, 3 Cold. (Tenn.) 587); *Walt v. Walsh*, 10 Heisk. (Tenn.) 314.

⁷ *Carpenter v. Snelling*, 97 Mass. 452, 458; quoted in *Knox v. Rossi*, 25 Nev. 96, 100; 83 Am. St. Rep. 566; 48 L. R. A. 305; 57 Pac. 179.

⁸ *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Bowen v. Byrne*, 55 Ill. 467; *Latham v. Smith*, 45 Ill. 29; *Wallace v. Cravens*, 34 Ind.

preferred to base their decision upon the construction of the statute.⁹ Some states have held, contrary to the foregoing views, that such statutes applied even to state courts.¹⁰ The next point to be considered is the validity of a contract from which a revenue stamp is omitted, contrary to the statute, apart from questions of its use as evidence. The act of Congress, approved June 13, 1898, provided¹¹ that "such instrument, document, or paper, not being stamped according to law shall be deemed invalid and of no effect." This has been held not to apply to cases, otherwise covered by the act, where the omission to affix a stamp was not fraudulent; but occurred through mere inadvertence.¹² Hence on compliance with the provisions of the statute for supplying stamps which had been omitted inadvertently the instrument is as valid as if originally stamped.¹³ If the instrument is one from which the stamp has been omitted with fraudulent intent, we are confronted with the question whether Congress has power to invalidate an instrument whose

534; *Hunter v. Cobb*, 1 Bush. (Ky.) 239; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633; *Schultz v. Herndon*, 32 Tex. 390.

⁹ *Trowbridge v. Addoms*, 23 Colo. 518; 48 Pac. 535; *Clemens v. Conrad*, 19 Mich. 170; *People v. Gates*, 43 N. Y. 40; *Stewart v. Hopkins*, 30 O. S. 502; *Talley v. Robinson*, 22 Gratt. (Va.) 888; *Weltner v. Riggs*, 3 W. Va. 445.

¹⁰ *Muscatine v. Sterneman*, 30 Ia. 526; 6 Am. Rep. 685; *Chartiers, etc., Co. v. McNamara*, 72 Pa. St. 278; 13 Am. Rep. 673.

¹¹ Section 13 of Act.

¹² *Campbell v. Wilcox*, 10 Wall. (U. S.) 421; *Trowbridge v. Addoms*, 23 Colo. 518; 48 Pac. 535; *Craig v. Dimock*, 47 Ill. 308; *Mitchell v. Ins. Co.*, 32 Ia. 421 (overruling *Muscatine v. Sterneman*, 30 Ia. 526; 6 Am. Rep. 685; *Berry v. Boyd*, 28 Ia. 410; *Botkins v. Spurgeon*, 20 Ia. 598); *Emery v. Hobson*, 63 Me.

33; *Black v. Woodrow*, 39 Md. 194; *Moore v. Quirk*, 105 Mass. 49; 7 Am. Rep. 499; *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339; *Cab-batt v. Radford*, 17 Minn. 320; *Morris v. McMorris*, 44 Miss. 441; 7 Am. Rep. 695; *Stewart v. Hopkins*, 30 O. S. 502; *Gaylor v. Hunt*, 23 O. S. 255; *Harper v. Clark*, 17 O. S. 190; *Atkins v. Plympton*, 44 Vt. 21; *Smith v. Scott*, 31 Wis. 437; *Fenelon v. Hogaboom*, 31 Wis. 172. Insurance policy, *Ins. Co. v. Estes*, 106 Tenn. 472; 82 Am. St. Rep. 892; 62 S. W. 149; *sub nomine*, *Southern Ins. Co. v. Estes*, 52 L. R. A. 915. Assignment of mortgage, *Wingert v. Ziegler*, 91 Md. 318; 80 Am. St. Rep. 453; 51 L. R. A. 316; 46 Atl. 1074. Note, *Rowe v. Bowman*, 183 Mass. 488; 67 N. E. 636.

¹³ *Wingert v. Ziegler*, 91 Md. 318; 80 Am. St. Rep. 453; 51 L. R. A. 316; 46 Atl. 1074; *Cooke v. England*, 27 Md. 14; 92 Am. Dec. 618.

validity depends in other respects upon state law, for fraudulent and wilful omission of revenue stamps. Upon this question we find that it is generally either assumed or decided that Congress has no power to make such instruments invalid; and hence they are held to be valid even if the requisite revenue stamp is omitted.¹⁴ It is true that in some of the cases cited this point is scarcely touched upon; but it is assumed necessarily in these decisions: since the courts discuss the admissibility of the instrument in evidence, and on holding it to be admissible, often even in cases where the revenue stamp is omitted wilfully, decide the case on the theory that if admissible in evidence the instrument must necessarily be enforceable. If the statute does not specifically provide that the instrument is to be void if the stamp is omitted, omission of the stamp will not make it void.¹⁵

II. DELIVERY.

§577. Nature of delivery.

The question as to the existence and nature of delivery may take two distinct forms: (1) has the instrument been delivered in any way by the obligor, so as to take effect at all; and (2) if it has been delivered by him is the delivery one which takes effect at once or is it a delivery in escrow? These questions will be considered in the following sections. Whether possession of an instrument by the obligee raised a presumption of delivery, raises a question upon which there is a conflict of authority. Possession of a negotiable note has been held to raise a presumption of delivery.¹ It has been held that delivery

¹⁴ *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; *Bowen v. Byrne*, 55 Ill. 467; *Hanford v. Obrecht*, 49 Ill. 146; *Latham v. Smith*, 45 Ill. 29; *Prather v. Zulauf*, 38 Ind. 155; *Steeley's Creditors v. Steeley* (Ky.),

64 S. W. 642; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633.

¹⁵ *Carothers v. Covington* (Tex. Civ. App.), 27 S. W. 1040.

¹ *Garrigus v. Missionary Society*, 3 Ind. App. 91; 50 Am. St. Rep. 262; 28 N. E. 1009.

of a non-negotiable instrument cannot be inferred from the mere possession thereof by the obligee.²

§578. Necessity of delivery.

A written contract which is not required by law to be proved by writing, or to be in writing, is of no effect unless it is delivered, unless there is a valid oral contract between the parties, intended by the parties to be effective before delivery. Thus, a written subscription to a corporation is of no validity unless it is delivered.¹ A made a mortgage to B to secure a loan made by X. B took no part in the transaction, and did not know of the existence of the mortgage. It was held that such mortgage was not delivered, and never took effect.² So a deed which has not been delivered is of no validity,³ and may be cancelled in equity.⁴ Accordingly, where a corporation has executed a written contract, the true date of the contract is the date of the execution and delivery, and not the date of the resolution of the corporation.⁵ So, if a due bill is signed and retained by the person signing it, no delivery exists, and it never takes effect.⁶ If delivery is necessary to give the contract validity, the instrument cannot be delivered after the maker's death.⁷ Thus, A executed a note payable to B, and told B that he had done so. B never saw the note, and on A's death it was found among his papers. It was held that there was no delivery.⁸ So an indorsed note cannot be delivered after the death of the indorser so as to put his contract into effect.⁹

² Wilbur v. Stoepel, 82 Mich. 344; 21 Am. St. Rep. 568; 46 N. W. 724.

¹ Davis v. Kneale, 103 Mich. 323; 61 N. W. 508; s. c., 97 Mich. 72; 56 N. W. 220; White v. Crosby (Tex. Civ. App.), 51 S. W. 350.

² Shirley v. Burch, 16 Or. 83; 8 Am. St. Rep. 273; 18 Pac. 351.

³ Gore v. Dickinson, 98 Ala. 363; 39 Am. St. Rep. 67; 11 So. 743.

⁴ Gore v. Dickinson, 98 Ala. 363;

39 Am. St. Rep. 67; 11 So. 743.

⁵ Keystone, etc., Co. v. Bates, 196 Pa. St. 566; 46 Atl. 887.

⁶ Cann v. Cann, 40 W. Va. 138; 20 S. E. 910.

⁷ Michigan Ins. Co. v. Leavenworth, 30 Vt. 11.

⁸ Purviance v. Jones, 120 Ind. 162; 16 Am. St. Rep. 319; 21 N. E. 1099.

⁹ Clark v. Sigourney, 17 Conn. 511; Clark v. Boyd, 2 Ohio 56.

§579. Elements of delivery.

Delivery consists of two distinct elements: (1) A party delivering the instrument must surrender control of the same, and the other party must take either actual or constructive possession thereof.¹ (2) This surrender of control must be accompanied by the intention of both the parties that the instrument shall take effect thereby. Mere change of custody without this intention does not amount to a delivery. If an instrument is taken from the custody of the person who executes it, without his knowledge, as where it is removed in his absence,² no delivery exists. If a written instrument is taken from the person by whom it is executed without his consent, as where it is snatched from his hand while he is threatened with physical violence,³ no delivery exists.

§580. Actual delivery.

Actual delivery exists when the written instrument comes under the control of the obligee. This usually involves a change of physical possession. While the obligor by person or agent usually delivers physical possession to the obligee, this is not necessary. A manager of an insurance company put upon his desk a policy on the life of a solicitor which had been issued by the company. He intended the solicitor to take the policy, as it was his custom to deliver policies by leaving them upon his desk for the solicitor to take and deliver when the premium was paid or arranged for. The solicitor took this policy in the absence of the manager. It was held to be a valid delivery.¹ Even change of physical possession is not necessary. A made out a note to his daughter B, for a valuable consideration, in her presence. The note was thus for a time under her control. With her assent A deposited the note in a separate pocket of a note-case in A's safe in the bank.

¹ Streissguth v. Kroll, 86 Minn. 325; 90 N. W. 577.

² Salley v. Terrill, 95 Me. 553; 85 Am. St. Rep. 433; 55 L. R. A. 730; 50 Atl. 896.

³ Palmer v. Poor, 121 Ind. 135; 6 L. R. A. 469; 22 N. E. 984.

¹ Massachusetts, etc., Association v. Sibley, 158 Ill. 411; 42 N. E. 137; affirming 57 Ill. App. 246.

This was held to be a valid delivery.² The same principle applies where a deed is executed in the grantee's presence and is for the time being under grantee's control.³ A deposit of a contract in the mail, for transmitting to the obligee, with the intent that it shall thereby take effect, amounts to a delivery.⁴ Hence, if the obligee dies after the contract is so deposited, but before it reaches him, the contract is in full force and effect.⁵ It has, however, been held that a bank-check which is mailed to the payee, but is never received by him, remains the property of the sender.⁶

§581. Recording as delivery.

If a grantor causes a deed to be recorded with the actual or presumed assent of the grantee, such act amounts to a delivery.¹ Thus if grantee sends a deed to grantor for execution, and asks him to have it recorded, delivery to the recorder is delivery to the grantee.² If the actual assent of grantee to such recording is shown delivery is conclusively presumed.³ Recording raises a *prima facie* presumption of assent of grantee, which is sufficient in the absence of evidence to the contrary.⁴ The pre-

² Reeves' Estates, 111 Ia. 260; 82 N. W. 912. To the same effect, see Sharmer v. McIntosh, 43 Neb. 509; *sub nomine*, Sharmer v. Johnson, 61 N. W. 727.

³ Delaplain v. Grubb, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201. The evidence did not contradict the presumption of delivery arising on these facts but strengthened it.

⁴ Triple Link, etc., Association v. Williams, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19; Kirkman v. Bank, 2 Cold. (Tenn.) 397.

⁵ Triple Link, etc., Association v. Williams, 121 Ala. 138; 77 Am. St. Rep. 34; 26 So. 19.

⁶ Garthwaite v. Bank, 134 Cal. 237; 66 Pac. 326.

¹ Gulf, etc., Co. v. O'Neal, 131 Ala. 117; 90 Am. St. Rep. 22; 30 So. 466; Brady v. Huber, 197 Ill. 291; 90 Am. St. Rep. 161; 64 N. E. 264; McReynolds v. Grubb, 150 Mo. 352; 73 Am. St. Rep. 448; 51 S. W. 822.

² Prignon v. Daussat, 4 Wash. 199; 31 Am. St. Rep. 914; 29 Pac. 1046.

³ Brady v. Huber, 197 Ill. 291; 90 Am. St. Rep. 161; 64 N. E. 264.

⁴ McReynolds v. Grubb, 150 Mo. 352; 73 Am. St. Rep. 448; 51 S. W. 822; Sweetland v. Buell, 164 N. Y. 541; 79 Am. St. Rep. 676; 58 N. E. 663.

sumption of delivery is especially strong in case of a voluntary deed, as to a grantee's wife⁵ or children.⁶ If, however, it can be shown that the grantee, being of full age and of sound mind, knew nothing of the existence or recording of such deed, the mere act of recording it will not make it take effect until he assents thereto.⁷

§582. Constructive delivery.

Delivery may, however, be constructive, as well as actual. If a note is made out, and placed by the maker in his safe, with the consent of the payee, simply for the purpose of safe keeping, it has been held to be constructively delivered.¹ In an extreme case, a note was held to be constructively delivered where the maker intended it to be a complete and binding obligation without any further act on his part.² So where A drew a check payable to B or order and the check never came into B's hands, but into X's, who by false representations got the bank to pay him, this was treated as such a delivery that B could maintain an action thereon.³ A made a deed to his son B, conveying real estate for which B was to pay A three hundred dollars a year until A's death. B at once went into possession of such property, paid this sum to A annually, paid the taxes on the property, erected improvements, and treated it as his own. A always retained the custody of the deed. A few days before A died he directed another son to deliver this deed to B.

⁵ Shields v. Bush, 189 Ill. 534; 82 Am. St. Rep. 474; 59 N. E. 962.

⁶ Gulf, etc., Co. v. O'Neal, 131 Ala. 117; 90 Am. St. Rep. 22; 30 So. 466; Parker v. Salmons, 101 Ga. 160; 65 Am. St. Rep. 291; 28 S. E. 681; Abbott v. Abbott, 189 Ill. 488; 82 Am. St. Rep. 470; 59 N. E. 958.

⁷ Weber v. Christen, 121 Ill. 91; 2 Am. St. Rep. 68; 11 N. E. 893; Cravens v. Rossiter, 116 Mo. 338;

38 Am. St. Rep. 606; 22 S. W. 736. So of a chattel mortgage, National State Bank v. Morse Wilson Co., 73 Ia. 174; 5 Am. St. Rep. 670; 34 N. W. 803.

¹ Victor v. Swisky, 87 Ill. App. 583.

² Rowan v. Chenoweth, 49 W. Va. 287; 38 S. E. 544.

³ Pickle v. Muse, 88 Tenn. 380; 17 Am. St. Rep. 900; 7 L. R. A. 93; 12 S. W. 919.

This was not done until after A died. These facts were held to amount to a constructive delivery.⁴

§583. Effect of re-delivery.

After rights have become fixed by the delivery of a written contract, the subsequent fate of the written instrument is, apart from questions of commercial paper, immaterial. Hence, the fact that the obligee ultimately regains possession of such written instrument, does not destroy the effect of a prior valid delivery.¹ Thus, where an insured returned his policy to the insurance agent and requested that it be cancelled, but the agent induced him not to insist upon so doing; it was held that the policy was in force.² Thus, after a deed has been delivered unconditionally to the duly authorized agent of the grantee, a subsequent retention thereof, either by another agent of the grantee³ or by the agent to whom the deed is delivered⁴ at the grantee's request to hold till some designated future event, is not a delivery in escrow. If the re-delivery is intended by the parties as a release by each to the other, of their respective rights under the contract, a different question is, of course, presented, and the original contract between the parties will be discharged, not by the mere fact of re-delivery, but by the new contract.⁵

⁴ Rodmeier v. Brown, 169 Ill. 347; 61 Am. St. Rep. 176; 48 N. E. 468.

¹ Deed, Tabor v. Tabor, — Mich. —; 99 N. W. 4; Schuffert v. Grote, 88 Mich. 650; 26 Am. St. Rep. 316; 50 N. W. 657; mortgage, Bradtfeldt v. Cooke, 27 Or. 194; 50 Am. St. Rep. 701; 40 Pac. 1; insurance policy, Shields v. Assurance Society, 121 Mich. 690; 80 N. W. 793; certificate given by architect to contractor, Arnold v. Bournique, 144 Ill. 132; 36 Am. St. Rep. 419; 20 L. R. A. 493; 33 N. E. 530.

² Shields v. Assurance Society,

121 Mich. 690; 80 N. W. 793. (In this case the note given by the insured became due after the insured was suffering from his last illness and incapable of doing business. It was not paid by him, but the agent insisted on the payment. The policy, on the death of the insured, was held to be in full force and effect.)

³ Von Schmidt v. Widber, 105 Cal. 151; 38 Pac. 682.

⁴ Parrish v. Steadham, 102 Ala. 615; 15 So. 354.

⁵ See Ch. LXII.

§584. Nature of delivery in escrow.

A written instrument is delivered in escrow when it is delivered by the obligor to a third person, to be held by such third person until some contingency occurs, or some condition is complied with, upon the performance of which condition it is to be delivered to the obligee and to become of full force and effect.¹ If a written instrument is in the possession of a person other than grantor or grantee, the question whether this is a delivery in escrow or not, turns on the question of the relation of such holder to the parties to the instrument and the agreement under which he received it. If the obligor has parted with control over the instrument, except in case of the non-happening of the contingency or condition upon which it is to take effect, and the obligee has no rights thereunder until the happening of such contingency or condition, the instrument is delivered in escrow.² Thus, A delivered a deed which contained a clause providing that the holder should deliver it to the grantee upon the death of the grantor, or should re-deliver it to the grantor at her request. The grantee subsequently obtained such deed and erased the clause providing for re-delivery to grantor. The deed was then put in the custody of the original depository. This was held to be a valid delivery in escrow.³ A deed has been held to be delivered in escrow where the grantor reserved the right to recall it, but never in fact attempted to exercise such right.⁴ It is not necessary that the terms under which a deed is deposited in escrow should be expressed in writing.⁵ If an instrument is placed in the hands

¹ Davis v. Clark, 58 Kan. 100; 48 Pac. 563. See to the same effect, Mudd v. Green (Ky.), 12 S. W. 139. "An escrow *ex vi termini* is a deed delivered to some third person to be by him delivered to the grantee upon performance of some precedent condition by the grantee or another or the happening of some event." Duncan v. Pope, 47 Ga. 445, 451.

² Shults v. Shults, 159 Ill. 654; 50 Am. St. Rep. 188; 43 N. E. 800.

³ Fulton v. Priddy, 123 Mich. 298; 81 Am. St. Rep. 201; 82 N. W. 65.

⁴ Lippold v. Lippold, 112 Ia. 134; 84 Am. St. Rep. 331; 83 N. W. 809.

⁵ Tharaldson v. Everts, 87 Minn. 168; *sub nom.*, Thoraldsen v. Hatch, 91 N. W. 467.

of a third person for delivery to the vendee, on performance by him of a certain condition of sale, it has been held that this amounts to a delivery in escrow.⁶ If, however, the person with whom the instrument is deposited is simply holding, subject to the obligor's instructions, but not under any agreement made with the obligee, or conferring rights upon him, such delivery is not in escrow.⁷ If a grantor deposits a deed with a third person, and subsequently recalls the deed and destroys it, and there is nothing to show the terms upon which such deposit was made, this can not be assumed to be such a delivery in escrow as to confer any right to the grantee.⁸ A delivery of a deed together with a will, to the grantor's sister-in-law, with the instructions to deliver them to the one who should settle grantor's estate, is not a delivery in escrow, especially where grantor subsequently takes such package of papers back, and places it in her desk, though with instructions to the sister-in-law to take the papers in case the grantor should become sick.⁹ A deed delivered to a third person, with instructions to deliver to the grantee in case the grantor died of the illness with which she was then suffering, but otherwise to be returned to the grantor, is not a delivery in escrow.¹⁰ If any future agreement must be made between the obligor and obligee, before the written instrument in the hands of a third person can be delivered, no delivery in escrow exists.¹¹ Thus, where deeds were deposited with a third person to be delivered, each in exchange for the other, if, after examination of title, everything was found "all right and perfected,"¹² or drafts which had been accepted were de-

⁶ *Hillhouse v. Pratt*, 74 Conn. 113; 49 Atl. 905.

⁷ Promissory note, *Nichols, etc., Co. v. Bank*, 6 N. D. 404; 71 N. W. 135; stock certificate, *Clark v. Campbell*, 23 Utah 569; 90 Am. St. Rep. 716; 54 L. R. A. 508; 65 Pac. 496.

⁸ *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188; 43 N. E. 800.

⁹ *Osborne v. Eslinger*, 155 Ind.

351; 80 Am. St. Rep. 240; 58 N. E. 439.

¹⁰ *Williams v. Daubner*, 103 Wis. 521; 74 Am. St. Rep. 902; 79 N. W. 748.

¹¹ *Miller v. Sears*, 91 Cal. 282; 25 Am. St. Rep. 176; 27 Pac. 589.

¹² *Miller v. Sears*, 91 Cal. 282; 25 Am. St. Rep. 176; 27 Pac. 589. However a deed delivered to a third person to hold "till we got proper

posited to be delivered if the acceptor approved the merchandise against which such drafts were drawn,¹³ it is not a delivery in escrow. A executed to B a note to take up a note of A's which B had held, but which had been mislaid. The note was placed in the hands of X, with instructions to X to deliver the note to B when B produced A's former note; and if such note could not be found, then X was to deliver the note when B had given sufficient indemnity, to be agreed upon thereafter between himself and A. A died before B had found the note, or before A and B had agreed upon the amount of the indemnity to be given. This was held not to be a delivery in escrow, but X's agency was held to terminate on A's death.¹⁴

§585. Rights of parties when delivery is in escrow.

"The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor, save upon the fulfillment of the agreed conditions, deliver it to the latter without the former's consent."¹ On the one hand, the obligor, or grantor, who has deposited such instrument with the holder in escrow, has no right to reclaim the same without the consent of the obligee or grantee.² If the instrument deposited in escrow passes title to realty it is valid as against subsequent devisees of the grantor or his grantees without consideration.³ If the grantor subsequently obtains possession of

abstracts of title," was said to be held in escrow. *Hoyt v. McLagan*, 87 Ia. 746; 55 N. W. 18.

¹³ *Lehigh Coal & Iron Co. v. Steel Co.*, 91 Wis. 221, 225; 64 N. W. 746. The court gave as a reason that the acceptor "retained absolute control over them and could by keeping silent prevent their delivery for all time."

¹⁴ *Farmer v. Marvin*, 63 Kan. 250; 65 Pac. 221.

¹ *Davis v. Clark*, 58 Kan. 100, 105;

48 Pac. 563; to the same effect are *Cannon v. Handley*, 72 Cal. 133; 13 Pac. 315; *Grove v. Jennings*, 46 Kan. 366; 26 Pac. 738; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Shirley v. Ayers*, 14 Ohio 307; 45 Am. Dec. 546; *Gammon v. Bunnell*, 22 Utah 421; 64 Pac. 958.

² *Tharaldson v. Everts*, 87 Minn. 168; *sub nomine Thoraldsen v. Hatch*, 91 N. W. 467.

³ *Bury v. Young*, 98 Cal. 446; 35 Am. St. Rep. 186; 33 Pac. 338.

the deed deposited in escrow,⁴ and even destroys it,⁵ the rights of the grantee in escrow are not thereby destroyed. On the other hand, the obligee or grantee under the instrument deposited in escrow, has no right to the custody of the instrument until the conditions of the deposit have been complied with, nor can the instrument take effect till then as between the parties.⁶ If the depository of a deed in escrow delivers it to the grantee before the conditions of the escrow are complied with, such delivery is of no validity as between the grantor and the grantee.⁷ So delivery of a lease⁸ or mortgage⁹ which has been deposited in escrow is of no effect if delivered before the conditions have been complied with. So a mortgagee who has placed a release of a mortgage in escrow may enjoin the mortgagor from having it recorded before the condition on which it was delivered has been complied with.¹⁰ If the grantee under a deed deposited in escrow obtains it from the depository by fraud, such deed is of no effect as between grantor and grantee.¹¹ The same rule applies where it is taken without the knowledge of the depository.¹² Neither is it of any validity as against persons claiming under such grantee who are not *bona fide* purchasers for value.¹³ Whether such delivery is of any validity against *bona fide* purchasers for value, is a question upon which there is a conflict of authorities. Some authorities hold that such deed passes title as to *bona fide* purchasers for value;¹⁴

⁴ Grove v. Jennings, 46 Kan. 366; 26 Pac. 738.

⁵ Robbins v. Rascoe, 120 N. C. 79; 58 Am. St. Rep. 774; 38 L. R. A. 238; 26 S. E. 807.

⁶ Wilson v. Savings Association, 42 Fed. 421.

⁷ Hogueland v. Arts, 113 Ia. 634; 85 N. W. 818; Jackson v. Rowley, 88 Ia. 184; 55 N. W. 339; Lewis v. Prather (Ky.), 21 S. W. 538; Matteson v. Smith, 61 Neb. 761; 86 N. W. 472; Tyler v. Cate, 29 Or. 515; 45 Pac. 800; Landon v. Brown, 160 Pa. St. 538; 28 Atl. 921.

⁸ Gentry v. Gatlin, 14 Tex.

Civ. App. 419; 38 S. W. 223.

⁹ Roberson v. Reiter, 38 Neb. 198; 56 N. W. 877.

¹⁰ Matteson v. Smith, 61 Neb. 761; 86 N. W. 472.

¹¹ Hanley v. Sweeny, 109 Fed. 712; 48 C. C. A. 612; Burnap v. Sharpsteen, 149 Ill. 225; 36 N. E. 1008; Everts v. Agnes, 6 Wis. 453; affirming same case in 4 Wis. 343; 65 Am. Dec. 314.

¹² Jackson v. Lynn, 94 Ia. 151; 58 Am. St. Rep. 386; 62 N. W. 704.

¹³ Roberson v. Reiter, 38 Neb. 198; 56 N. W. 877.

¹⁴ Schurtz v. Colvin, 55 O. S.

others hold that it does not.¹⁵ So, if a non-negotiable contract, deposited in escrow, is delivered before the terms of the deposit are complied with, it is of no validity against the obligor.¹⁶ Where a deed has been improperly delivered by the depositary, the grantor may subsequently ratify such delivery.¹⁷ By remaining silent, and seeing third persons without knowledge of the facts alter their condition, in reliance upon the apparent delivery, he may estop himself to deny the validity of such delivery.¹⁸ So a promissory note deposited in escrow and delivered by the depositary before the terms of the delivery are complied with is invalid except when in the hands of a *bona fide* holder who acquires legal title for value and before maturity.¹⁹ In the hands of a *bona fide* holder, however, a negotiable instrument, wrongfully delivered by a holder in escrow, is valid.²⁰ A depositary of a promissory note in escrow who delivers it before the conditions are complied with, in consequence of which the maker is obliged to pay the note to an innocent holder for value, is liable in damages to such maker.²¹ A party to a delivery in escrow, for whose benefit certain conditions were imposed, may, however, waive such conditions and allow the deed to be delivered without the performance thereof.²²

274; 45 N. E. 527; *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314.

¹⁵ *Dixon v. Bank*, 102 Ga. 461; 66 Am. St. Rep. 193; 31 S. E. 96; *Quick v. Milligan*, 108 Ind. 419; 58 Am. Rep. 49; 9 N. E. 392; *Jackson v. Lynn*, 94 Ia. 151; 58 Am. St. Rep. 386; 62 N. W. 704; *Tyler v. Cate*, 29 Or. 515; 45 Pac. 800; *Smith v. Bank*, 32 Vt. 341; 76 Am. Dec. 179; *Everts v. Agnes*, 6 Wis. 453; affirming same case in 4 Wis. 343; 65 Am. Dec. 314. (In the case in 4 Wis. *supra* it did not appear definitely that the subsequent purchaser acted *bona fide*. in 6 Wis. *supra* the record showed him to be a *bona fide* grantee.)

¹⁶ *Daniels v. Gower*, 54 Ia. 319; 3 N. W. 424; 6 N. W. 525.

¹⁷ *Dixon v. Bank*, 102 Ga. 461; 66 Am. St. Rep. 193; 31 S. E. 96.

¹⁸ *Dixon v. Bank*, 102 Ga. 461; 66 Am. St. Rep. 193; 31 S. E. 96; *Reese v. Medlock*, 27 Tex. 120; 84 Am. Dec. 611.

¹⁹ *Jamison v. McFarland*, 10 S. D. 574; 74 N. W. 1033.

²⁰ *Schmid v. Frankfort*, 131 Mich. 197; 91 N. W. 131; *Chase National Bank v. Faurot*, 149 N. Y. 532; 35 L. R. A. 605; 44 N. E. 164.

²¹ *Riggs v. Trees*, 120 Ind. 402; 5 L. R. A. 696; 22 N. E. 254.

²² *Smith v. Goodrich*, 167 Ill. 46; 47 N. E. 316; *Tharaldson v. Everts*, 87 Minn. 168; *sub nomine* *Tharaldsen v. Hatch*, 91 N. W. 467.

§586. Necessity of second delivery of escrow.

Whether the failure or omission of the depositary in escrow to deliver the instrument to the party entitled to it when the conditions of the deposit in escrow have been complied with defeats the rights of the parties under the instrument, is a question upon which there is a conflict of authority. In some jurisdictions it is held that at the instant that the conditions of the delivery in escrow are complied with, the party so complying has a right to the possession of the instrument, and the act of the depositary in withholding such delivery cannot affect his rights.¹ In other jurisdictions, it is held that the party who has a right to such instrument cannot maintain an action thereon until it is delivered to him.²

§587. Fiction of relation to original delivery in escrow.

By a legal fiction an instrument which has been deposited in escrow may relate back upon the performance of the conditions of delivery to the time of the delivery in escrow, and for some purposes, take effect from such time.¹ This doctrine is generally invoked where the obligor has died before the conditions of the escrow have been complied with. A mere agency would be revoked by such death, but by the theory given, the law treats the instrument delivered in escrow as valid, notwithstanding

¹ So with deeds, *White Star, etc., Co. v. Moragne*, 91 Ala. 610; 8 So. 867; *Combeau v. Geis*, 73 Cal. 176; 2 Am. St. Rep. 785; 14 Pac. 580; *Davis v. Clark*, 58 Kan. 100; 48 Pac. 563; notes, *Couch v. Meeker*, 2 Conn. 302; 7 Am. Dec. 274; *Taylor v. Thomas*, 13 Kan. 217. "A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depositary has not formally delivered it to the payee." Syllabus of *Taylor v. Thomas*, 13 Kan. 217;

quoted *Davis v. Clark*, 58 Kan. 100, 106; 48 Pac. 563.

² So with bonds, *Jackson, etc., Co. v. Pearson*, 60 Fed. 113.

¹ *Perryman's Case*, 5 Co. 84a; *Bostwick v. McEvoy*, 62 Cal. 496; *Peck v. Goodwin*, Kirby (Conn.) 64; *Price v. R. R.*, 34 Ill. 13; *Wallace v. Harris*, 32 Mich. 380; *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285; 7 Am. Dec. 375; *Shirely v. Ayers*, 14 Ohio 307; 45 Am. Dec. 546; *Gammon v. Bunnell*, 22 Utah 421; 64 Pac. 958.

ing the death of the obligor. Deeds² and bank-checks³ held in escrow may thus take effect upon delivery after the obligor's death. Whether a deed can be delivered in escrow upon a condition which by its terms cannot be performed until after the grantor's death, so that upon performance of the condition the deed will relate back to the original delivery is a question upon which there is a conflict of authority. If a deed is placed in the hands of a third person, to be delivered on grantor's death, provided that after grantor's death grantee performs some condition precedent, it has been held that such delivery is not a valid delivery in escrow.⁴ On the other hand a deed deposited with a third person and delivered in accordance with conditions imposed by the grantor's will has been held to relate back, no third person's rights being injured thereby.⁵ Like other legal fictions, however, the fiction of relation will not be extended to cases not intended by the fiction originally. Thus, where the rights of third persons will be prejudiced by such relation, the relation will not exist as to them. Thus, A made a deed of gift to his son B, and delivered it in escrow to X, to be delivered to B on A's death. It was held that such delivery was ineffective as against subsequent creditors of A who had extended credit to him, relying upon his apparent ownership of such property.⁶ The doctrine of relation will not be invoked where it is contrary to the apparent intention of the parties. Thus, where a deed has been delivered in escrow, and before the conditions of the escrow were complied with, a building upon the land which belonged to a third person, of which fact the grantee had

² *Schuur v. Rodenback*, 133 Cal. 85; 65 Pac. 298; *Trask v. Trask*, 90 Ia. 318; 48 Am. St. Rep. 446; 57 N. W. 841; *Davis v. Clark*, 58 Kan. 100; 48 Pac. 563; *Brown v. Stutson*, 100 Mich. 574; 43 Am. St. Rep. 462; 59 N. W. 238; *Tharaldson v. Everts*, 87 Minn. 168; *sub nomine Thoraldsen v. Hatch*, 91 N. W. 467; *Lindley v. Groff*, 37 Minn. 338; 34 N. W. 26; *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671;

22 S. W. 1077; *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578; 30 N. E. 52.

³ *Whitehouse v. Whitehouse*, 90 Me. 468; 60 Am. St. Rep. 278; 38 Atl. 374.

⁴ *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; 26 N. W. 426.

⁵ *Dettmer v. Behrens*, 106 Ia. 585; 68 Am. St. Rep. 326; 76 N. W. 853.

⁶ *Rathmell v. Shirey*, 60 O. S. 187; 53 N. E. 1098.

notice, was purchased by the grantee to prevent the owner from removing the same, it was held that upon performance of the conditions of the delivery, the deed did not relate back to the time of the delivery in escrow, in order to hold the grantor for the value of such building upon his covenants of warranty.⁷ Thus where a deed has been delivered in escrow under an agreement that the grantee is to desist from all further defense to a particular suit, and that in case a certain judgment is affirmed, the deed is to be delivered to the grantee, the deed will not, upon performance of such condition, relate back to the time of its original delivery for the purpose of defeating the judgment in question, which, besides the title to the land conveyed by such deed, operated as an adjudication as between the grantor and the grantee, as to their rights. For the purpose of determining their rights the deed will be treated as taking effect only from the time of the performance of the conditions of the delivery; that is, from the affirmance of the judgment.⁸ If a grantor has delivered a deed in escrow and at the time of his death the conditions of the escrow have not been performed, it has been held that the legal title thereto descends to the heirs and devisees of such grantor subject to be divested by the performance of the conditions of the delivery.⁹

§588. Who can be depositary in escrow.—Obligor.

The question of delivery depends in part upon the relation of the person in whose custody and possession the instrument is, to the instrument itself, or to the parties thereto. A written instrument may be, (1) retained by the party executing it; (2) delivered to his agent; (3) delivered to a person who is not a party to the instrument, and who does not take as the agent of either party, or who may be said to take as the agent of both parties; (4) delivered to the agent of the adversary party; or, (5) delivered to the adversary party himself. The

⁷ Hoyt v. McLagan, 87 Ia. 746; 264; 48 Am. St. Rep. 37; 14 So. 55 N. W. 18. 663.

⁸ Ashford v. Prewitt, 102 Ala. ⁹ Chadwick v. Tatem, 9 Mont. 354; 23 Pac. 729.

effect of each of these states of fact must, therefore, be considered. A written contract which is executed by one party and retained in his custody, and of which the possession and control has never been surrendered to the adversary party, is of no validity.¹ The same principle makes invalid a deed which is executed by the grantor and retained by him in his possession,² or which is placed in the possession of one of two or more joint grantors, as where a deed executed by a husband and wife is put in the custody of the husband,³ or of the wife,⁴ though with the expectation of delivering it at a later time. If an instrument is executed by both parties thereto, and is intended to take effect, a valid delivery exists if it is left in the custody of either of such parties.⁵ Under any other rule an instrument executed by both adversary parties could never be delivered between them.

§589. Unauthorized delivery by co-obligor.

If an obligor, such as a surety, leaves an instrument to which he has affixed his name with a co-obligor to be delivered only if some other party signs it as co-obligor, and the custodian of the instrument delivers it to the obligee, who does not know that such signing is conditional, the party so signing is liable to the obligee.¹ The rules governing delivery by a holder in

¹ Harrison v. Morton, 83 Md. 456; 35 Atl. 99.

² Parrott v. Avery, 159 Mass. 594; 38 Am. St. Rep. 465; 22 L. R. A. 153; 35 N. E. 94; Tyler v. Hall, 106 Mo. 313; 27 Am. St. Rep. 337; 17 S. W. 319; Cazassa v. Cazassa, 92 Tenn. 573; 36 Am. St. Rep. 112; 20 L. R. A. 178; 22 S. W. 560.

³ Kopp v. Reiter, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942.

⁴ Morris v. Caudle, 178 Ill. 9; 69 Am. St. Rep. 282; 44 L. R. A. 489; 52 N. E. 1036.

⁵ Templeton v. Twitty, 88 Tenn. 595; 14 S. W. 435.

¹ Dair v. United States, 16 Wall. (U. S.) 1; State v. Pepper, 31 Ind. 76; Carter v. Moulton, 51 Kan. 9; 37 Am. St. Rep. 259; 20 L. R. A. 309; 32 Pac. 633; Flannery v. Bank (Ky.), 52 S. W. 847; Millett v. Parker, 2 Met. (Ky.) 608; State v. Peck, 53 Me. 284; Board of Education v. Robinson, 81 Minn. 305; 84 N. W. 105; Fowler v. Allen, 32 S. C. 229; 7 L. R. A. 745; 10 S. E. 947; Dun v. Garrett, 93 Tenn. 650; 42 Am. St. Rep. 937; 27 S. W. 1011; Turnbull v. Mann, 99 Va. 41; 37 S. E. 288.

escrow do not apply, as a co-obligor is not a holder in escrow.² The requirement that the obligee must take without notice implies that the instrument is complete on its face and does not show that it is not to take effect until others sign.³ If this requirement appears on the face of the instrument the obligee is charged with notice thereof. So a condition that a written contract which has been delivered to the promisee is not to take effect until other parties sign cannot be interposed as against third persons who have a right to rely, and who have relied, upon such contract. Thus persons who sign and deliver a subscription for stock complete on its face under an oral agreement that it shall not take effect until others subscribe, cannot set up such oral condition as to subsequent subscribers who subscribe in reliance on the validity of such prior subscription.⁴ But where A, a surety on a bond of indemnity, signed it and left it with B, the obligor, on condition that C, another specified surety, would sign, and B forged the name of C and delivered the bond it was held that A was not liable, as the obligee was bound to know the genuineness of the signatures.⁵ The fact that after B made default C voluntarily made a payment on such bond does not make A liable. If the obligee of an instrument knows that it has been signed by a party thereto, upon condition that his liability should not attach until some additional party had signed, and such instrument is left in the custody of an obligor, and is delivered by him contrary to his agreement, it is held in many courts that such instrument does not take effect as to a party signing upon such conditions.⁶ If the payee has notice of the fact that the surety signed on condition that others were to sign before the instrument was delivered, and that the maker

² *Carter v. Moulton*, 51 Kan. 9; 37 Am. St. Rep. 259; 20 L. R. A. 309; 32 Pac. 633.

³ *Dun v. Garrett*, 93 Tenn. 650; 42 Am. St. Rep. 937; 27 S. W. 1011.

⁴ *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701; 3 L. R. A. 769; 41 N. W. 1026.

⁵ *Southern Cotton-Oil Co. v. Bass*, 126 Ala. 343; 28 So. 576. And see as to such facts in signing a note, *Sharp v. Allgood*, 100 Ala. 183; 14 So. 16.

⁶ *State Bank v. Evans*, 15 N. J. L. 155; 28 Am. Dec. 400; *Black v. Lamb*, 13 N. J. Eq. (2 Beas.) 455; 12 N. J. Eq. (1 Beas.) 108.

has delivered such note in violation of such agreement, some authorities hold that the payee cannot recover.⁷

§590. Agent of obligor.

If a written instrument is delivered to one who holds as the agent of the grantor, this does not amount to delivery which will give the instrument legal effect. Thus a deed delivered to one who is agent of the grantor, is of no validity, even if the grantor has instructed him to deliver it to the grantee.¹ Thus A deposited certain stock with a bank and gave the bank written instructions to deliver it to B on payment by B of seventy-five thousand dollars before November 24, 1898. B paid such amount upon such date. In the meantime, on November 22nd, a dividend had been declared. It was held that the bank took as the agent of the grantor, who had in the meantime full control over such stock, and that title thereto did not pass until payment by B and delivery to him. Accordingly the dividends did not pass to B.² The test for determining whether the holder of the written instrument is the agent of the maker thereof or not turns on the question of the right of the maker to recall the instrument. If the maker has such right the holder is acting as his agent and no delivery exists.³

§591. Agent of obligor taking in different capacity.

On the other hand, an instrument may be delivered to one who is the agent of the maker and yet he may not take in his capacity of agent. A executed a note, placed it in an envelope,

⁷ Stricklin v. Cunningham, 58 Ill. 293; Bank v. Bornman, 124 Ill. 200; 16 N. E. 210; Coffman v. Wilson, 2 Mete. (Ky.) 542; Jackson v. Cooper (Ky.), 19 Ky. Law Rep. 9; 39 S. W. 39; Williams v. Luther (Ky.), 17 Ky. Law Rep. 311; 30 S. W. 199; Dunn v. Smith, 12 Smedes & M. (Miss.) 602; Read v. McLe-more, 34 Miss. 110; Hill v. Sweetser, 5 N. H. 168; Cowan v. Baird, 77 N.

C. 201; Large v. Parker (Tex. Civ. App.), 56 S. W. 587.

¹ Furenes v. Eide, 109 Ia. 511; 77 Am. St. Rep. 545; 80 N. W. 539.

² Clark v. Campbell, 23 Utah 569; 90 Am. St. Rep. 716; 54 L. R. A. 508; 65 Pac. 496.

³ Miller v. Sears, 91 Cal. 282; 25 Am. St. Rep. 176; 27 Pac. 589; Nichols v. Opperman, 6 Wash. 618; 34 Pac. 162.

sealed the envelope, and marked it with the initials of the payee, and delivered it to A's domestic servant, with instructions to be sure that the payee got it at A's death. It was held that unless A had reserved the right to recall such note this was a good delivery in escrow, and could be delivered by such servant to the payee after A's death. A verdict finding that this was a delivery in escrow was sustained.¹ A executed a deed and delivered it to his housekeeper, with instructions to deliver the deed to his son at A's death. This was held to be a valid delivery in escrow if A had no right to recall the deed. The fact that the housekeeper subsequently put the deed in A's trunk for safe-keeping did not invalidate such delivery.² A's intention to put the deed beyond his recall by such delivery was held to be shown from the fact that he did not try to recall it, and also from the fact that he made such delivery after receiving an opinion from his attorney that such delivery would be valid, and would be binding upon A. A grantor who has sold land through a real estate agent may deposit the deed to the property sold in escrow with such agent.³ So, if an application is made for insurance, under a contract that if the application for insurance is accepted the insurance will take effect from the time of the application, and the application is accepted, and the policy is forwarded to the agent of the insurance company with unconditional instructions to deliver to the insured, such policy takes effect, even though the manual possession of the policy is not surrendered by the agent to the insured.⁴ This principle

¹ Daggett v. Simonds, 173 Mass. 340; 46 L. R. A. 332; 53 N. E. 907.

² Munro v. Bowles, 187 Ill. 346; 54 L. R. A. 865; 58 N. E. 331.

³ McLaughlin v. Wheeler, 1 S. D. 497; 47 S. W. 816; modified on another point 2 S. D. 379; 50 N. W. 834.

⁴ Xenos v. Wickham, L. R., 2 H. L. 296; Union Central Life Ins. Co. v. Phillips, 102 Fed. 19; 41 C. C. A. 263; reversing on another ground Phillips v. Ins. Co., 101 Fed.

33; Young v. Assurance Society, 30 Fed. 902; Harrigan v. Ins. Co., 128 Cal. 531; 61 Pac. 99; incorrectly entitled Harrington v. Ins. Co., in 58 Pac. 180; Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1; 31 S. E. 779; New York Life Ins. Co. v. Babcock, 104 Ga. 67; 69 Am. St. Rep. 134; 42 L. R. A. 988; 30 S. E. 273; Medearis v. Ins. Co., 104 Ia. 88; 65 Am. St. Rep. 428; 73 N. W. 495; Mutual Life Ins. Co. v. Thomson, 94 Ky. 253; 22 S. W. 87; Lee

applies even where, by the terms of the contract, the policy is not to take effect until its delivery.⁵ This holding shows that the court looks upon such facts as amounting to a delivery. In other cases the controlling theory may be that the contract of insurance was effective between the parties, even if no delivery had ever been made. So, if the insured is notified by the agent that the policy is in the hands of the agent subject to his orders, delivery exists even though he does not in fact call for it.⁶ Thus a policy delivered by the insurance company to its agent under unconditional instructions to deliver to the insured, but retained by the agent until the insured has reimbursed the agent for the premium advanced by such agent, is delivered to the insured so as to take effect.⁷ If, on the other hand, there is some other and further act to be done before the policy takes effect, delivery to the agent does not amount to delivery to the insured.⁸ Thus if the policy is not to take effect until the premium is paid, and such premium has not been paid and payment thereof has not been waived, possession by the agent of the insurance company does not amount to the delivery to the insured.⁹ So if the insured is not bound to take the policy, but has the right to accept or reject it, delivery to the agent of the insurance company is not delivery to the insured.¹⁰ So if the agent does not take under unconditional instructions for delivery, as where he is directed to hold the policy, pending an investigation by the

v. Ins. Co. (Ky.), 41 S. W. 319; Dibble v. Assurance Co., 70 Mich. 1; 14 Am. St. Rep. 470; 37 N. W. 704; Newark Machine Co. v. Ins. Co., 50 O. S. 549; 22 L. R. A. 768; 35 N. E. 1060; Porter v. Ins. Co., 70 Vt. 504; 41 Atl. 970. "The agent and the mails were only the vehicles to carry it to him and it was the same thing as if mailed or sent directly to the plaintiff." Hallock v. Ins. Co., 26 N. J. L. 268, 279; affirmed 27 N. J. L. 645; 72 Am. Dec. 379.

⁵ New York Life Ins. Co. v. Babcock, 104 Ga. 67; 69 Am. St. Rep.

134; 42 L. R. A. 88; 30 S. E. 273.

⁶ Phoenix Assurance Co. v. McAuthor, 116 Ala. 659; 67 Am. St. Rep. 154; 22 So. 903.

⁷ Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1; 31 S. E. 779.

⁸ Bluegrass Ins. Co. v. Cobb, 109 Ky. 339; 58 S. W. 981.

⁹ Jurgens v. Ins. Co., 114 Cal. 161; 45 Pac. 1054; 46 Pac. 386; Griffith v. Ins. Co., 101 Cal. 627; 40 Am. St. Rep. 96; 36 Pac. 113.

¹⁰ Dickerson's Administrator v. Assurance Society (Ky.), 52 S. W. 825.

insurance company of the truth of the statements in the application,¹¹ or where it is held by the insurance company's agent, pending the approval of the company of the risk,¹² even if it has been exhibited to the agent of the insured, no delivery exists.

§592. Depositary representing both obligor and obligee.

A delivery of an instrument to a third person to hold free from control of the obligor, and free from the control of the obligee, until the happening of a certain event, and then to deliver such instrument, on the happening of such event, to the obligee, is a delivery in escrow.¹ Thus a delivery of a deed to one who agreed to deliver to the grantee on the grantor's death, and who placed the deed in his own box in a safety vault, amounts to a delivery in escrow.² So, where grantor executed a deed and grantee executed a lease back to grantor for life, and the two parties deposited both instruments in a bank, with an indorsement that they should be delivered to the grantor or, upon the grantor's death, to the grantee, is a valid delivery.³ If grantor delivers a deed to the officer who takes the acknowledgment, with instructions to deliver to the grantee under certain contingencies, this is a valid delivery in escrow.⁴ So, where grantor delivered deeds to a third person with instructions, "Take these papers and keep them until I am gone, and give them to the ones that they belong to," a delivery in escrow exists.⁵ It is not necessary to the validity of the delivery of a deed in escrow that the grantee should know of its existence when it is so delivered. If he learns of it, and accepts the deed subsequently, the original delivery is a valid delivery in escrow.⁶

¹¹ *Oliver v. Ins. Co.*, 97 Va. 134; 33 S. E. 536.

¹² *Nutting v. Ins. Co.*, 98 Wis. 26; 73 N. W. 432.

¹ *Beloit, etc., Ry. v. Palmer*, 19 Wis. 594.

² *Haeg v. Haeg*, 53 Minn. 33; 55 N. W. 1114.

³ *Martin v. Flaharty*, 13 Mont. 96; 40 Am. St. Rep. 415; 19

L. R. A. 242; 32 Pac. 287.

⁴ *Appleman v. Appleman*, 140 Mo. 309; 62 Am. St. Rep. 732; 41 S. W. 794; *Brown v. Westfield*, 47 Neb. 399; 53 Am. St. Rep. 532; 66 N. W. 439.

⁵ *Shea v. Murphy*, 164 Ill. 614; 56 Am. St. Rep. 215; 45 N. E. 1021.

⁶ *Clark v. Clark*, 183 Ill. 448; 75 Am. St. Rep. 115; 56 N. E. 82.

A depositary in escrow is relieved from liability on delivering the instrument deposited with him in escrow, in accordance with the agreement made between the parties to the depositary.⁷ On the one hand, he is not bound by agreements between the parties to the instrument not disclosed to him.⁸ On the other hand, other instructions given him by one of the parties can not alter his duty to deliver in accordance with the terms of the deposit.⁹ A delivery of a mortgage in escrow, to be delivered on the joint request of the two parties, does not give the mortgagee a right to its delivery until such joint request is made.¹⁰ But where the parties agree to make a joint request for delivery upon the performance of certain conditions, and delivery is then to be made, an arbitrary refusal to one party to consent to the delivery does not defeat the rights of the other party.¹¹ Under an agreement with B, A placed notes in the hands of X to be delivered to B when called for. This was held to be a sufficient delivery.¹²

§593. Agent of obligee.

A delivery by the obligor to the agent of the obligee, without imposing any conditions or restrictions, is in legal effect a delivery to the obligee himself. Thus a non-negotiable note,¹ or a negotiable note,² or an insurance policy,³ delivered unconditionally to the agent of the obligee take effect at once.

§594. Agent of obligee in different capacity.

Whether the obligor can deliver to one who is the agent of the obligee and in making such delivery can impose such conditions

⁷ *Bean v. Trust Co.*, 122 N. Y. 622; 26 N. E. 11.

⁸ *Walker v. Bamberger*, 17 Utah 239; 54 Pac. 208.

⁹ *Porter v. Metcalf*, 84 Tex. 468; 19 S. W. 696.

¹⁰ *Belding Savings Bank v. Moore*, 118 Mich. 150; 76 N. W. 368.

¹¹ *Fred v. Fred* (N. J. Eq.), 50 Atl. 776.

¹² *School District v. Sheidley*, 138 Mo. 672; 60 Am. St. Rep. 576; 37

L. R. A. 406; 40 S. W. 656.

¹ *Stockton, etc., Society v. Giddings*, 96 Cal. 84; 31 Am. St. Rep. 181; 21 L. R. A. 406; 30 Pac. 1016.

² *Shaw v. Camp*, 160 Ill. 425; 43 N. E. 608; affirming 61 Ill. App. 62; *Enneking v. Woebkenberg*, 88 Minn. 259; 92 N. W. 932; *Merrill v. Hurley*, 6 S. D. 592; 55 Am. St. Rep. 859; 62 N. W. 958.

³ *Connecticut Indemnity Association v. Grogan's Administrator* (Ky.), 52 S. W. 959.

as to make a delivery in escrow, is a question upon which there is a conflict of authority. In some jurisdictions an agent of the obligee may hold in escrow wherever the acceptance by him of the agency of escrow involves no violation of duty to his principal.¹ Thus a deed delivered to an attorney of the grantee with a written memorandum signed by the grantor, setting forth the terms on which such deed was to be delivered to the grantee, is an escrow.² So a delivery of a bond to the agent of the obligee under an agreement on his part not to surrender it to the obligee until twelve more names have been added, is delivered in escrow.³ In other jurisdictions it is said that a delivery to the agent of the obligee is in legal effect an absolute delivery to the obligee himself, and can not be a delivery in escrow.⁴ So it has been held that a promissory note cannot be delivered in escrow to the agent of the payee.⁵ This last principle applies on where delivery is to the grantee's agent in his capacity of agent. The fact that a grantee under a deed delivered in escrow has paid the depositary to represent him under certain conditions, does not make the depositary his agent or attorney, so that a delivery to him is a delivery to the grantee.⁶ The divergence of authority as to the power of an agent of the obligee to hold in escrow is in part a special application of conflicting views entertained by different jurisdictions upon the question whether the obligee himself can hold in escrow or not.⁷ In some jurisdictions, however, which deny that an obligee may hold in escrow, it is held that an agent of the obligee may so hold if the duties

¹ Deed, *Watkins v. Nash*, L. R. 20 Eq. 262; *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37; 14 So. 663; *Southern, etc., Co. v. Cole*, 4 Fla. 359; *Cincinnati, etc., R. R. v. Hiff*, 13 O. S. 254; *Merchants' Ins. Co. v. Nowlin* (Tex. Civ. App.), 56 S. W. 198; *contract, Humphreys v. Ry.*, 88 Va. 431; 13 S. E. 985.

² *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37; 14 So. 663.

³ *Fertig v. Bucher*, 3 Pa. St. 308.

⁴ Deed, *Duncan v. Pope*, 47 Ga. 445; *Hubbard v. Greeley*, 84 Me. 340; 17 L. R. A. 511; 24 Atl. 799; *Bond v. Wilson*, 129 N. C. 325; 40 S. E. 179.

⁵ *Stewart v. Anderson*, 59 Ind. 375.

⁶ *Dixon v. Bank*, 102 Ga. 461; 66 Am. St. Rep. 193; 31 S. E. 96.

⁷ See §§ 595-596.

of a depositary in escrow are not inconsistent with those of agent.⁸

§595. Obligee.—Theory that he can hold simple contract in escrow.

Whether an instrument can be delivered to the obligee, to hold until some event or contingency occurs, not appearing on its face, and then to take effect, is a question upon which there is a great divergence of authority. The weight of authority in cases of simple contracts is that they may be delivered to the adversary party to take effect only upon some other and further condition.¹ Thus a promissory note² or an insurance policy³ may be so delivered. A contract executed by some of the parties of one part and delivered to the party of the other part, to take effect only if the rest of the parties of the one part sign it, is, according to this view, of no effect until such parties sign it.⁴ A promissory note delivered to payee but not to take effect until another party signs it is ineffective till then.⁵ Thus if a contract signed by a surety is delivered upon condition that such contract shall take effect only if some additional surety signs it, the weight of authority treats this as a delivery which is conditional only, and not absolute; and the surety thus signing is not bound unless the additional surety signs. Thus a promissory note, delivered to payee upon condition that it shall take effect only when signed by an additional security, is held not to take effect

⁸ See *ante* this section.

¹ *Wilson v. Powers*, 131 Mass. 539; *Blewit v. Boorum*, 142 N. Y. 357; 40 Am. St. Rep. 600; 37 N. E. 119; *Benton v. Martin*, 52 N. Y. 570.

² *Burke v. Dailaney*, 153 U. S. 228; *MacFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111; 7 Atl. 408; *Watkins v. Bowers*, 119 Mass. 383; *Brown v. St. Charles*, 66 Mich. 71; 32 N. W. 926; *Westman v. Krumweide*, 30 Minn. 313; 15 N. W. 255; *Reynolds v. Robinson*, 110

N. Y. 654; 18 N. E. 127; *Jordan v. Jordan*, 10 Lea. (Tenn.) 124; 43 Am. Rep. 294.

³ *Westerfield v. Ins. Co.*, 129 Cal. 68; 61 Pac. 667; 58 Pac. 92.

⁴ *Flinn v. Mowry*, 131 Cal. 481; 63 Pac. 724; modified 63 Pac. 1006; *Packer v. Benton*, 35 Conn. 343; 95 Am. Dec. 246.

⁵ *Belleville Savings Bank v. Bornman*, 124 Ill. 200; 16 N. E. 210; *German-American National Bank v. Peoples Gas Co.*, 63 Minn. 12; 65 N. W. 90; *McCormick Har-*

until such additional surety signs.⁶ This principle has been applied to delivery of a bond which was required by law, to public officers, to take effect only if some additional party signs such bond.⁷ So where a surety signed a bond in replevin and delivered it to a deputy sheriff to be by him delivered to the clerk of court only in case an additional surety signed, delivery by the deputy sheriff without the signature of such additional surety does not make the instrument effective.⁸ The obligee must, however, have notice of the conditions upon which the instrument was delivered. An officer of the school district asked A to sign the bond of X, the district treasurer. A signed, upon an understanding that such bond should only take effect if B also signed it. The bond was delivered. It was held that the bond took effect, even if B did not sign it, since the officer was not acting in his official capacity in asking A to sign such bond, and notice to him was not notice to the public corporation.⁹

§596. Obligee.—Theory that he cannot hold simple contract in escrow.

Some authorities, however, hold that a written simple contract cannot be delivered to the obligee in escrow. In some jurisdictions, negotiable instruments are specially singled out as instruments which cannot be delivered in escrow to the payee.¹ A negotiable "note may be delivered as an escrow to a third person, but it cannot be so delivered to the payee."² Thus, if a nego-

vesting Machine Co. v. Faulkner, 7 S. D. 363; 58 Am. St. Rep. 839; 64 N. W. 163.

⁶ Knight v. Hurlbut, 74 Ill. 133; McCormick Harvesting Machine Co. v. Faulkner, 7 S. D. 363; 58 Am. St. Rep. 839; 64 N. W. 163; Majors v. McNeilly, 7 Heisk. (Tenn.) 294.

⁷ Gatling v. San Augustine County, 25 Tex. Civ. App. 283; 61 S. W. 432.

⁸ Smith v. Spragins, 109 Ky. 535; 59 S. W. 855.

⁹ Board of Education v. Robinson, 81 Minn. 305; 84 N. W. 105.

¹ Garner v. Fite, 93 Ala. 405; 9 So. 367; Scott v. Bank, 9 Ark. 36; Walker v. Crawford, 56 Ill. 444; 8 Am. Rep. 701; Murray v. W. W. Kimball Co., 10 Ind. App. 184; 37 N. E. 734; Dils v. Bank, 109 Ky. 757; 60 S. W. 715; Hurt v. Ford, 142 Mo. 283; 41 L. R. A. 823; 44 S. W. 228; Henshaw v. Dutton, 59 Mo. 139.

² Clanin v. Machine Co., 118 Ind. 372, 374; 3 L. R. A. 863; 21 N. E.

tible instrument is delivered to the payee to take effect only if some other person signs such instrument, such condition is invalid and the instrument takes effect at once, even if such additional party does not sign it.³ A surety who signed an instrument which was delivered to an obligee to take effect only if additional sureties signed it, may, in jurisdictions where such instrument is held to take effect at once, maintain an action against such obligee for damages which he has suffered by reason of the breach of such agreement.⁴

§597. Contracts under seal delivered to obligee in escrow.

In case of sealed contracts and other instruments under seal the weight of authority is that they can not be delivered in escrow to the obligee unless the condition of such delivery appears upon the face of the instrument.¹ Thus, by the weight of authority, a deed can not be delivered in escrow to the grantee, but such delivery takes effect at once.² So a contract under seal takes effect at once upon delivery to the obligee, and can not be delivered to him in escrow.³ If a sealed instru-

35; citing *Stewart v. Anderson*, 59 Ind. 375.

³ *Scott v. Bank*, 9 Ark. 36; *Dils v. Bank*, 109 Ky. 757; 60 S. W. 715; *Hubble v. Murphy*, 1 Duv. (Ky.) 278; *Hurt v. Ford*, 142 Mo. 283; 41 L. R. A. 823; 44 S. W. 228; *Henshaw v. Dutton*, 59 Mo. 139.

⁴ *Bond, Hudspeth's Administrator v. Tyler*, 108 Ky. 520; 56 S. W. 973; *Note, Dils v. Bank*, 109 Ky. 757; 60 S. W. 715.

¹ *Newman v. Baker*, 10 App. D. C. 187. "If I seal my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, etc., in this case let the form of words be what it will, the delivery is absolute and the deed shall take effect as his deed presently and the party is not bound to perform the conditions;

for *in traditionibus chartarum non quod dictum sed quod factum, est inspicitur.*" *Shep. Touch.*, 59 quoted in *Ordinary v. Thatcher*, 41 N. J. L. 403, 407; 32 Am. Rep. 225.

² *Blewett v. Ry.*, 51 Fed. 625; affirming 49 Fed. 126; *Darling v. Butler*, 45 Fed. 332; 10 L. R. A. 469; *Haworth v. Norris*, 28 Fla. 763; 10 So. 18; *McCann v. Ather-ton*, 106 Ill. 31; *McGee v. Allison*, 94 Ia. 527; 63 N. W. 322; *Dyer v. Shadan*, 128 Mich. 348; 92 Am. St. Rep. 461; 87 N. W. 277; *Wor-rall v. Munn*, 5 N. Y. 229, 238; 55 Am. Dec. 330; *Miller v. Fletcher*, 27 Gratt. (Va.) 403; 21 Am. Rep. 356.

³ *Reed v. Latham*, 1 Ark. 66; *Ryan v. Cooke*, 172 Ill. 302; 50 N. E. 213; *Pickett v. Green*, 120 Ind. 584; 22 N. E. 737; *Ordinary v. Thatcher*, 41 N. J. L. 403; 32 Am.

ment shows upon its face that the parties signing it are to be bound only in case additional parties signed, delivery to the obligee does not make the instrument operative until such additional parties sign.⁴ Thus a deed showing on its face that it is to be signed by husband and wife, but which is signed by the husband alone and is then delivered to the attorney of the grantee to take effect when the wife signs, is ineffective till then.⁵ The courts are not unanimous as to what shows on its face that a sealed instrument is incomplete. The fact that the body of the instrument contains the names of persons who have not signed the instrument, when it is delivered, has been held not of itself to show that the signatures of those who execute the instrument are not to take effect until such additional parties signed it.⁶ Even in case of sealed instruments, however, it may always be shown that a surrender of the actual custody of the instrument is not done with the intent of putting it into effect, but for some other purpose. Thus, handing a deed before proper acknowledgment by the grantor to grantee so that his lawyer can examine it,⁷ or handing a deed to grantee to put in the grantor's box at the bank,⁸ or to hold as grantor's agent, subject to his orders,⁹ does not amount to a delivery. So the obligor under a sealed instrument may show that the instrument was taken from his possession surreptitiously.¹⁰

III. EFFECT OF REDUCING CONTRACT TO WRITING.

§598. What constitutes the terms of a written contract.

In discussion of the question of what may constitute the terms of a written contract of this class we find even greater

Rep. 225; *Easton v. Driscoll*, 18 R. I. 318; 27 Atl. 445. 67 Am. St. Rep. 860; 74 N. W. 778.

⁴ *Sullivan County v. Ruth*, 106 Tenn. 85; 59 S. W. 138. ⁸ *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; 30 N. E. 1041.

⁵ *Shelby v. Tardy*, 84 Ala. 327; 4 So. 276. ⁹ *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176; 41 N. E. 1007.

⁶ *Ordinary v. Thatcher*, 41 N. J. L. 403; 32 Am. Rep. 225. ¹⁰ *Southern. etc. Co. v. Cole*, 4 Fla. 359; *Black v. Shreve*, 13 N. J. Eq. 455.

⁷ *Curry v. Colburn*, 99 Wis. 319;

difficulty than usual in separating one topic from its context of allied topics. Any such division is in its nature more or less arbitrary, yet for practical purposes it is an inevitable necessity. In this case the question of what constitutes the terms of a written contract is intimately connected with the so-called parol evidence rule,¹ and the parol evidence rule is in turn a branch of construction. The truth is that construction is essentially a part of the contract,² and yet for purposes of convenience it must be discussed apart from the question of what makes up the contract.

§599. Validity of oral contracts of this class.

A contract which is not within the statute of frauds or any similar statute, and which is not within the classes of contracts required by the law-merchant to be in writing, is valid though entirely oral.¹ Thus a contract of insurance may be made by oral agreement and proved by oral evidence, if by its terms performance is not to last beyond a year from the time that it is made.² So an account stated may be made by oral agreement.³ So a debt growing out of a contract may be assigned

¹ See Ch. LVI.

² *Sattler v. Hallock*, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667.

³ *Reed v. Orleans*, 1 Ind. App. 25; 27 N. E. 109.

² *Eames v. Ins. Co.*, 94 U. S. 621; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *King v. Cox*, 63 Ark. 204; 37 S. W. 877; *Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275; 45 N. E. 540; *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220; 77 Am. St. Rep. 423; 55 N. E. 119; *Davenport v. Ins. Co.*, 17 Ia. 276; *Western, etc., Ins. Co. v. Duffey*, 2 Kan. 347; *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644; 58 Pac. 1024; *Howard Ins. Co. v. Owen*, 94 Ky. 197; 21 S. W. 1037; *Good-*

hue v. Ins. Co., 175 Mass. 187; 55 N. E. 1039; *Sanford v. Ins. Co.*, 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883; *Emery v. Ins. Co.*, 138 Mass. 398; *Angell v. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322; *Trustees of First Baptist Church v. Ins. Co.*, 19 N. Y. 305; s. c., 28 N. Y. 153; *Croft v. Ins. Co.*, 40 W. Va. 508; 52 Am. St. Rep. 902; 21 S. E. 854; *Campbell v. Ins. Co.*, 73 Wis. 100; 40 N. W. 661; *King v. Ins. Co.*, 58 Wis. 508; 17 N. W. 297; *contra*, *Bell v. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542.

² *Knowles v. Michel*, 13 East. 249; *Pinchon v. Chilcott*, 3 C. & P. 236; *Lallande v. Brown*, 121 Ala. 513; 25 So. 997; *Watkins v. Ford*, 69 Mich. 357; 37 N. W. 300.

orally.⁴ Even if the contract is one which by reason of the statute of frauds must be proved by writing, an oral assignment of it is valid.⁵ So an oral contract for the adoption⁶ or emancipation⁷ of a child is valid. As we have seen elsewhere⁸ parties who make an oral contract which they intend to reduce to writing may either intend the contract to be in force at once⁹ or they may not intend that it shall take effect until the formal contract is executed.¹⁰ Whichever intention they may have will be given full force and effect, and the contract will be in force before it is reduced to writing or not, as they may have agreed.

§600. Words employed are terms of contract.

The words used by the parties in their written contract are of course a part thereof. Each and every one of them must be considered in arriving at the intention of the parties. It does not necessarily follow that every word written on the paper when the contract is executed is a part thereof. Thus where a letter contained a proposition to pay for the manufacture and delivery of goods, and it was accepted by the party to whom it was sent by a letter, the words "All sales subject to strikes and accidents," printed as part of the letter-head of the reply,

⁴ *Heath v. Hall*, 4 Taunt. 326; *Tibbits v. George*, 5 Ad. & El. 107; *Chamberlin v. Gilman*, 10 Colo. 94; *Barthol v. Blakin*, 34 Ia. 452; *Robbins v. Klein*, 60 O. S. 199; 54 N. E. 94; *Clark v. Gillespie*, 70 Tex. 513; 8 S. W. 121; *Noyes v. Brown*, 33 Vt. 431; *Chapman v. Plummer*, 36 Wis. 262.

⁵ *In re Huggin's Estate*, 204 Pa. St. 167; 53 Atl. 746.

⁶ *Quinn v. Quinn*, 5 S. D. 328; 49 Am. St. Rep. 875; 58 N. W. 808; *Taylor v. Deseve*, 81 Tex. 246; 16 S. W. 1008.

⁷ *Flynn v. Baisley*, 35 Or. 268; 76

Am. St. Rep. 495; 45 L. R. A. 645; 57 Pac. 908.

⁸ See § 54.

⁹ *Drummond v. Crane*, 159 Mass. 577; 38 Am. St. Rep. 460; 23 L. R. A. 707; 35 N. E. 90; *Lowrey v. Danforth*, 95 Mo. App. 441; 69 S. W. 39; *Sanders v. Fruit Co.*, 144 N. Y. 209; 43 Am. St. Rep. 757; 29 L. R. A. 431; 39 N. E. 75.

¹⁰ *Ridgway v. Wharton*, 6 H. L. Cas. 238, 268; *Lake Erie, etc., Co. v. Ry.*, 86 Fed. 840; *Lyman v. Robinson*, 14 All. (Mass.) 242; *Mississippi, etc., Steamship Co. v. Swift*, 86 Me. 248; 41 Am. St. Rep. 545; 29 Atl. 1063.

do not form any part of the contract.¹ This principle is still clearer where the words in question are on some paper other than that on which the contract is written. So if a contract of sale is in writing, the printed bill-head of the invoice of goods is no part thereof.² The same principle applies where the contract is not in writing. Thus A, a manufacturer, had placed a printed warranty on wheels manufactured and sold by him. B bought a wheel and resold it without removing the placard. It was held that B did not thereby adopt A's warranty.³ These are really special examples of the application of the general doctrines of offer and acceptance.

§601. Law as term of contract.

It is impracticable and impossible to set forth in writing all the different stipulations and provisions which, by the operation of law, are terms of the contract. The difficulty exists, not because the contract is in writing, but because it is impossible to make an exhaustive enumeration in express words of everything which may in law be a part of the contract. Some things are a part of the contract which are in the minds of both parties, though not stated in express languages. Other things are presumed to be in the minds of the parties; but in many cases this presumption is purely artificial—a mere fiction. What is really meant is that certain things affect the contract, even if the parties do not agree upon them or even think of them. Valid laws which are in force when the contract is made are a part thereof, even though not expressly referred to.¹ Thus an ordinance requiring the walls of opera-houses to be of a specified thickness is a part of a contract of subscription for the erection of an opera-house within the city, although it is not referred to therein.² So municipal ordinances creating and establishing

¹ Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899.

² Sturm v. Boker, 150 U. S. 312.

³ Pemberton v. Dean, 88 Minn. 60; 97 Am. St. Rep. 503; 60 L. R. A. 311; 92 N. W. 478.

¹ Nielsen v. Assurance Society, 139 Cal. 332; 96 Am. St. Rep. 146; 73 Pac. 168.

² Gerner v. Church, 43 Neb. 690; 62 N. W. 51.

fire limits are part of a contract of insurance of property in such limits, and bind the insurer.³ An unconstitutional statute is not, however, a term of a contract made between the time that it is passed and the time that it is declared unconstitutional;⁴ even, it has been held, if expressly made a part of the contract.⁵

§602. Extrinsic facts as terms of contract.

When we pass from consideration of the words of the contract to the question of what else may be regarded as a term of such contract we are met with a practical difficulty which admits of only a rather arbitrary solution. The parties who enter into a contract do so with full knowledge and in contemplation of a great many rules of law, customs, and facts which they do not carry into their written contract in express terms. They have probably reached their written contract as the result of long negotiations. All these things have undoubtedly made some impression on their minds, and probably have influenced the wording of the contract. To what extent will the law recognize them as terms of the written contract? The principles of the law which afford a solution of this question are grouped under the rather unfortunate name of the Parol Evidence rule. It may be said to be a general rule that the surrounding facts and circumstances other than the prior and contemporaneous oral negotiations of the parties constitute a part of the contract as long as such contract is not inconsistent therewith.¹

§603. Rules and by-laws.

Rules of a voluntary association are a part of a contract for membership in such association entered into between the asso-

³ Larkin v. Ins. Co., 80 Minn. 527; 81 Am. St. Rep. 286; 83 N. W. 409.

⁴ Palmer v. Tingle, 55 O. S. 423; 45 N. E. 313.

⁵ People v. Coler, 166 N. Y. 1;

52 L. R. A. 814; 59 N. E. 716; (City of) Cleveland v. Construction Co., 67 O. S. 197; 93 Am. St. Rep. 670; 59 L. R. A. 775; 65 N. E. 885. (Contracts of public corporations.)

¹ See § 1123.

ciation and a member thereof.¹ The constitution and by-laws of a beneficial association form a part of a contract of insurance entered into between such association and a member thereof,² whether such by-laws are referred to in the contract of insurance or not.³ The construction placed upon such by-laws by its highest tribunal becomes as much a part of the contract as the by-laws themselves.⁴ If power to change the by-laws is reserved, subsequent amendments become terms of the contract and are binding on the members.⁵ However, general power to change by-laws has been held not to confer power to change the contractual rights of a member.⁶

§604. Usages and customs.

In many kinds of business a great number of usages and customs have gradually been built up. These customs are rarely carried in express terms into contracts made with reference to such kinds of business, yet they are ordinarily intended by the parties as terms of such contracts. Accordingly even though the contract is in writing, extrinsic evidence may be resorted to to show usages and customs of such business consistent with the contract, and either known to the parties to

¹ *Lawson v. Hewell*, 118 Cal. 613; 49 L. R. A. 400; 50 Pac. 763; *Green v. Board of Trade*, 174 Ill. 585; 49 L. R. A. 365; 51 N. E. 599.

² *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Illinois, etc., Association v. Wahl*, 68 Ill. App. 411; *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489; 3 L. R. A. 409; 20 N. E. 479; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203; 55 Am. St. Rep. 310; 20 So. 712; *Home Forum Benefit Order v. Jones*, 5 Okla. 598; 50 Pac. 165; *McLendon v. Woodmen of the World*, 106 Tenn. 695; 52 L. R. A. 444; 64 S. W. 36.

³ *Hass v. Relief Association*, 118 Cal. 6; 49 Pac. 1056; *Condon v.*

Reserve Association, 89 Md. 99; 73 Am. St. Rep. 169; 44 L. R. A. 149; 42 Atl. 944.

⁴ *Supreme Lodge Knights of Pythias v. Kalinski*, 163 U. S. 289.

⁵ *Lawson v. Hewell*, 118 Cal. 613; 49 L. R. A. 400; 50 Pac. 763; *Hass v. Relief Association*, 118 Cal. 6; 49 Pac. 1056; *Robinson v. Templar Lodge*, 117 Cal. 370; 59 Am. St. Rep. 193; 49 Pac. 170; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203; 55 Am. St. Rep. 310; 20 So. 712.

⁶ *Sieverts v. Benevolent Association*, 95 Ia. 710; 64 N. W. 671; *Cohen v. Supreme Sitting*, 105 Mich. 283; 63 N. W. 304; *Strause v. Life Association*, 126 N. C. 971; 54 L. R.

the contract,¹ or so notorious that one dealing in such business must be presumed to know it.² Thus a principal who employs a broker is bound by the customs of the market at which such broker acts.³ Thus in an oral contract of insurance not specifying when it is to take effect extrinsic evidence of a custom as to when the risk attaches is admissible.⁴ So under a contract to pay twelve dollars an acre for clearing a right of way at points to be designated, it has been held proper to show a custom to pay for clearing in open fields only such proportion of the contract price as such work bears to the work of clearing in the forest.⁵ So under a binding slip issued by an insurance company which recites that it is issued to the insured to protect him against loss for a certain time and amount, but which is incomplete as not showing the consideration, it may be shown that the custom of the insurance business is to issue such slips pending the acceptance or rejection of the policy and that in case of rejection, liability under the binding slip ceases at once.⁶ To be regarded as part of a contract, however, the usage or custom must have both of the foregoing elements. (1) It must be actually or constructively known; and (2) it must be consistent with the contract. If either of these elements is lacking the usage or custom cannot be regarded as part of the contract. If the usage is neither actually or constructively known to one of the parties to the contract, it is not binding upon him.⁷ Thus the usage of banks to hold checks deposited as a deposit until the end of banking hours to see if the account is good is not binding on a depositor if not known to him.⁸ It is per-

A. 60; 36 S. E. 352; rehearing denied, 128 N. C. 465; 54 L. R. A. 605; 39 S. E. 55; *Hale v. Aid Union*, 168 Pa. St. 377; 31 Atl. 1066.

¹ *Kauffman v. Raeder*, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278.

² *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298; 74 Am. St. Rep. 463; 77 N. W. 970.

³ *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298; 74 Am. St. Rep. 463; 77 N. W. 970.

⁴ *Cleveland Oil Co. v. Ins. Society*, 34 Or. 228; 55 Pac. 435.

⁵ *McCarthy v. McArthur*, 69 Ark. 313; 63 S. W. 56.

⁶ *Underwood v. Ins. Co.*, 161 N. Y. 413; 55 N. E. 936.

⁷ *Daun v. Brewery Co.*, L. R. 8 Eq. 155; *McDonough v. Marble Co.*, 112 Fed. 634; *Nonotuck Silk Co. v. Fair*, 112 Mass. 354.

⁸ *National Bank v. Burkhardt*, 100 U. S. 686.

fectly possible for parties to make contracts which are not controlled by given usages. This may be done by expressly providing against them; but it is done more frequently by making express provisions, covering the same ground as the usage, but inconsistent therewith. Accordingly the usage invoked must furthermore be consistent with the contract in question in order to be regarded as part of it. If consistent, with the express provisions of the contract, it cannot be used to contradict them and to show an intent different from that expressed.⁹ Thus the specific provisions of a contract to ship goods cannot be contradicted by a local custom.¹⁰ So a contract to saw logs as fast as the operator could cannot be contradicted by a custom to saw logs of different owners in the order in which they were delivered.¹¹ So a contract which provides who shall pay the duty cannot be contradicted by a custom as to who receives the benefit of subsequent reductions.¹² So a written oil lease cannot be contradicted by evidence of a custom that the prospector should burn oil produced on a claim.¹³ So a contract requiring a specific number of wells to be bored cannot be contradicted by a custom to bore a certain number in a given time.¹⁴ So if a contract requires "walls to be washed or sized with good strong glue" preliminary to papering, evidence of a custom as to the method of papering is no part of the contract.¹⁵ So under a contract to print a catalogue cover in accordance with approved proof, it cannot be shown to be the custom for the printers to add their name to the bottom of the last page of the catalogue, proof having been approved without

⁹ *Menage v. Rosenthal*, 175 Mass. 358; 56 N. E. 579; *Watkins v. Greene*, 22 R. I. 34; 46 Atl. 38.

¹⁰ *Boon v. The Belfast*, 40 Ala. 184; 88 Am. Dec. 761; *Louisville, etc., Co. v. Rogers*, 20 Ind. App. 594; 49 N. E. 970; *Benson v. Gray*, 154 Mass. 391; 13 L. R. A. 262; 28 N. E. 275; *Meloche v. Ry.*, 116 Mich. 69; 74 N. W. 301.

¹¹ *Mowatt v. Wilkinson*, 110 Wis. 176; 85 N. W. 661.

¹² *Withers v. Moore*, 140 Cal. 591; 74 Pac. 159; reversing in banc, 71 Pac. 697.

¹³ *Swift v. Petroleum Co.*, 141 Cal. 161; 74 Pac. 700; reversing in banc, 70 Pac. 470.

¹⁴ *Stoddard v. Emery*, 128 Pa. St. 436; 18 Atl. 339.

¹⁵ *Independent School District v. Swearingen*, 119 Ia. 702; 94 N. W. 206.

such addition.¹⁶ The legal effect of a transaction cannot be contradicted by a usage. So a custom of banks that crediting a deposit by indorsing checks is merely a receipt, not an assignment of the check for value, and that the bank is not a *bona fide* holder for value has no validity.¹⁷

§605. Incomplete written contracts.

Contracts of this sort, being perfectly valid if oral, may be in part reduced to writing by the parties and left oral in part.¹ Whatever the rule may be as to a contract within the provisions of the statute of frauds² a contract reduced to writing merely because the parties thereto choose to do so need not set forth the consideration.³

§606. Adding party to simple written contract by extrinsic evidence.

If A signs a written contract made with B on behalf of A's principal X, and affixes his own name thereto without apt words to show that he is acting only as agent B may undoubtedly hold A on such contract. If, however, B wishes to hold the real principal X, his right to do so is not inconsistent with his right to

¹⁶ Harris v. Sharples, 202 Pa. St. 243; 58 L. R. A. 214; 51 Atl. 965.

¹⁷ Shaw v. Jacobs, 89 Ia. 713; 48 Am. St. Rep. 411; 21 L. R. A. 440; 55 N. W. 333; 56 N. W. 684.

¹ Guidery v. Green, 95 Cal. 630; 30 Pac. 786; Kinney v. Whiton, 44 Conn. 262; 26 Am. Rep. 462; Chamberlain v. Lesley, 39 Fla. 452; 22 So. 736; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; Gould v. Excelsior Co., 91 Me. 214; 64 Am. St. Rep. 221; 39 Atl. 554; Courtney v. Mfg. Co., 97 Md. 499; 55 Atl. 614; Drew v. Wiswall, 183 Mass. 554; 67 N. E. 666; Germania Bank v. Osborne, 81 Minn. 272; 83 N. W.

1084; Jamestown, etc., Association v. Allen, 172 N. Y. 291; 92 Am. St. Rep. 740; 64 N. E. 952; State v. Cunningham, 154 Mo. 161; 55 S. W. 282; Selig v. Rehfuß, 195 Pa. St. 200; 45 Atl. 919; Lewis v. Turnley, 97 Tenn. 197; 36 S. W. 872; Steed v. Harvey, 18 Utah 367; 72 Am. St. Rep. 789; 54 Pac. 1011; Puget Sound, etc., Works v. Clements, 32 Wash. 36; 72 Pac. 465; Knowles v. Rogers, 27 Wash. 211; 67 Pac. 572.

² See § 696.

³ Gillighan v. Boardman, 29 Me. 79; Horn v. Hansen, 56 Minn. 43; 22 L. R. A. 617; 57 N. W. 315; Patchin v. Swift, 21 Vt. 292.

hold A, since both rights may exist together until B has made his election between them.¹ Accordingly it does not contradict the legal effect of such instrument to show that X is the real party in interest. If B wishes to sue X, the real principal, the parol evidence rule does not, therefore, prevent B from showing that A signed on behalf of X. Such evidence is admissible therefore where the contract is in writing, but is not required by law to be in writing or to be proved by writing.² Thus one who deposits money in a bank and takes receipts given by the cashier in his own name, without any official designation, may show that the bank was the real party to the contract.³ The fact that a warehouse receipt is declared negotiable by statute does not make it negotiable within the meaning of this rule. The holder of the receipt may show who the real principal is and hold him on the receipt.⁴ In an action on a non-negotiable note the maker may show that the nominal payee was the agent of the real payee, and thus show the dealings between the maker and the real payee to show failure of consideration.⁵

§607. Effect of knowledge of identity of principal.

In many of the cases some emphasis is laid on the fact that the principal was not disclosed when the agent entered into the contract with the adversary party. The importance of this fact is

¹ See §§ 695, 976.

² *Nash v. Towne*, 5 Wall. (U. S.) 689; *Merrill v. Kenyon*, 48 Conn. 314; 40 Am. Rep. 174; *Daugherty v. Heckard*, 189 Ill. 239; 59 N. E. 569; affirming 89 Ill. App. 544; *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314; *Jones v. Williams*, 139 Mo. 1; 61 Am. St. Rep. 436; 37 L. R. A. 682; 39 S. W. 486; 40 S. W. 353; *Kayton v. Barnett*, 116 N. Y. 625; 23 N. E. 24; *Patrick v. Mercantile Co.*, — N. D. —; 99 N. W. 55; *Aetna Ins. Co. v. Church*, 21 O. S. 492; *Anderson v. Flouring Mills*, 37 Or. 483; 82 Am. St. Rep. 771; 50 L. R. A. 235; 60 Pac.

839; *Barbre v. Goodale*, 28 Or. 465; 38 Pac. 67; 43 Pac. 378; *Hubbard v. Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585; 2 L. R. A. 823; 16 Atl. 817; *Landers v. Foster*, — Wash. —; 76 Pac. 274.

³ *Hanson v. Heard*, 69 N. H. 190; 38 Atl. 788; (citing *Van Leuven v. First Nat. Bank*, 54 N. Y. 671; *Pierston v. Atlantic Nat. Bank*, 77 N. Y. 304).

⁴ *Anderson v. Flouring Mills Co.*, 37 Or. 483; 82 Am. St. Rep. 771; 50 L. R. A. 235; 60 Pac. 839.

⁵ *Stockton, etc., Society v. Giddings*, 96 Cal. 84; 31 Am. St. Rep. 181; 21 L. R. A. 406; 30 Pac. 1016.

the same in written and unwritten contracts and may be briefly stated as follows. If the parties agree orally that the agent is acting on behalf of his principal, there is no question then in oral contracts as to the right of the adversary party to enforce the contract against the principal.¹ In written contracts not required to be in writing or to be proved in writing the only question raised by attempting to enforce the contract against the real principal is that of the effect of the parol evidence rule. But if identity and existence of the principal are alike undisclosed, the additional question has been raised, whether the adversary party can properly be said to have contractual relations with this unknown principal. As this is the most extreme case, most stress has been laid upon it. The courts have held that whether the contract is oral or written, as long as it is not of the class of contracts which must be in writing the real principal may be shown and held liable on the contract.² Some courts, however, have misunderstood the reason for emphasizing the fact that the principal is unknown, and have said that the rule allowing the real principal to be held on a written contract by which he is not in terms made liable, is limited to cases where the real principal is unknown to the adversary party at the time of making the contract; and that if the real principal is known, and the adversary party accepts a written contract which by terms and legal effect binds the agent, this is an election to hold the agent and not the principal.³ An examination of the authorities cited in *Chandler v. Coe*,⁴ will show that those sustaining the proposition are cases of negotiable instruments, that is, of contracts which must be in writing. They come therefore under the operation of a different principle from that here discussed. In cases involving contracts not required to be in writing, many fail to indicate whether the principal was known or unknown to the adversary party when

¹ See § 964.

² *Merchants' Bank v. Bank*, 1 Ga. 418; 44 Am. Dec. 665; *Williams v. Robbins*, 16 Gray (Mass.) 77; 77 Am. Dec. 396; *Borcherling v. Katz*, 37 N. J. Eq. 150; *Brewster v.*

Baxter, 2 Wash. Ter. 135; 3 Pac. 844.

³ *Chandler v. Coe*, 54 N. H. 561; Obiter to the same effect in *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764; 11 S. W. 165.

⁴ 54 N. H. 561.

the contract was entered into, and, by fair inference, treat such fact as immaterial. Where the courts have discussed the effect of the adversary party's knowing who the real principal is when he accepts a contract signed by the agent alone, the weight of authority is that he can hold the real principal.⁵

§608. Subsequent oral modification.

The parol evidence rule by its terms applies only to prior and contemporaneous negotiations. Contracts which are in writing merely because the parties thereto chose to reduce them to writing offer no technical difficulties to subsequent oral modifications. Accordingly the parol evidence rule does not prevent the parties to a written contract, not under seal, and not required by law to be in writing or to be proved by writing, from making subsequent oral modifications of its terms.¹ Thus a subsequent oral settlement making an account stated,² a subsequent extension of time,³ a subsequent agreement that a policy, the premium for which by its terms was payable in advance, should take effect at once, the insurer holding the policy until the premium was

⁵ *Colder v. Dobell*, L. R. 6 C. P. 486; *Bateman v. Phillips*, 15 East. 272; *Obiter* in *Higgins v. Senior*, 8 M. & W. 834; *York County Bank v. Stein*, 24 Md. 447.

¹ *Wood v. Ft. Wayne*, 119 U. S. 312; *The Sappho*, 94 Fed. 545; 36 C. C. A. 395; reversing 89 Fed. 366; *Pecos Valley Bank v. Evans-Snyder-Buel Co.*, 107 Fed. 654; 46 C. C. A. 534; *Andrews v. Tucker*, 127 Ala. 602; 29 So. 34; *Hartford, etc., Co. v. Attalla*, 119 Ala. 59; 54 So. 845; *Katz v. Bedford*, 77 Cal. 319; 1 L. R. A. 826; 19 Pac. 523; *Hurlburt v. Dusenbery*, 26 Colo. 240; 57 Pac. 860; *Gunby v. Drew*, — Fla. —; 34 So. 305; *Chicago, etc., Co. v. Moran*, 187 Ill. 316; 58 N. E. 335; affirming 85 Ill. App. 543; *Palmer v. Bennett*, 96 Ill. App. 281; *Toledo, etc., Ry. v. Levy*, 127 Ind. 168;

26 N. E. 773; *Bartlett v. Stanchfield*, 148 Mass. 394; 2 L. R. A. 625; 19 N. E. 549; *Mouat v. Bamlet*, 123 Mich. 345; 82 N. W. 74; *Moore v. Locomotive Works*, 14 Mich. 266; *Conrad v. Fisher*, 37 Mo. App. 352; 8 L. R. A. 147; *Harris v. Murphy*, 119 N. C. 34; 56 Am. St. Rep. 656; 25 S. E. 708; *Wadge v. Kittleson*, — N. D. —; 97 N. W. 856; *Cline v. Shell*, 43 Or. 372; 73 Pac. 12; *Cunningham v. Church*, 159 Pa. St. 620; 28 Atl. 490; *Chicago, etc., Co. v. Barry* (Tenn. Ch. App.), 52 S. W. 451; *Carstens v. Earles*, 26 Wash. 676; 67 Pac. 404. See Ch. LXII.

² *Krueger v. Dodge*, 15 S. D. 159; 87 N. W. 965.

³ *Bannon v. Aultman*, 80 Wis. 307; 27 Am. St. Rep. 37; 49 N. W. 967.

paid;⁴ to deliver a note to an agent of the adversary party,⁵ or providing that a note already endorsed should be received as security and not as payment⁶ may all be used as modifications of prior written contracts. A provision in a written contract that no one can change its provisions,⁷ or that they can be changed only by writing,⁸ are each ineffectual to prevent subsequent oral modifications. So a subsequent agreement by a vendor, on valuable consideration, to give different warranties from those in the original written contract of sale can be enforced.⁹ The subsequent modification can be most readily shown after it has been performed in full.¹⁰ By statute in some jurisdictions, subsequent oral modifications of written contracts can be enforced only when partly performed. If purely executory they are unenforceable.¹¹ The oral modification is not partly performed unless something has been done which the party performing was not bound to do under the original contract.¹² Subsequent conversations as to the meaning of a prior contract, not amounting to a new contract and not giving rise to an estoppel, are not intended to change the legal effect of such contract and hence do not operate as such change.¹³

⁴ Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30; 59 N. E. 873.

⁵ Stokes v. Polley, 164 N. Y. 266; 58 N. E. 133.

⁶ Willow River Lumber Co. v. Furniture Co., 102 Wis. 636; 78 N. W. 762.

⁷ Peterson v. Reaping Machine Co., 97 Ia. 148; 59 Am. St. Rep. 399; 66 N. W. 96.

⁸ Chicago, etc., R. R. v. Moran, 187 Ill. 316; 58 N. E. 335; Illinois Central Ry. v. Manion, — Ky. —; 67 S. W. 40.

⁹ McCormick Harvesting Mach. Co. v. Hiatt, — Neb. Rep. Unofficial —; 95 N. W. 627.

¹⁰ Town v. Jepson, — Mich. —; 95 N. W. 742.

¹¹ Armington v. Stelle, 27 Mont. 13; 69 Pac. 115.

¹² Mackenzie v. Hodgkin, 126 Cal. 591; 77 Am. St. Rep. 209; 59 Pac. 36.

¹³ Dixon v. Williamson, 173 Mass. 50; 52 N. E. 1067.

CHAPTER XXXV.

CONTRACTS WHICH MUST BE PROVED BY WRITING.

I. HISTORY OF THE STATUTE.

§609. The fourth section of the statute of frauds.

In the twenty-ninth year of the reign of Charles II., Parliament passed a statute for the prevention of frauds and perjuries. This statute covers a variety of subjects, as its title imports. The most familiar sections are those which deal with contracts, the fourth and the seventeenth sections. The fourth section of this statute in the spelling of the English Statutes, Revised Edition, is as follows: "And bee it further enacted by the authoritie aforesaid that from and after the said fower and twentyeth day of June¹ noe action shall be brought whereby to charge any executor or administrator upon any speciall promise to answere damages out of his owne estate or whereby to charge the defendant upon any speciall promise to answere for the debt, default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith, or some other person thereunto by him lawfully authorized."² The date of this statute is variously given. The Stat-

¹ 1677 A. D.

authority; Rot. Par. 29 C. II., p. 2,

² 29 Car. II., Ch. III., § 4. Eng-
lish Statutes, Revised Edition, by

Nu. 2.

utes at Large³ give the date as 1676. The English Statutes, Revised Edition, give the date as 1677. The fact is that the statute was introduced at a session of Parliament which began February 15, 1676; but the statute did not receive the royal assent until April 16, 1677. This section of the statute with some change in phrasology and much in spelling has been adopted by most of the states of the Union. It has been prolific of litigation; and has been so worked into the general system of law as to be known as the adopted child of the Common Law. A discussion of its nature and effect is therefore necessary.

II. SPECIAL PROMISE OF EXECUTOR OR ADMINISTRATOR.

§610. Special promise of executor or administrator to answer damages out of his own estate.

This clause of the statute does not include promises on which the executor or administrator is personally liable, even though made in consideration of property or services for the benefit of the estate, and though he assumes to contract "as executor."¹ Thus a promise by an administrator to be personally responsible for legal services rendered the estate,² or to pay a debt created after testator's death,³ is not affected by this clause of the statute. So A, who has located a land certificate which belonged to B, deceased, under an oral contract with C, B's administrator, that A should have one-third of such realty for his services, may have specific performance of such contract if such remedy prove appropriate even where it is provided by statute that contracts of decedent's can be enforced specifically only when in writing.⁴ Such a contract may be affected by other clauses of the local statute. Thus an oral contract by executors to pay brokers a com-

³ Edited by Danby Pickering.

¹ See § 995.

² Meade v. Bowles, 123 Mich. 696; 82 N. W. 658.

³ Fehlinger v. Wood, 134 Pa. St. 517; 19 Atl. 746. But if the debt is one on which executor is not personally liable, his promise to pay a

debt incurred after testator's death may be a promise to pay the debt of another. Dillaby v. Wilcox, 60 Conn. 71; 25 Am. St. Rep. 299; 13 L. R. A. 643; 22 Atl. 491.

⁴ Jack v. Cassin, 9 Tex. Civ. App. 228; 28 S. W. 832.

mission for selling decedent's realty is affected by a clause of the statute concerning contracts for commissions to brokers for the sale of real estate.⁵ Nor does this clause include a promise by one who is executor, legatee and the husband of the principal legatee to pay a certain amount to one in consideration of his refraining from contesting the will.⁶ To create a case for the application of this clause there must be in the first instance a liability against decedent's estate primarily, which the executor or administrator promises to pay out of his own estate.⁷ It is "very nearly allied"⁸ to the clause which applies to contracts to answer for the debt, default or miscarriage of another,⁹ though it is doubtful whether the rules applicable to novation as distinguished from guaranty¹⁰ would apply to a promise by an executor where the claim against decedent's estate is thereby cancelled.¹¹

III. SPECIAL PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER.

§611. Scope of clause.

This clause of the statute refers to transactions in which two distinct liabilities, involving three persons, must co-exist. It assumes that C has incurred or is incurring a liability to B, and

⁵ Perkins v. Cooper (Cal.), 24 Pac. 377; under Cal. Civ. Code, § 1624; reversed on another point, 87 Cal. 241; 25 Pac. 411.

⁶ Bellows v. Sowles, 57 Vt. 164; 52 Am. Rep. 118.

⁷ Taylor v. Mygatt, 26 Conn. 184; Holderbaugh v. Turpin, 75 Ind. 84; 39 Am. Rep. 124; Cochrane v. McEntee (N. J. Eq.), 51 Atl. 279; Wales v. Stout, 115 N. Y. 638; Bellows v. Sowles, 57 Vt. 164; 52 Am. Rep. 118. "This phraseology clearly implies an obligation, duty or liability on the part of the testator's estate for which the executor promises to pay damages out of his own

estate." Bellows v. Sowles, 57 Vt. 164, 169; 52 Am. Rep. 118, 119.

⁸ Harrington v. Rich, 6 Vt. 666; quoted in Bellows v. Sowles, 57 Vt. 164, 170; 52 Am. Rep. 118.

⁹ See § 611, *et seq.*

¹⁰ See § 629.

¹¹ McKeaney v. Black, 117 Cal. 587; 49 Pac. 710; holds that the executor's oral promise to pay a debt of decedent out of his own estate is within the statute even if the debt of the estate is to be discharged thereby. The contract in this case was also within the statute as one not to be performed within a year from the date of the making there-

that A has assumed a liability to B for the ultimate payment of the debt for which C is in the first instance liable. At the outset it may be said that no general test for determining whether A's promise to B to discharge C's debt is so related to C's liability as to fall within the statute of frauds can be laid down, which will reconcile all the decisions of the courts, or which can even claim the support of a clear weight of authority.¹ The confusion on this subject has in part grown out of the fact that when A releases himself from liability to B by paying C's debt it is hard to say whether it is A's debt or C's that he is paying. Furthermore, the natural difficulties of this subject have been increased by a loose use of terms; especially of "original" and "collateral." If A promises to pay B for goods furnished by B to C, C incurring no liability, A's liability may well be termed original.² From this use of "original" it has been an easy step for some courts to assume that questions as to this clause of the statute of frauds could be solved by the use of the terms "original" and "collateral," overlooking the fact that only the statute can be relied on as the ultimate expression of its meaning, and that if we wish to substitute "original" and "collateral" liability for the terms used in the statute, we must first define those

of. *Crawford v. King*, 54 Ind. 6, seems to hold that an oral promise by an executor to pay a claim against the estate personally in consideration of the release of the estate is valid.

¹ "Perhaps few questions have occasioned more controversy, or given rise to more nice and shadowy distinctions than those arising out of this branch of the statute of frauds. The cases on the subject are in hopeless conflict and every attempt heretofore made to classify them or to draw from them a rule that might be a guide to future decisions seems rather to have furnished new grounds for controversy than to put the question at rest." *Gilmore v. Box Factory*, 20 Wash. 703, 704;

56 Pac. 934. So in speaking of this clause the court said: "An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. Almost any theory of its scope and meaning can find some case to support it. The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered." *Dillaby v. Wilcox*, 60 Conn. 71, 76; 25 Am. St. Rep. 299, 301; 13 L. R. A. 643; 22 Atl. 491. To the same effect see *Fullam v. Adams*, 37 Vt. 391.

² See § 618.

terms so as to conform to the meaning of the statute, or they will mislead us rather than aid us.³ As is often the case, the adjudications, while far from harmonious, are by no means as discordant as the theories, expressed and reasons assigned by the courts in deciding them would indicate.

§612. Theory that continued existence of original debt is test.

The theories actually established by the adjudicated cases may be grouped under four heads. (1) Some courts hold that the test of the applicability of the statute is the continued existence of the old debt. If A's promise to B discharges C's debt, A's promise is not within the statute; but if C remains liable, A's promise is within the statute.¹ This rule is undoubtedly true where A's promise is sought to be upheld as a novation.² By the great weight of authority it has no application where A's

³ See, as using, "original" or "collateral" as a test, *Underhill v. Gibson*, 2 N. H. 352; 9 Am. Dec. 82; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247; 8 Am. Rep. 549; *Warren v. Smith*, 24 Tex. 484; 76 Am. Dec. 115. "An agreement, if it be not collateral, but in the nature of an original agreement to pay the debt of another, founded on a sufficient consideration, received by the promisor himself, is not within the provisions of the statute." *Thatcher v. Rockwell*, 4 Colo. 375, 409; quoted in *Fisk v. Reser*, 19 Colo. 88; 34 Pac. 572. For a criticism of the use of the terms "original" and "collateral" as a test, see *Dil-laby v. Wilcox*, 60 Conn. 71; 25 Am. St. Rep. 299; 13 L. R. A. 643; 22 Atl. 491.

¹ *Mallet v. Bateman*, L. R. 1 C. P. 163; *Packer v. Benton*, 35 Conn. 343; 95 Am. Dec. 246; *Mitchell v. Griffin*, 58 Ind. 559; *Span v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346;

Andre v. Bodman, 13 Md. 241; 71 Am. Dec. 628; *Dow v. Swett*, 134 Mass. 140; 45 Am. Rep. 310; *Perkins v. Hershey*, 77 Mich. 504; 43 N. W. 1021; *Ackley v. Parmenter*, 98 N. Y. 425; 50 Am. Rep. 693; *Dougherty v. Bash*, 167 Pa. St. 429; 31 Atl. 729; *Corbett v. Cochran*, 3 Hill. L. (S. C.) 41; 30 Am. Dec. 348; *Warren v. Smith*, 24 Tex. 484; 76 Am. Dec. 115; *Anderson v. Davis*, 9 Vt. 136; 31 Am. Dec. 612; *Hooker v. Russell*, 67 Wis. 257; 30 N. W. 358. This clause of the statute applies only to "an undertaking by a person *not before liable*, for the purpose of securing or performing the *same duty* for which the party for whom the undertaking was made *continues* liable." *Packer v. Benton*, 35 Conn. 343, 350; 95 Am. Dec. 246, 249; quoted in *Dil-laby v. Wilcox*, 60 Conn. 71, 77; 25 Am. St. Rep. 299; 13 L. R. A. 643; 22 Atl. 491.

² See § 629.

promise is to assume C's debt to B for a valuable consideration.³ It cannot be regarded therefore as a rule sustained by the weight of authority.

§613. Theory that independent liability of promisor is test.

(2) Other courts hold that if the new promise is not dependent on the payment of the pre-existing indebtedness it is not within the statute of frauds, but that if it is so dependent it is within the statute even if it is made on a new consideration and primarily for the benefit of the promisor.¹ Where this theory obtains A's promise to pay C's indebtedness to B on consideration that B will forbear to enforce a lien on C's property is within the statute,² even if A expects to gain some indirect advantage for himself thereby;³ and so is A's promise to pay C's debt to B

³ See § 623.

¹ *Merrell v. Witherby*, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; *Board of Commissioners v. Cincinnati Co.*, 128 Ind. 240; 12 L. R. A. 502; 27 N. E. 612; *King v. Lumber Co.*, 80 Minn. 274; 83 N. W. 170; *Giles v. Mahoney*, 79 Minn. 309; 82 N. W. 583; *Maurin v. Fogelberg*, 37 Minn. 23; 5 Am. St. Rep. 814; 32 N. W. 858; *Grant v. Wolf*, 34 Minn. 32; 24 N. W. 289; *Lamkin v. Palmer*, 164 N. Y. 201; 58 N. E. 123; *White v. Rintoul*, 108 N. Y. 222; 15 N. E. 318; *Garfield v. Ins. Co.*, 69 Vt. 549; 38 Atl. 235; *McKenzie v. Bank*, 9 Wash. 442; 43 Am. St. Rep. 844; 37 Pac. 668. "Original promises as distinguished from collateral promises under the statute of frauds required to be made in writing are such as are founded on a new consideration, the debt antecedently contracted for still subsisting, moving to the promisor and beneficial to him and such that the promisor

thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." *White v. Rintoul*, 108 N. Y. 222; 15 N. E. 318 (from syllabus in 15 N. E. 318; quoted in *Greene v. Latham*, 2 Colo. App. 416; 31 Pac. 233). "A consideration to support a promise not in writing to pay the debt of another must be of a peculiar character, and must operate to the advantage of the promisor and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt." *McKenzie v. Bank*, 9 Wash. 442, 445; 43 Am. St. Rep. 844; 37 Pac. 668; citing *Ackley v. Parmenter*, 98 N. Y. 425; 50 Am. Rep. 693; *Cross v. Richardson*, 30 Vt. 641.

² *White v. Rintoul*, 108 N. Y. 222; 15 N. E. 318; *Durham v. Arledge*, 1 Strobb. Law (S. C.) 5; 47 Am. Dec. 544.

³ *McKenzie v. Bank*, 9 Wash. 442; 43 Am. St. Rep. 844; 37 Pac. 668.

if C fails to pay it after B extends the time of payment.⁴ Under this rule, A's promise to fall without the statute must be a promise to discharge a liability which is fixed upon him and which he must discharge in any event in some way, even if the liability of the principal debtor were to cease to exist; and the sole effect of A's promise must be to designate the manner in which he is to discharge his liability with the consent of the party to whom he owes it. The modern tendency of courts is unquestionably toward the adoption of this rule, although it may still be unsafe to say that it has the indorsement of the weight of authority.

§614. Theory that new consideration for benefit of promisor is test.

(3) Other courts hold that if the new promise is based on a new consideration which is a pecuniary benefit to the promisor, the new promise is not within the statute of frauds, but that otherwise it is.¹ If no consideration moves to the promisor, that is, if he receives no benefit, the sole consideration being a detriment to the promisee, his promise where this theory obtains is within the statute of frauds.² If he receives a personal benefit his promise is not within the statute.³ Under this theory a

⁴ *Hilton v. Dinsmore*, 21 Me. 410; overruling *Russell v. Babcock*, 14 Me. 138; *Lang v. Henry*, 54 N. H. 57; *Harrington v. Rich*, 6 Vt. 666.

¹ *Chapline v. Atkinson*, 45 Ark. 67; 55 Am. Rep. 531; *Smith v. Delaney*, 64 Conn. 264; 42 Am. St. Rep. 181; 29 Atl. 496; *Schaafs v. Wentz*, 100 Ia. 708; 69 N. W. 1022; *Durgin v. Smith*, 115 Mich. 239; 73 N. W. 361; *Swayne v. Hill*, 59 Neb. 652; 81 N. W. 855; *Lookout Mountain R. R. Co. v. Houston*, 85 Tenn. 224; *Farnham v. Chapman*, 61 Vt. 395; 18 Atl. 152; *Kelley v. Schupp*, 60 Wis. 76; 18 N. E. 725.

² *Scott v. White*, 71 Ill. 287; *Parker v. Dillingham*, 129 Ind. 542; 29 N. E. 23; *Crawford v. King*, 54 Ind. 6; *Schaafs v. Wentz*, 100 Ia. 708; 69

N. W. 1022; *Ames v. Foster*, 106 Mass. 400; 8 Am. Rep. 343; *Bates v. Johnrowe* (also styled *Bates v. Donnelly*), 57 Mich. 521; 24 N. W. 788; (Citing *Packer v. Benton*, 35 Conn. 343; 95 Am. Dec. 246; *Conradt v. Sullivan*, 45 Ind. 180; 15 Am. Rep. 261; *Townsend v. Long*, 77 Pa. St. 143; 18 Am. Rep. 438; *Muller v. Riviere*, 59 Tex. 640; 46 Am. Rep. 291; *Clopper v. Poland*, 12 Neb. 69; 10 N. W. 538; *Fitzgerald v. Morrissey*, 14 Neb. 198; 15 N. W. 233; *Clay v. Tyson*, 19 Neb. 531; 26 N. W. 240; *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012; *Rogers v. Hardware Co.*, 24 Neb. 653; 39 N. W. 844; *Mathews v. Seaver*, 34 Neb. 592; 52 N. W. 283.)

³ *Smith v. Delaney*, 64 Conn. 264;

promise by A, who is a partner of C, to pay C's debt to B if B will not seek to enforce C's debt against partnership property is not within the statute,⁴ nor is A's promise to pay a debt of C, deceased, if B will withdraw opposition to the probate of the will and if the estate proves solvent and pays all debts and legacies.⁵ A modification of this view is held by those courts which seek to make the motive of the promisor A in agreeing to pay C's debt to B, the test of the application of the statute. If A's main purpose is to secure some benefit to himself the promise is not within the statute; otherwise it is.⁶ The objection to this

42 Am. St. Rep. 181; 29 Atl. 496; *Garvey v. Crouch* (Ky.), 35 S. W. 273; *Durgin v. Smith*, 115 Mich. 239; 73 N. W. 361; *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012. "Where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not." *Calkins v. Chandler*, 36 Mich. 320, 324; 24 Am. Rep. 593, 597; quoted in *Perkins v. Hershey*, 77 Mich. 504; 43 N. W. 1021.

⁴ *Swayne v. Hill*, 59 Neb. 652; 81 N. W. 855.

⁵ *Rowell v. Dunwoodie*, 69 Vt. 111; 37 Atl. 227; and see for similar facts *Templetons v. Bascom*, 33 Vt. 132.

⁶ "Whenever the main purpose and object of the promise is not to answer for another, but to subserve some pecuniary or business purpose of his own involving either benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." *Emerson v. Slater*, 22

How. (U. S.) 28, 43; quoted in *Fisk v. Reser*, 19 Colo. 88; 34 Pac. 572. "Where the leading object of a party promising to pay the debt of another is to promote his own interest and not to become guarantor, and the promise is made on sufficient consideration, it will be valid though not in writing." *Fitzgerald v. Morrissey*, 14 Neb. 198, 201; quoted in *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012. To the same effect see *Davis v. Patrick*, 141 U. S. 479; *Emerson v. Slater*, 22 *How.* (U. S.) 28; *Choate v. Hoogstraet*, 105 Fed. 713; *Conradt v. Sullivan*, 45 Ind. 180; 15 Am. Rep. 261; *Calkins v. Chandler*, 36 Mich. 320; 24 Am. Rep. 593; *Winn v. Hillyer*, 43 Mo. App. 139; *Mathews v. Seaver*, 34 Neb. 592; *Ward v. Hasbrouck*, 169 N. Y. 407; 62 N. E. 434; *Mallory v. Gillett*, 21 N. Y. 412; *Bailey v. Marshall*, 174 Pa. St. 602; 34 Atl. 326; *Elkin v. Timlin*, 151 Pa. St. 491; 25 Atl. 139; *Fehlinger v. Wood*, 134 Pa. St. 517; 19 Atl. 746; *Nugent v. Wolfe*, 111 Pa. St. 471; 56 Am. Rep. 291; 4 Atl. 15; *Muller v. Riviere*, 59 Tex. 640; 46 Am. Rep. 291; *Lemmon v. Box*, 20 Tex. 329; *Clapp v. Webb*, 52 Wis. 638; 9 N. W. 796.

rule is that in terms it places A's contract to guarantee C's debt to B outside of the operation of the statute if any consideration passes to A.⁷ Cases of this class are clearly within the statute in accordance with the view held by the weight of authority. Many of the cases cited in support of this rule could be explained as well by the second rule given above, and it may be said that the tendency now is for states to pass from the third class to the second. The modification of this theory that makes promisor's motive the test is still more objectionable. Actions and words, not motives, should be the operative facts in contract law; and it is substituting conjecture for certainty to make the validity of the contract turn on what either court or jury may think was the predominant motive in the mind of the promisor.

§615. Theory that new consideration of any kind is test.

(4) Some courts hold that if A's promise rests on a new consideration, distinct from C's liability the statute does not apply, whether the consideration is a benefit to the promisor or a detriment to the promisee.¹ Some of the states which adopt this theory have done so as an extension of the theory discussed in the preceding section, where such extension is made necessary to uphold the promise sought to be enforced. This principle is sometimes invoked where strictly it is not necessary. Thus where B bought an engine of C, under a guaranty as to its quality and a promise to deliver it, and at C's request B made his note for such machine payable to A, A guaranteeing performance of C's contract, B could set up C's breach in an action by

⁷ *Graves v. Shulman*, 59 Ala. 406.

¹ *Chapline v. Atkinson*, 45 Ark. 67; 55 Am. Rep. 531; *Hughes v. Lawson*, 31 Ark. 613; *Kurtz v. Adams*, 12 Ark. 174; *Craft v. Kendrick*, 39 Fla. 90; 21 So. 803; *Carragher v. Allen*, 112 Ia. 168; 83 N. W. 902; *Creel v. Bell*, 2 J. J. Mar. (Ky.) 309; *Dearborn v. Parks*, 5 Greenl. (Me.) 81; 17 Am. Dec. 206; *Jones v. Hardesty*, 10 G. & J. (Md.)

404; 32 Am. Dec. 180; *Swayne v. Hill*, 59 Neb. 652; 81 N. W. 855; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; 5 Am. Dec. 317; *Whitehurst v. Hyman*, 90 N. C. 487; *Cooper v. Chambers*, 4 Dev. L. (N. C.) 261; 25 Am. Dec. 710; *Tindal v. Touchberry*, 3 Strobb. (S. C.) 177; 49 Am. Dec. 637; *Templeton v. Bascom*, 33 Vt. 132.

A.² If this theory is literally enforced, every contract of guaranty made after the original debt is incurred is unaffected by the statute; since at Common Law it must be supported by a consideration, which if the original debt has been already incurred must necessarily be a new and distinct consideration; and under this theory the statute requires nothing more. The statute can, therefore, apply only to cases where the liability as guarantor was incurred at the same time as the liability of the principal debtor. For these reasons this theory may be said to be discredited by modern decisions and the states which have entertained it are passing into the second or third classes.³

§616. Comparison of theories.

It will be noticed that the same state often appears as enforcing two or more theories. There are two reasons for this: first, certain facts in one case may require the court to invoke a theory which is not an extreme one, such as the first or second of those given, while in a subsequent case presenting different facts the court may be willing to take a more extreme theory such as the third or fourth. Second, the courts of one state may at different times have held two or more of these theories, as has been already suggested. For example, the history of the various changes which this doctrine has undergone in New York, is well set forth in a New York case.¹ The original test was whether the primary debt continued to exist concurrently with the new promise. If it did, the statute of frauds was held to apply; otherwise not. As the courts departed from this case, the first position taken was, that an original promise was one founded on a new or further consideration of benefit or harm moving between the promisor and promisee.² It was soon evident that since every contract had to have some consideration, the "terms of the defi-

² Gale v. Harp, 64 Ark. 426; 43 S. W. 144.

³ West v. Grainger, — Fla. —; 35 So. 91.

¹ White v. Rintoul, 108 N. Y. 222; 15 N. E. 318.

² Leonard v. Vredenburg, 8 John.

(N. Y.) 29; 5 Am. Dec. 317. (There must be "some new and original consideration of benefit or harm moving between the newly contracting parties." 5 Am. Dec. 317, 320.)

dition," already given, "were dangerously broad and capable of a grave misapprehension, making it almost possible to say that a promise good at Common Law between the new parties was good also in spite of the statute."³ The second position taken, was that the consideration must move to the promisor, and be beneficial to him.⁴ The third position taken, was that the test of the application of the statute of frauds was "whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in the case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety for the performance by some other person of the obligation of the latter to the creditor."⁵ In view of the confusion of authorities and the abstract form of the proposition's discussion, it is better to consider certain of the more common forms of contracts concerning which questions of the applicability of this clause of the statute have been raised, and discuss them with reference to the words of the statute without invoking the distinction between "original" and "collateral" liability.

§617. Essential features of this clause.—Debt of third person must exist.

In turning from an abstract statement of the principles which determine the applicability of the statute, to a consideration of the adjudications themselves, we find that while the cases are far from harmonious, they can be more nearly reconciled than would appear from the conflict in the theories. In discussing these cases, the words of this clause applicable to each class of cases will constantly be considered. The clause in effect requires (1) a debt of a third person, (2) the continued existence of such debt, (3) a promise to "answer for" such debt, (4) which must be made to the creditor to whom such debt is due, and (5) the

³ White v. Rintoul, *supra*.

⁴ Mallory v. Gillett, 21 N. Y. 412. To the same effect see Nelson v. Boynton, 3 Metc. (Mass.) 396; 37 Am. Dec. 148.

⁵ Brown v. Weber, 38 N. Y. 187, 189; quoted in White v. Rintoul, *supra*. See also Ackley v. Parmenter, 98 N. Y. 425; 50 Am. Rep. 693.

transaction, as a corollary from these elements must not be a promise merely to pay the debt of the promisor. (1) The statute includes only promises to answer for the "debt default or miscarriage" of another. Accordingly if C is not liable to B, the statute has no application since as between A and B there is no "debt of another."¹ Thus a contract whereby A, who is organizing a corporation, in order to induce B to subscribe to stock therein, agrees to purchase such stock,² to find a purchaser therefor,³ or to guarantee dividends thereon,⁴ is not within the statute of frauds.⁵ So is a contract whereby the widow agrees to make up the difference out of her share of the estate in consideration that certain heirs will forbear suit against other heirs for allowing advancements made by decedent to such other heirs.⁶ So an agreement by A, who claims to have control over the debtor's (B's) property to surrender certain property of debtor to C who was about to become surety for B, as indemnity, is an original contract between A and C, and is not within the statute.⁷ For this reason a promise to indemnify one against loss, as in the case of insurance, which may be incurred in the future without any liability on the part of any third person therefor is not within the statute.⁸ So where A, who was getting up a school exhibition, asked B to assist him and to procure music therefor and promised to indemnify him for his expenses if enough for that purpose was not raised by subscription, A's promise was not within the statute since there was no third person liable to B and hence no debt of another.⁹ So where A demanded a certain

¹ Kilbride v. Moss, 113 Cal. 432; 54 Am. St. Rep. 361; 45 Pac. 812; McKinney v. Armstrong, 97 Ill. App. 208; Voris v. Loan Association, 20 Ind. App. 630; 50 N. E. 779; Boos v. Hinkle, 18 Ind. App. 509; 48 N. E. 383; Stewart v. Patton, 65 Mo. App. 21; Walker v. Norton, 29 Vt. 226.

² Kilbride v. Moss, 113 Cal. 432; 54 Am. St. Rep. 361; 45 Pac. 812.

³ Green v. Brookins, 23 Mich. 48; 9 Am. Rep. 74.

⁴ Moorehouse v. Crangle, 36 O. S.

130; 38 Am. Rep. 564; Thompson v. Whitney, 20 Utah 1; 57 Pac. 429.

⁵ *Contra*, that a contract to pay to the vendee the amount paid by him for his stock if the corporation does not return it to him is within the statute. Gansey v. Orr, 173 Mo. 532; 73 S. W. 477.

⁶ Fain v. Turner, 96 Ky. 634; 29 S. W. 628.

⁷ Waid v. Hobson, 17 Colo. App. 54; 67 Pac. 176.

⁸ See § 634.

⁹ Walker v. Morton, 29 Vt. 226.

sum for constructing a railway, and the railway company offered a smaller sum, the promise of a third person to pay to A a certain sum in addition to that offered by the railway company to induce him to undertake such contract is not within the statute.¹⁰ So, where a married woman's contract is void, a promise to answer for her debt is not within this clause of the statute.¹¹ If, however, C's liability is voidable, but not void, as where C is a minor,¹² A's promise is within the meaning of this clause.

§618. Effect of sole liability of promisor.

A contract whereby A agrees to pay B for property, services, and the like to be delivered to C by B, or performed for him, is valid, as the detriment to B is a consideration for C's promise.¹ The liability on these facts rests upon A alone. Accordingly such a promise is not included in this clause of the statute, even though C receives the benefit of the promise as the debt is not C's and never was.² This is, therefore, an illustration of the principle discussed in the preceding section.³ Thus if B delivers goods to C,⁴ or furnishes C with

¹⁰ Champlain Construction Co. v. O'Brien, 117 Fed. 271, 788.

¹¹ Miller v. Long, 45 Pa. St. 350. Of course, this rule does not apply where the married woman is liable personally by statute, or her estate is charged with her debts. Connerat v. Goldsmith, 6 Ga. 14.

¹² Dexter v. Blanchard, 11 All. (Mass.) 365; Brown v. Bank, 88 Tex. 265; 33 L. R. A. 359; 31 S. W. 285; reversing on this point, 31 S. W. 216. *Contra*, but obiter, King v. Summitt, 73 Ind. 312; 38 Am. Rep. 145.

¹ See § 276.

² Jenkins, etc., Co. v. Landgren, 85 Ill. App. 494; Cox v. Peltier, 159 Ind. 355; 65 N. E. 6; Collins v. Stanfield, 139 Ind. 184; 38 N. E. 1091; Marr v. Ry., 121 Ia. 117; 96 N. W. 716; Biglane v. Hicks. — Miss. —; 33 So. 413; Williams v.

Auten, 62 Neb. 832; 87 N. W. 1061; Peyson v. Conniff, 32 Neb. 269; 49 N. W. 340; Kesler v. Cheadle, 12 Okla. 489; 72 Pac. 367; Nixon v. Jacobs, 22 Tex. Civ. App. 97; 53 S. W. 595.

³ See § 617.

⁴ Clark v. Jones, 87 Ala. 474; 6 So. 362; Sears v. Flodstrom, 5 Ida. 314; 49 Pac. 11; Lusk v. Throop, 189 Ill. 127; 59 N. E. 529; affirming, 89 Ill. App. 509; Clark v. Smith, 87 Ill. App. 409; Foster, etc., Co. v. Felcher, 119 Mich. 353; 78 N. W. 120; Maurin v. Fogelberg, 37 Minn. 23; 5 Am. St. Rep. 814; 32 N. W. 858; Chick v. Coal Co., 78 Mo. App. 234; Gill v. Reed, 55 Mo. App. 246; Lindsey v. Heaton, 27 Neb. 662; 43 N. W. 420; Nesbitt v. Reduction Co., 22 Nev. 260; 38 Pac. 670; Gallagher v. McBride, 66 N. J. L. 360; 49 Atl. 582; White v. Tripp, 125 N.

board,⁵ or care,⁶ or a house,⁷ or if B furnishes a coffin for C,⁸ or if B performs services for C,⁹ such as services of an attorney,¹⁰ or a physician,¹¹ or services in transporting property,¹² in reliance on A's promise to pay, A's contract is not within this clause of the statute of frauds as long as no liability exists against C. Still less is A's promise within the statute if A has some interest in C's property on which B does work relying on A's promise to pay him,¹³ as where A is a mortgagee of the property.¹⁴ So if A is the president of a corporation, C, and to induce B to give an option to C A agrees personally to pay C's expenses and attorney fees arising out of such transaction if the corporation does not accept such option is not within the statute.¹⁵

§619. Effect of independent liability of party receiving benefit.

If B is to furnish goods to C and is to hold C and A both liable

C. 523; 34 S. E. 686; Grand Forks, etc., Co. v. Tourtelot, 7 N. D. 587; 75 N. W. 901; Kesler v. Cheadle, 12 Okla. 489; 72 Pac. 367; Mackey v. Smith, 21 Or. 598; 28 Pac. 974; First National Bank v. Cotton Co., 24 Tex. Civ. App. 645; 60 S. W. 828; Hamilton v. Mfg. Co., 15 Tex. Civ. App. 338; 39 S. W. 641; Hopkins v. Stefan, 77 Wis. 45; 45 N. W. 676.

⁵ Marr v. Ry., 121 Ia. 117; 96 N. W. 716; King v. Lumber Co., 80 Minn. 274; 83 N. W. 170; Breeler v. Fimmel, 85 Mo. App. 438; Doremus v. Daniels (N. J. Eq.), 20 Atl. 147.

⁶ Harlan v. Harlan, 102 Ia. 701; 72 N. W. 286.

⁷ Shafer v. Cherry, 5 Colo. App. 513; 39 Pac. 345.

⁸ Cox v. Peltier, 159 Ind. 355; 65 N. E. 6.

⁹ Milliken v. Warner, 62 Conn. 51; 25 Atl. 450; Mitchell v. Beck, 88 Mich. 342; 50 N. W. 305; Sproule v. Hopper (Miss.), 16 So. 901; Lyons v. Daugherty (Tex. Civ. App.), 26 S. W. 146.

¹⁰ Stein v. Blake, 56 Ill. App. 525; James v. Carson, 24 Wis. 632; 69 N. W. 1004; Murphey v. Gates, 81 Wis. 370; 51 N. W. 573; Iverson v. Caldwell, 3 Wyom. 465; 27 Pac. 563.

¹¹ Wellman v. Jones, 124 Ala. 580; 27 So. 416; Crowder v. Keys, 91 Ga. 180; 16 S. E. 986; Brandner v. Krebbs, 54 Ill. App. 652; Biglane v. Hicks, — Miss. —; 33 So. 413; Rounsevel v. Osgood, 68 N. H. 418; 44 Atl. 535; Boston v. Farr, 148 Pa. St. 220; 23 Atl. 901; Speer v. Meschine, 46 S. C. 505; 24 S. E. 329; Clark v. Waterman, 7 Vt. 76; 29 Am. Dec. 150.

¹² Proprietors of the Upper Locks v. Abbott, 14 N. H. 157; 40 Am. Dec. 184.

¹³ Backus v. Clark, 1 Kan. 303; 83 Am. Dec. 437; Keyes v. Allen, 65 Vt. 667; 27 Atl. 319.

¹⁴ Conradt v. Sullivan, 45 Ind. 180; 15 Am. Rep. 261; Greene v. McDonald, 70 Vt. 372; 40 Atl. 1035.

¹⁵ Manary v. Runyon, 43 Or. 495; 73 Pac. 1028.

therefor, A's promise is in effect to pay the debt of another and his promise is within this clause of the statute of frauds, if the real transaction is not a joint contract by A and C on one side and B on the other.¹ However, the fact that B made the charge on his books against A and C jointly is not conclusive that the liability was not A's alone.² On the other hand the fact that B made the charge against A is not sufficient to show that the real transaction was not a guaranty.³ If the contract is really a joint one between A and C on one side and B on the other, A's liability is not within the statute.⁴

§620. Promisor must incur liability on debt of other.

To come within this clause of the statute the promise must be one to "answer for," that is, to incur some liability on the debt of another. Hence, if A's promise to B is not to incur liability on C's debt, but to buy it,¹ or to waive a prior lien held by A so as to advance the priority of B's claim,² or to share the benefit of his alleged lien with an unsecured creditor,³ or to redeem bonds

¹ *Pake v. Wilson*, 127 Ala. 240; 28 So. 665; *Webb v. Lumber Co.*, 101 Ala. 630; 14 So. 407; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Langdon v. Richardson*, 58 Ia. 610; 12 N. W. 622; *Norris v. Graham*, 33 Md. 56; *Bugbee v. Kendrick*, 130 Mass. 437; *Ford v. McFane*, 131 Mich. 371; 91 N. W. 617; *Welch v. Marvin*, 36 Mich. 59; *Cole v. Hutchinson*, 34 Minn. 410; 26 N. W. 319; *Bloom v. McGrath*, 53 Miss. 249; *Swigart v. Gentert*, 63 Neb. 157; 88 N. W. 159; *Williams v. Auten*, 62 Neb. 832; 87 N. W. 1061; *Walker v. Richards*, 39 N. H. 259; *Hayden v. Weldon*, 43 N. J. L. 128; 39 Am. Rep. 551; *Hetfield v. Dow*, 27 N. J. L. 440; *Matteson v. Moore*, — R. I. —; 54 Atl. 1058; *Wood v. Patch*, 11 R. I. 445; *Matthews v. Milton*, 4

Yerg. (Tenn.) 576; 26 Am. Dec. 247; *Mead v. Watson*, 57 Vt. 426; *Radcliff v. Poundstone*, 23 W. Va. 724.

² *Lusk v. Throop*, 189 Ill. 127; 59 N. E. 529; affirming, 89 Ill. App. 509.

³ *Indiana Trust Co. v. Finitzer*, 160 Ind. 647; 67 N. E. 520.

⁴ *Boyce v. Murphy*, 91 Ind. 1; 46 Am. Rep. 567; *Swift v. Pierce*, 13 All. (Mass.) 136; *Eddy v. Davidson*, 42 Vt. 52.

¹ *Stillman v. Dresser*, 22 R. I. 389; 48 Atl. 1.

² *Townsend v. White*, 102 Ia. 477; 71 N. W. 337; *Chism v. Alcorn*, 71 Miss. 506; 15 So. 73.

³ *Wolff v. Bank*, 131 Mich. 655; 92 N. W. 287.

pledged by A to B for C's debt where in consideration of B's releasing a mortgage given by C, A pledged such bonds and agreed to redeem them at par within one year,⁴ or to obtain mortgage security for the debt,⁵ or to buy certain property,⁶ the statute has no application.

§621. Debt of "another."—Promise cannot be made to original debtor.

To be included in this clause of the statute the promise must be to answer for the debt of "another." A promise by A to B to pay B's debt is not a promise to pay the debt of "another" within the meaning of the statute, even though the ultimate effect of performance by A will be to discharge a debt owing from B of another.¹ Thus an oral promise made by A to B to pay taxes which B owes,² or to pay attorney's fees which B owes,³ are none of them within the statute. This principle often operates in connection with the principle that a promise by one to pay his own debt is not within the statute even if performance operates to discharge the debt of the promisee.

§622. Promise to pay one's own debt.

If the promisor is promising merely to pay his own debt it is not a promise to pay the debt of "another" within the statute, even if the effect of such payment will be to discharge the debt

⁴ *Booth v. Eighmie*, 60 N. Y. 238; 19 Am. Rep. 171. For a similar case in which stock was pledged see *Taft v. Church*, 162 Mass. 527; 39 N. E. 283.

⁵ *Resseter v. Waterman*, 151 Ill. 169; 37 N. E. 875; reversing, 45 Ill. App. 155.

⁶ *Goodman v. Cohen*, 132 N. Y. 205; 30 N. E. 399 (where the insurance appraiser agreed to buy damaged goods, the loss to which was covered by the insurance).

¹ *Windell v. Hudson*, 102 Ind. 521;

2 N. E. 303; *Merchant v. O'Rourke*, 111 Ia. 351; 82 N. W. 759; *Botkin v. Land Co. (Ky.)*, 66 S. W. 747; *Spadone v. Reed*, 7 Bush. (Ky.) 455; *McCartney v. Shepard*, 21 Mo. 573; 64 Am. Dec. 250; *Gill v. Ferrin*, 71 N. H. 421; 52 Atl. 558; *Hoile v. Bailey*, 58 Wis. 434; 17 N. E. 322; *Fosha v. Prosser*, — Wis. —; 97 N. W. 924.

² *Gill v. Ferrin*, 71 N. H. 421; 52 Atl. 558.

³ *Weilage v. Abbott (Neb.)*, 90 N. W. 1128.

of another.¹ Thus an oral promise made by a partner after dissolution to pay a debt of the firm contracted while he was a member,² or a promise by one bound to keep certain property clear of liens to pay a certain claim which might have been secured by lien on consideration that the holders thereof would not resort to a lien to secure the same,³ is not within the statute.

§623. Assumption of debt of other.

A may incur an obligation to C, which he agrees with C to discharge by paying the amount due thereon to B in payment of, or as credit upon, C's debt to B. This transaction between A and C is not a novation since C's debt to B is not released until payment in the absence of B's consent; and B's consent is not essential to the validity of A's promise. As between A and C, no question of the application of the statute of frauds can arise, since it is not the promise to answer for the debt of "another," that is, for the debt of a third person; since A is merely promising C to discharge A's liability in a specified manner.¹ Thus, where B assigns a lease to A in consideration of which A promises to B to pay to B a claim held by him against C, such promise is not included in this clause of the statute.² The complicating element which introduces the statute of frauds into the discussion of this subject is that in many jurisdictions B can treat such promise as one made for his benefit and can enforce

¹Meyer v. Parsons, 129 Cal. 653; 62 Pac. 216; Tuttle v. Armstead, 53 Conn. 175; 22 Atl. 677; Reid v. Wilson, 109 Ga. 424; 34 S. E. 608; Boldenwick v. Cahill, 187 Ill. 218; 58 N. E. 351; affirming, 86 Ill. App. 561; Darst v. Bates, 95 Ill. 493; Dumanoise v. Townsend, 80 Mich. 302; 45 N. W. 179; James v. Hicks, 58 Mo. App. 521; Smart v. Smart, 97 N. Y. 559; Thompson v. Cheesman, 15 Utah 43; 48 Pac. 477; Hooper v. Hooper, 32 W. Va. 526; 9 S. E. 937.

²Reid v. Wilson, 109 Ga. 424; 34

S. E. 608; Dumanoise v. Townsend, 80 Mich. 302; 45 N. W. 179; Garner v. Hudgins, 46 Mo. 399; 2 Am. Rep. 520.

³Stephen v. Yeomans, 112 Mich. 624; 71 N. W. 159.

¹Pratt v. Fishwild, 121 Ia. 642; 96 N. W. 1089; Goodspeed v. Fuller, 46 Me. 141; 71 Am. Dec. 572; Goetz v. Foos, 14 Minn. 265; 100 Am. Dec. 218; Ware v. Allen, 64 Miss. 545; 60 Am. Rep. 67; 1 So. 738.

²Duncan v. Grant, 87 Me. 429; 32 Atl. 1000.

it.³ Where B can enforce such contracts, the question is often raised whether A's promise is not to answer for the debt of another and hence within the statute of frauds. The view entertained by the great majority of the courts is that even between A and B, A's promise is to pay his own debt and not that of "another," and hence that this section of the statute of frauds does not apply. Furthermore, A's liability to C is not dependent on the continuance of C's liability to B.⁴ Thus, if A is indebted to C and promises to pay such debt by paying C's debt to B, such promise is not within the statute.⁵ So if A buys property of C and agrees to pay therefor by discharging C's debt to B, B, if he can maintain an action upon such contract at all can do so whether A's promise can be proved in writing or not,⁶ even if C is not released from liability by B.⁷ Thus where C

³ See Ch. LX.

⁴ For this reason such promises fall within the principle of the second theory given above. See § 613.

⁵ *Nordby v. Winsor*, 24 Wash. 535; 64 Pac. 726.

⁶ *De Walt v. Hartzell*, 7 Colo. 601; 4 Pac. 1201; *Mulvany v. Gross*, 1 Colo. App. 112; 27 Pac. 878; *Tuttle v. Armstead*, 53 Conn. 175; 22 Atl. 677; *Boldenwick v. Cahill*, 187 Ill. 218; 58 N. E. 351; affirming, 86 Ill. App. 561; *Knisely v. Brown*, 95 Ill. App. 516; *Rothermel v. Coal Co.*, 79 Ill. App. 667; *McCasland v. Doorley*, 47 Ill. App. 513; *Dickson v. Conde*, 148 Ind. 279; 46 N. E. 998; *Bateman v. Butler*, 124 Ind. 223; 24 N. E. 989; *Deering v. Armstrong*, 14 Ind. App. 44; 42 N. E. 372; *Morrison v. Hogue*, 49 Ia. 574; *Neiswanger v. McClellan*, 45 Kan. 599; 26 Pac. 18; *Mudd v. Carico*, 104 Ky. 719; 47 S. W. 1080; *Flint v. Land Co.*, 89 Me. 420; 36 Atl. 634; *Ware v. Allen*, 64 Miss. 545; 60 Am. Rep. 67; 1 So. 738; *Lee v. Newman*, 55 Miss. 365; *Schufeldt v. Smith*, 139 Mo. 367; 40 S. W. 887; *Duerre v.*

Ruediger, 65 Mo. App. 407; *Barnett v. Pratt*, 37 Neb. 349; 55 N. W. 1050; *Mason v. Wilson*, 84 N. C. 51; 37 Am. Rep. 612; *Jarmusch v. Steel Co.*, 23 Ohio C. C. 122; *Feldman v. McGuire*, 34 Or. 309; 55 Pac. 872; *Fehlinger v. Wood*, 134 Pa. St. 517; 19 Atl. 746; *Delp v. Brewing Co.*, 123 Pa. St. 42; 15 Atl. 871; *Wynn v. Wood*, 97 Pa. St. 216; *Townsend v. Long*, 77 Pa. St. 143; 18 Am. Rep. 438; *Sargent v. Johns*, 206 Pa. St. 386; 55 Atl. 1051; *Morris v. Gaines*, 82 Tex. 255; 17 S. W. 538; *Gay v. Pemberton* (Tex. Civ. App.), 44 S. W. 400; *Thompson v. Cheesman*, 15 Utah 43; 48 Pac. 477; *Keyes v. Allen*, 65 Vt. 667; 27 Atl. 319; *Don Yook v. Mill Co.*, 16 Wash. 459; 47 Pac. 964; *Silsby v. Frost*, 3 Wash. Terr. 388; 17 Pac. 887; *Hooper v. Hooper*, 32 W. Va. 526; 9 S. E. 937; *Martin v. Davis*, 80 Wis. 376; 50 N. W. 171.

⁷ *Rothermel v. Coal Co.*, 79 Ill. App. 667; *Gay v. Pemberton* (Tex. Civ. App.), 44 S. W. 400; *Keyes v. Allen*, 65 Vt. 667; 27 Atl. 319.

conveys realty,⁸ or assigns a lease of realty,⁹ or transfers personally¹⁰ to A, who in consideration of such transfer agrees to discharge C's debt to B, A's promise is not affected by this clause of the statute. So where there is a change in the membership of a firm and the incoming partner,¹¹ or the partner who remains in the firm,¹² agrees as payment for the interest acquired by him to pay the debts of the partnership, such contract is not within this clause of the statute. In some jurisdictions such contracts

⁸ *Smith v. Caldwell*, 6 Ida. 436; 55 Pac. 1065; *Mudd v. Carico*, 104 Ky. 719; 47 S. W. 1080; *Daniels v. Gibson* (Ky.), 47 S. W. 621; *Jennings v. Crider*, 2 Bush. (Ky.) 322; 92 Am. Dec. 487; *Coffin v. Bradbury*, 89 Me. 476; 36 Atl. 988; *Flint v. Land Co.*, 89 Me. 420; 36 Atl. 634; *Reynolds v. Deitz*, 39 Neb. 180; 58 N. W. 89; *Moore v. Booker*, 4 N. D. 543; 62 N. W. 607; *Taylor v. Preston*, 79 Pa. St. 436; *Johnson v. Elmen*, 94 Tex. 168; 86 Am. St. Rep. 845; 52 L. R. A. 162; 59 S. W. 253; *Morris v. Gaines*, 82 Tex. 255; 17 S. W. 538; *Beitel v. Dobbin* (Tex. Civ. App.), 44 S. W. 299; *Thompson v. Cheesman*, 15 Utah 43; 48 Pac. 477; *Skinker v. Armstrong*, 86 Va. 1011; 11 S. E. 977; *Morgan v. Lake View Co.*, 97 Wis. 275; 72 N. W. 872. In a Massachusetts case, decided under Rhode Island law, B's suit against A was held to release C and to take the case out of the statute. *Aldrich v. Carpenter*, 160 Mass. 166; 35 N. E. 456.

⁹ *Wolke v. Fleming*, 103 Ind. 105; 53 Am. Rep. 495; 2 N. E. 325.

¹⁰ *Aultman v. Fletcher*, 110 Ala. 452; 18 So. 215; *Tevis v. Savage*, 130 Cal. 411; 62 Pac. 611; *Mulvany v. Gross*, 1 Colo. App. 112; 27 Pac. 878; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360; 11 So. 488; *Rothermel v. Coal Co.*, 79 Ill.

App. 667; *Scudder v. Carter*, 43 Ill. App. 252; *Dickson v. Conde*, 148 Ind. 279; 46 N. E. 998; *Deering & Co. v. Armstrong*, 14 Ind. App. 44; 42 N. E. 372; *Clinton National Bank v. Studemann*, 79 Ia. 104; 37 N. W. 112; *Watson v. Perrigo*, 87 Me. 202; 32 Atl. 876; *Armitage v. Saunders*, 94 Mich. 482; 54 N. W. 174; *Brittain v. Kelly*, 86 Mich. 278; 49 N. W. 53; *Schufeldt v. Smith*, 139 Mo. 367; 40 S. W. 887; *Deal v. Bank*, 79 Mo. App. 262; *Wills v. Bank*, 23 Nev. 59; 42 Pac. 490; *Townsend v. Long*, 77 Pa. St. 143; 18 Am. Rep. 438; *Wood v. Moriarty*, 15 R. I. 518; 9 Atl. 427; *Dimmick v. Collins*, 24 Wash. 78; 63 Pac. 1101; *Gilmore v. Box Factory*, 20 Wash. 703; 56 Pac. 934; *Don Yook v. Mill Co.*, 16 Wash. 459; 47 Pac. 964; *Lessel v. Zillmer*, 105 Wis. 334; 81 N. W. 403; *J. & H. Clasgens Co. v. Silber*, 93 Wis. 579; 67 N. W. 1122; *Green v. Hadfield*, 89 Wis. 138; 61 N. W. 310. In Georgia A is not bound by an oral promise of this sort, *Strauss v. Garrett*, 101 Ga. 307; 28 S. E. 850, except where B's claim is a lien on the personality transferred from C to A. *Wooten v. Wilcox*, 87 Ga. 474; 13 S. E. 595.

¹¹ *Bartlett v. Smith* (Neb.), 98 N. W. 687.

¹² *Dickson v. Conde*, 148 Ind. 279; 46 N. E. 998.

are within the statute of frauds unless the original debtor is released by agreement of all the parties.¹³

§624. Guaranty as part of contract of assignment.

If A sells to B an obligation of C which A owns, and as part of the sale A guarantees the obligation such promise is not within the statute of frauds.¹ Thus, if A in payment of certain property sold to him by B assigns to B a certificate of deposit issued by a bank C, and also gives a check on such bank, A's promise to B to pay such certificate of deposit and check if C does not pay by a certain time is not within the statute.² The same rule applies where A sells to B, C's property left with A to sell and apply the proceeds to A's debt, and A agrees to protect B against a pending replevin suit brought by X.³

§625. Promise to pay out of debtor's funds.

If A has in his hands money or property belonging to C, out of which he has authority to pay C's debt to B, and A promises to pay C's debt to B, A's promise is not within this clause of the statute.¹ Thus a promise by an employer to pay a debt of his

¹³ *Stowell v. Gram*, 184 Mass. 562; 69 N. E. 342.

¹ *Carter v. Odom*, 121 Ala. 162; 25 So. 774; *Smith v. Corege*, 53 Ark. 295; 14 S. W. 93; *Chapline v. Atkinson*, 45 Ark. 67; 55 Am. Rep. 531; *Power v. Rankin*, 114 Ill. 52; 29 N. E. 185; *Voris v. Loan Association*, 20 Ind. App. 630; 50 N. E. 779; *Fears v. Story*, 131 Mass. 47; *Crane v. Wheeler*, 48 Minn. 207; 50 N. W. 1033; *Wilson v. Hentges*, 29 Minn. 102; 12 N. W. 151; *Barker v. Scudder*, 56 Mo. 272; *Bruce v. Burr*, 67 N. Y. 237; *Crawford v. Pyle*, 190 Pa. St. 263; 12 Atl. 687; *Malone v. Keener*, 44 Pa. St. 107; *Hall v. Rodgers*, 26 Tenn. 236; *Wyman v. Goodrich*, 26 Wis. 21. *Con-*

tra, *Dows v. Sweet*, 120 Mass. 322, where, however, A was not the holder of the note guaranteed. See, however, the same case in 134 Mass. 140; 45 Am. Rep. 310. The question of the value of this case as authority turns in part on the question of the value of a case where the record discloses one combination of facts (that A did not own the note) and the opinion of the court assumes another (that A did own the note).

² *Kiernan v. Kratz*, 42 Or. 474; 69 Pac. 1027; 70 Pac. 506.

³ *Farnham v. Chapman*, 61 Vt. 395; 18 Atl. 152.

¹ *Hughes v. Fisher*, 10 Colo. 383; 15 Pac. 702; *Clarke v. Palmer*, 129 Mass. 373; *Bice v. Building Co.*, 96

employee's out of wages due the latter in the former's hands,² as where A promises B to pay C's board to B out of C's wages due from A³ is not within the statute. So if C transfers property to A to be used in paying C's debt to B, A's promise to B to make such use of the proceeds of the property is not within the statute.⁴ So where A owns property for the improvement of which he has let a contract to C, and C has employed B, and A promises to pay B out of funds owing by him to C, A's promise is not within the statute.⁵ If C has a lien on B's property to secure his debt, C's contract with A whereby he waives his lien and allows A to sell the property, and A agrees to pay C's debt out of such proceeds is not within the statute.⁶ If A is protected by a mortgage given by C as indemnity his promise to pay C's debt to B is held not within the statute,⁷ and A's promise to B that A will get a mortgage from C to protect B against liability as surety both on the debt in question and on a former debt, is held not to be within the statute.⁸ In some jurisdictions this proposition must be stated with the qualification that if the original liability of C is extinguished A's promise is not within the statute of frauds, but if C's liability remains, A's promise is within the statute.⁹ If A has C's property in his hands, without any authority from C to expend it in paying C's debts, A's promise to B to pay C's debt is within the statute.¹⁰

Mich. 24; 55 N. W. 382; Dibble v. De Mattos, 8 Wash. 542; 36 Pac. 485.

² Hefferlin v. Karlman, — Mont. —; 74 Pac. 201.

³ Baldwin Coal Co. v. Davis, 15 Colo. App. 371; 62 Pac. 1041.

⁴ McIntire v. Schiffer, 31 Colo. 246; 72 Pac. 1056.

⁵ Bice v. Building Co., 96 Mich. 24; 55 N. W. 382; Dibble v. De Mattos, 8 Wash. 542; 36 Pac. 485.

⁶ Simpson v. Carr (Ky.), 76 S. W. 346.

⁷ Chapline v. Atkinson, 45 Ark. 67; 55 Am. Rep. 531.

⁸ Ressetter v. Waterman, 151 Ill. 169; 37 N. E. 875; reversing 45 Ill. App. 155, and citing Bushnell v. Beavan, 1 Bing. N. C. 103.

⁹ West v. Grainger, — Fla. —; 35 So. 91; O'Connell v. Mt. Holyoke College, 174 Mass. 511; 55 N. E. 460; Bugbee v. Kendrick, 130 Mass. 437; Swift v. Pierce, 13 All. (Mass.) 136; Allen v. Leavens, 26 Or. 164; 46 Am. St. Rep. 613; 26 L. R. A. 620; 37 Pac. 488; Wiloughby v. Florence, 51 S. C. 462; 29 S. E. 242; Barto v. Phillips, 28 Wash. 482; 68 Pac. 895.

¹⁰ Diltz v. Parke, 4 N. J. L. 219.

§626. **Promise to accept order or draft.**

If A has in his hands money or property belonging to C, out of which he has authority to pay C's debt to B, A's promise to B to accept an order drawn by C upon such fund is not within the statute.¹ So, orders which operate as payment of the original liability may be accepted orally,² this being really a form of novation.

If A has no funds of C's in his hands and is not indebted to C, his promise to accept C's order to B is within the statute.³ Thus, a promise by a widow, who is the beneficiary of an insurance certificate taken out by her husband in a beneficial association, to pay his debts out of this fund, is within the statute,⁴ since this fund is not property which ever belonged to the deceased husband. Since a bill of exchange merges the liability of the drawee to the drawer, it may be accepted orally without violating the statute of frauds,⁵ except in those jurisdictions where by special statute acceptance of a bill of exchange must be in writing.⁶ However, a promise by the drawee of a bill of exchange to a prospective purchaser thereof to repay to him

¹ *Durkee v. Conklin*, 13 Colo. App. 313; 57 Pac. 486; *Lavell v. Frost*, 16 Mont. 93; 40 Pac. 146. If A is indebted to C, his promise to accept C's order to B is said to be unnecessary. *Barnett v. Lumber Co.*, 43 W. Va. 441; 27 S. E. 209.

² *Cook v. Wolfendale*, 105 Mass. 401; *Parkhurst v. Dickerson*, 21 Pick. (Mass.) 307; *Washburn v. Cordis*, 15 Pick. (Mass.) 53.

³ *Killough v. Payne*, 52 Ark. 174; 12 S. W. 327; *Chapline v. Atkinson*, 45 Ark. 67; 55 Am. Rep. 531; *Winburn v. Building Association*, 110 Ia. 374; 81 N. W. 682; *Willis v. Shinn*, 42 N. J. L. 138.

⁴ *Fisher v. Donovan*, 57 Neb. 361; 44 L. R. A. 383; 77 N. W. 778.

⁵ *Townesley v. Sumrall*, 2 Pet. 170; *Kennedy v. Geddes*, 3 Ala. 581; 37 Am. Dec. 714; *Nelson v. Bank*, 48

Ill. 36; 95 Am. Dec. 510; *Louisville, etc., Ry. v. Caldwell*, 98 Ind. 245; *Cook v. Baldwin*, 120 Mass. 317; 21 Am. Rep. 517; *Dunavan v. Flynn*, 118 Mass. 537; *Pierce v. Kittredge*, 115 Mass. 374; *Spaulding v. Andrews*, 48 Pa. St. 411; *Fisher v. Beckwith*, 19 Vt. 31; 46 Am. Dec. 174.

⁶ *Flato v. Mulhall*, 72 Mo. 522; *Haeberle v. O'Day*, 61 Mo. App. 390; *Nichols v. Bank*, 55 Mo. App. 81; *Risley v. Bank*, 83 N. Y. 318; 38 Am. Rep. 421. By statute in Pennsylvania acceptance of a bill draft or order for the payment of money exceeding twenty dollars cannot be enforced unless it is in writing. *National State Bank v. Linderman*, 161 Pa. St. 199; 28 Atl. 1022; *Maginn v. Bank*, 131 Pa. St. 362; 18 Atl. 901.

the amount expended by him in purchasing such bill is not within this statute.⁷ A promise by one not indebted to another to indorse bills drawn by such other in favor of his creditor, on consideration that such creditor would refrain from issuing execution, is within the statute.⁸

§627. Del credere agency.

If A is B's agent, and as part of the contract of employment, A agrees to be personally liable to B on all contracts made by A for B with third persons, A's promise is not within this clause of the statute.¹ In such cases A is known as a *del credere* agent. Like some of the other rules on this subject it is easier to state this than to explain it. Probably the best explanation why such a promise is not within the statute is that it is not intended by the parties as a promise to pay the debt of others, though it can be performed only by paying such debts, but, like a contract of insurance, it provides for indemnity against loss due to the acts of such agent.

§628. Promise to discharge liens.

If A buys property from C which is encumbered by liens held by B, and A is not bound by his contract with C to pay off the liens but subsequently in consideration of a release of the lien¹

⁷ Kelley v. Greenough, 9 Wash. 659; 38 Pac. 158.

⁸ Harbury, etc., Co. v. Martin (1902), 1 K. B. 778.

¹ Sutton v. Grey (1894), 1 Q. B. 285; Swan v. Nesmith, 7 Pick. (Mass.) 220; 19 Am. Dec. 282; Osborne v. Baker, 34 Minn. 307; 57 Am. Rep. 55; 25 N. W. 606; Bullock v. Orgo, 57 N. J. Eq. 428; 41 Atl. 494; Guggenheim v. Rosenfeld, 9 Baxt. (Tenn.) 533; Bradley v. Richardson, 23 Vt. 720.

¹ Choate v. Hoogstraet, 105 Fed. 713; Wooten v. Wilcox, 87 Ga. 474; 13 S. E. 595; Power v. Rankin, 114 Ill. 52; 29 N. E. 185; Scott v.

White, 71 Ill. 287; Williamson v. Rexroat, 55 Ill. App. 116; McCasland v. Doorley, 47 Ill. App. 513; Parker v. Dillingham, 129 Ind. 542; 29 N. E. 23; Crawford v. King, 54 Ind. 6; Spooner v. Dunn, 7 Ind. 81; 63 Am. Dec. 414; Vaughn v. Smith, 65 Ia. 579; 22 N. W. 684; Stewart v. Campbell, 58 Me. 439; Fears v. Story, 131 Mass. 47; Hodgins v. Heaney, 15 Minn. 185; Joseph v. Smith, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012; Provenchee v. Piper, 68 N. H. 31; 36 Atl. 552; Blackford v. Gaslight Co., 43 N. J. L. 438; Rees v. Jutte, 153 Pa. St. 56; 25 Atl. 998; Powell v. Dun-

or a reduction of the amount thereof² promises to pay the debt secured by the lien, the promise is not within the statute. It is "a mere arrangement to relieve the property of a lien."³ Thus, if B holds a chattel mortgage on C's horse, and C sells said horse to A, A's subsequent promise to B to pay the mortgage note if C will release the lien is not within the statute.⁴ A promise to pay a claim in order to acquire or retain property has been held not to be within the statute even if the promisor was under no prior personal liability to anyone. Where property has passed to A out of the estate of C, deceased, and A, in consideration that B will refrain from attempting to apply such property to the satisfaction of C's debt to B, agrees to pay it himself, such contract is not included in this clause of the statute.⁵ Thus, if a lessee of realty dies, and his widow in order to retain possession agrees to pay the rent personally, her promise is not within the statute.⁶ Where A has not received property from C's estate, but expects to gain personally by delay, his promise to pay C's debt has been held to be within the statute.⁷

If the lien is not waived, the contract on these facts is within the statute.⁸ So if the lien is prospective, and B agrees in

woodie, 69 Vt. 111; 37 Atl. 227 (citing *Ide v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698); *McGraw v. Franklin*, 2 Wash. 17; 25 Pac. 911; 26 Pac. 810; *Weisel v. Spence*, 59 Wis. 301; 18 N. W. 165.

² *Fisk v. Reser*, 19 Colo. 88; 34 Pac. 572. The court said that it was "as between himself and payee an original agreement based upon a new and sufficient consideration moving from the creditor and promise to himself for his benefit."

³ *Williamson v. Rexroat*, 55 Ill. App. 116. "An original undertaking on a valuable consideration." *Wooten v. Wilcox*, 87 Ga. 474, 476; 13 S. E. 595.

⁴ *Provenchee v. Piper*, 68 N. H. 31; 36 Atl. 552. (It is "not a contract for the payment of (C's) debt,

but for the purchase of the plaintiff's interest in the horse.")

⁵ *French v. French*, 84 Ia. 655; 15 L. R. A. 300; 51 N. W. 145; *Muller v. Riviere*, 59 Tex. 640; 46 Am. Rep. 291.

⁶ *Linam v. Jones*, 134 Ala. 570; 33 So. 343.

⁷ *Schaafs v. Wentz*, 100 Ia. 708; 69 N. W. 1022. A was C's father-in-law and was already surety on another claim. The estate proved to be insolvent. *Distinguishing Helt v. Smith*, 74 Ia. 667; 39 N. W. 81; *Wilson v. Smith*, 73 Ia. 429; 35 N. W. 506.

⁸ *Greene v. Latham*, 2 Colo. App. 416; 31 Pac. 233; *Vaughn v. Smith*, 65 Ia. 579; 22 N. W. 684; *Stewart v. Campbell*, 58 Me. 439; *Brightman v. Hicks*, 108 Mass. 246.

advance to waive it if A pays the debt, A's promise is not within the statute,⁹ but without B's agreement to waive it A's promise is within the statute.¹⁰ So if A has a lien on B's stock for feeding it, and X claiming a lien on the same stock, promises to pay A the amount of his lien if A will release it, X's promise is not within the statute.¹¹

§629. Discharge of liability.—Novation.

If A is indebted to C and C is indebted to B, a contract between the three whereby B releases C and C releases A and A agrees to pay to B the indebtedness originally owed by him to C is not infrequently made. This kind of contract is called a novation. The clause of the statute of frauds under discussion does not apply to it, as it is not primarily a promise by A to pay C's debt, but a promise by A to pay his own debt. Hence it is not a promise to pay the debt of "another," although the transaction has the effect of discharging C's debt to B. Furthermore, C's liability to B is discharged by the transaction and no liability of "another" remains in existence. Accordingly A does not undertake to answer for the liability of another.¹

It is therefore necessary to bring a case within the principle of novation contracts that the original debtor should be released from liability. If he remains bound, the contract cannot be a

⁹ Lamkin v. Palmer, 164 N. Y. 201; 58 N. E. 123; Bailey v. Marshall, 174 Pa. St. 602; 34 Atl. 326.

¹⁰ Tanquary v. Walker, 47 Ill. App. 451.

¹¹ Joseph v. Smith, 39 Neb. 259; 42 Am. St. Rep. 571; 57 N. W. 1012.

¹ Dillaby v. Wilcox, 60 Conn. 71; 25 Am. St. Rep. 299; 13 L. R. A. 643; 22 Atl. 491; Pratt's Appeal, 41 Conn. 191; Packer v. Benton, 35 Conn. 343; 95 Am. Dec. 246; Lindley v. Simpson, 45 Ill. App. 648; Hyatt v. Bonham, 19 Ind. App. 256; 49 N. E. 361; Fain v. Turner, 96 Ky. 634; 29 S. W. 628; Griffin v.

Cunningham, 183 Mass. 505; 67 N. E. 660; Trudeau v. Poutre, 165 Mass. 81; 42 N. E. 508; Eden v. Chaffee, 160 Mass. 225; 35 N. E. 675; Martin v. Curtis, 119 Mich. 169; 77 N. W. 690; Hummel's Estate, 55 Minn. 315; *sub nomine*, Haggemiller v. Passavant, 56 N. W. 1064; Wilson v. Vass, 54 Mo. App. 221; Mallory v. Gillett, 21 N. Y. 412; Warren v. Smith, 24 Tex. 484; 76 Am. Dec. 115; First National Bank v. Border, 9 Tex. Civ. App. 670; 29 S. W. 659; Bates v. Sabin, 64 Vt. 511; 24 Atl. 1013; Putnam v. Farnham, 27 Wis. 187; 9 Am. Rep. 459.

novation and the statute of frauds applies.² Thus, where B took C's note under such circumstances as not to extinguish his claim against C, and A agreed to discount C's note without recourse on B,³ or B has pledged C's claim and cannot release it,⁴ the contract is essentially one to answer for the debt of "another."

The original debtor must assent to the contract to make it a novation. If he does not assent, he is not released, nor is his debtor; and the contract between A and B not only lacks consideration but is within the statute of frauds.⁵ Thus where the proposition was made to the original debtor when he was "too sick to talk" and he neither accepted nor rejected it, the contract between A and B was within the statute.⁶ The intention of the parties to effect a novation depends upon the construction of the contract as a whole. On the one hand a promise "to pay and guarantee" the debt of another was held to contemplate his discharge from liability.⁷ On the other an offer by a wife, with reference to her husband's note, "I will pay this note when it comes due"; accepted "I will take you, then, in your husband's place," was held from the entire contract not to contemplate the husband's discharge from liability thereon.⁸

§630. Promise to "answer for" antecedent liability.

Where A promises to pay a pre-existing debt of C's to B in case C does not pay it, and C's liability to B is unaffected, A's promise is within the statute.¹ Thus where the administrator of

² Perkins v. Hershey, 77 Mich. 504; 43 N. W. 1021; Hanson v. Nelson, 82 Minn. 220; 84 N. W. 742; Giles v. Mahoney, 79 Minn. 309; 82 N. W. 583; Nelson v. Larson, 57 Minn. 133; 58 N. W. 687; Cornwell v. Megins, 39 Minn. 407; 40 N. W. 610; Haeberle v. O'Day, 61 Mo. App. 390.

³ Dougherty v. Bash, 167 Pa. St. 429; 31 Atl. 729; citing and following Mallet v. Bateman, L. R. 1 C. P. 163.

⁴ Haeberle v. O'Day, 61 Mo. App. 390.

⁵ Hanson v. Nelson, 82 Minn. 220; 84 N. W. 742.

⁶ Hanson v. Nelson, 82 Minn. 220; 84 N. W. 742.

⁷ Packer v. Benton, 35 Conn. 343; 95 Am. Dec. 246.

⁸ Giles v. Mahoney, 79 Minn. 309; 82 N. W. 583.

¹ Harris v. Frank, 81 Cal. 280; 22 Pac. 856; Turner v. Hubbell, 2 Day (Conn.) 457; 2 Am. Dec. 115;

a mortgagee's estate promises a tax collector to pay a tax levied against mortgagor if he will forbear to levy on the mortgaged property,² or where the widow of a decedent promises to pay a claim for taxes owing from such decedent and paid by another if such other would refrain from suit to enforce such claim,³ or where a vendor of land covenants that a certain railroad near such land will operate permanently,⁴ such promise is within the statute. Where B incorporates an item for which C is liable into his account against A, and by A's verbal agreement the entire account becomes an account stated, the statute nevertheless applies to the item for which C was liable.⁵

Cross v. Kistler, 14 Colo. 571; 23 Pac. 903; Hersey v. Tully, 8 Colo. App. 110; 44 Pac. 854; Bluthenthal v. Moore, 111 Ga. 297; 36 S. E. 689; Flanagan v. Scott, 102 Ga. 399; 31 S. E. 23; Calverly v. Wirth, 59 Ill. App. 553; Hahn v. Maxwell, 33 Ill. App. 261; Blumenthal v. Tibbits, 160 Ind. 70; 66 N. E. 159; Brant v. Johnson, 46 Kan. 389; 26 Pac. 735; Strickland v. Hamlin, 87 Me. 81; 32 Atl. 732; Richardson v. Williams, 49 Me. 558; Stewart v. Campbell, 58 Me. 439; 4 Am. Rep. 296; Doyle v. White, 26 Me. 341; 45 Am. Dec. 110; Slingluff v. Supply Co., 89 Md. 557; 43 Atl. 759; Ames v. Foster, 106 Mass. 400; 8 Am. Rep. 343; Nelson v. Boynton, 3 Met. (Mass.) 396; 37 Am. Dec. 148; Dean v. Ellis, 108 Mich. 240; 65 N. W. 971; Preston v. Zekind, 84 Mich. 641; 48 N. W. 180; Perkins v. Hershey, 77 Mich. 504; 43 N. W. 1021; Stewart v. Jerome, 71 Mich. 201; 15 Am. St. Rep. 252; 38 N. W. 895; Wallace v. Wortham, 25 Miss. 119; 57 Am. Dec. 197; Bissig v. Britton, 59 Mo. 204; 21 Am. Rep. 379; Nunn v. Carroll, 83 Mo. App. 135; Simpson v. Harris, 21 Nev. 353; 31 Pac. 1009; Chesebrough v. Tirrill, 61 N. J. L. 628; 41 Atl. 215; Ackley v. Parmenter, 98 N. Y.

425; 50 Am. Rep. 693; Belknap v. Bender, 75 N. Y. 446; 31 Am. Rep. 476; Duffy v. Wunsch, 42 N. Y. 243; 1 Am. Rep. 514; Mallory v. Gillett, 21 N. Y. 412; Carville v. Crane, 5 Hill (N. Y.) 483; 40 Am. Dec. 364; Haun v. Burrell, 119 N. C. 544; 26 S. E. 111; Pinson v. Prentise, 8 Okla. 143; 56 Pac. 1049; Gump v. Halberstadt, 15 Or. 356; 15 Pac. 467; Branson v. Kitchenman, 148 Pa. St. 541; 24 Atl. 61; Allshouse v. Ramsey, 6 Whart. (Pa.) 331; 37 Am. Dec. 417; Taylor v. Drake, 4 Strobb. Law. (S. C.) 431; 53 Am. Dec. 680; Durham v. Arledge, 1 Strobb. Law. (S. C.) 5; 47 Am. Dec. 544; Rentfrow v. Lancaster, 10 Tex. Civ. App. 321; 31 S. W. 229; Hughes v. Frum, 41 W. Va. 445; 23 S. E. 604; Gray v. Herman, 75 Wis. 453; 6 L. R. A. 691; 44 N. W. 248; Hooker v. Russell, 67 Wis. 257; 30 N. W. 358.

² Dillaby v. Wilcox, 60 Conn. 71; 25 Am. St. Rep. 299; 13 L. R. A. 643; 22 Atl. 491.

³ Blumenthal v. Tibbits, 160 Ind. 70; 66 N. E. 159.

⁴ Bradfield v. Land Co., 93 Ala. 527; 8 So. 383.

⁵ Martyn v. Arnold, 36 Fla. 446; 18 So. 791.

Since for purposes of doing business a corporation is a legal entity distinct from its officers and stockholders, a promise by an officer,⁶ stockholder⁷ or receiver⁸ of a corporation binding himself personally to pay the debts of the corporation is within the statute. So where a cashier of a bank is not personally liable for loss on a loan made by him, his promise to pay such debt if the debtor does not is within the statute.⁹ If C claims a commission from A, the former owner of realty, for effecting a sale thereof to B, B's promise to C to pay such commission is within the statute.¹⁰

§631. Promise to "answer for" contemporaneous liability.

Where A promises to pay to B a liability of C's incurred at the time that A's promise is made, if C does not pay it, as where B furnishes C with goods,¹ such as lumber² or fodder for horses,³ or renders services,⁴ or where B leases realty to C,⁵ or furnishes board to C,⁶ such promises are included in this clause of the statute.

⁶ Beattie v. Dinnick, 27 Ont. 285; Temple v. Bush, 76 Conn. 41; 55 Atl. 557; Ramsdell v. Power Co., 103 Mich. 89; 61 N. W. 275.

⁷ Trustees, etc., v. Flint, 13 Met. (Mass.) 539; Searight v. Payne, 2 Tenn. Ch. 175.

⁸ Bray v. Parcher, 80 Wis. 16; 27 Am. St. Rep. 17; 49 N. W. 111.

⁹ First National Bank v. Gaddis, 31 Wash. 596; 72 Pac. 460.

¹⁰ Wulff v. Lindsay, — Ariz. —; 71 Pac. 963.

¹ Tevis v. Savage, 130 Cal. 411; 62 Pac. 611; Schotte v. Puscheck, 79 Ill. App. 31; Indiana Trust Co. v. Finitzer, 160 Ind. 647; 67 N. E. 520; Newman v. Newman, 7 Kan. App. 77; 52 Pac. 908; Goodman v. Felcher, 116 Mich. 348; 74 N. W. 511; Loonie v. Hogan, 9 N. Y. 435; 61 Am. Dec. 683; Putnam Machine Co. v. Cann, 173 Pa. St. 392; 34 Atl. 67.

² Webb v. Lumber Co., 101 Ala. 630; 14 So. 407; Engleby v. Harvey, 93 Va. 440; 25 S. E. 225.

³ Stevens v. Mayberry, 82 Me. 65; 19 Atl. 92.

⁴ Walker v. Irwin, 94 Ia. 448; 62 N. W. 785 (services of an attorney); Slone v. Berlin, 88 Ia. 205; 55 N. W. 341 (services of a teacher); Chappell v. Barkley, 90 Mich. 35; 51 N. W. 351 (services of a physician); Russell v. Fenner, 21 Ohio C. C. 527; 11 Ohio C. D. 754; Aldrich v. Jewell, 12 Vt. 125; 36 Am. Dec. 330.

⁵ Moses v. Norton, 36 Me. 113; 58 Am. Dec. 738; Koenig v. Brewery Co., 38 Mo. App. 182; Riegelman v. Focht, 141 Pa. St. 380; 23 Am. St. Rep. 293; 21 Atl. 601.

⁶ Perkins v. Westcoat, 3 Colo. App. 338; 33 Pac. 139; Price v. R. R., 40 Mo. App. 189.

§632. What shows intention to assume primary liability.

What form of words shows an intention to assume a primary liability for the debt in question cannot be determined in advance by arbitrary rules. Promises to "see that B is paid,"¹ that "B will get his pay,"² to "see him through," referring to the original debtor,³ or that "whatever sum should become due should be paid by" C,⁴ are held to import a promise to pay the debt of another.

On the other hand, there are many authorities which hold that a promise to "see that B is paid" is not necessarily a promise to answer for the debt of another, but may be a promise incurring primary liability.⁵ These are cases where from the entire transaction, including the relationship of the various parties to the transaction, the court found that the real intention of the parties was to incur a primary liability.⁶

A promise to "pay" or to "assume"⁸ a certain obligation ordinarily imports a primary obligation. A promise to "pay and guarantee" C's debt has been held to create liability to pay one's own debt.⁹

On the other hand, a promise to "pay B if C does not" imports a liability dependent on the debt of another.¹⁰ So a prom-

¹ Jenkins, etc., Co. v. Lundgren, 85 Ill. App. 494; Butters, etc., Co. v. Vogel, 130 Mich. 33; 89 N. W. 560; Garrett-Williams Co. v. Hamill, 131 N. C. 57; 42 S. E. 448; Birchall v. Neaster, 36 O. S. 331; Lewis v. Mfg. Co., 156 Pa. St. 217; 27 Atl. 20.

² Fuller, etc., Co. v. Houseman, 117 Mich. 553; 76 N. W. 77.

³ Malone v. Ice Co., 88 Wis. 542; 60 N. W. 999.

⁴ Harris v. Harris, 9 Colo. App. 211; 47 Pac. 841.

⁵ Davis v. Patrick, 141 U. S. 479; Berkowsky v. Viall, 66 Ill. App. 349; Phelps v. Stone, 172 Mass. 355; 52 N. E. 517; Amort v. Chistofferson, 57 Minn. 234; 59 N. W. 304; Osborn v. Emery, 51 Mo. App.

408; Raabe v. Squier, 148 N. Y. 81; 42 N. E. 516; Meldrum v. Kenefick, 15 S. D. 370; 89 N. W. 863.

⁶ In Davis v. Patrick, 141 U. S. 479, 489, the court said: "The real character of a promise does not depend altogether upon the form of expression but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a direct or a collateral promise."

⁷ Herendeen Mfg. Co. v. Moore, 66 N. J. L. 74; 48 Atl. 525.

⁸ Schultz v. Babcock, 64 Ill. App. 199.

⁹ Packer v. Benton, 35 Conn. 343; 95 Am. Dec. 246.

¹⁰ Warner v. Willoughby, 60

ise "if he fails to pay I will" has been held a promise to pay the debt of another.¹¹ An offer "I will pay this debt when it comes due," accepted "very well, I will take you, then, in your husband's place," has been held a promise to pay the debt of another.¹²

§633. Application of foregoing rules to building contracts.

A common illustration of these rules is found where A owns realty, lets a contract to C for erecting a building thereon and subsequently finding that C cannot get credit from B, A agrees to pay B for certain articles to be furnished by B to C for use on A's property. In such cases if A's promise is such as to make him primarily liable, his promise is not within this clause of the statute of frauds.¹ Similar considerations control A's promise to pay B for labor done for C.² The same rule applies where A is the chief contractor, C a subcontractor and A promises B to pay for supplies furnished to C.³ If, on the other

Conn. 468; 25 Am. St. Rep. 343; 22 Atl. 1014.

¹¹ Garrett-Williams Co. v. Hamill, 131 N. C. 57; 42 S. E. 448.

¹² Giles v. Mahoney, 79 Minn. 309; 82 N. W. 583. (The only consideration being an extension of time to the husband.)

¹ Buchanan v. Moran, 62 Conn. 83; 25 Atl. 396; Craft v. Kendrick, 39 Fla. 90; 21 So. 803; Sext v. Geise, 80 Ga. 698; 6 S. E. 174; Berkowsky v. Viall, 66 Ill. App. 349; Schultz v. Babcock, 64 Ill. App. 199; Cornell v. Electric Co., 61 Ill. App. 325; Lynch v. Smith, 50 Ill. App. 668; Gibson County Commissioners v. Heating Co., 128 Ind. 240; 12 L. R. A. 502; 27 N. E. 612; Cedar Valley Mfg. Co. v. Starbald (Ia.), 89 N. W. 14; Hall v. Alford, 105 Ky. 664; 49 S. W. 444; Phelps v. Stone, 172 Mass. 355; 52 N. E. 517; Rand v. Mather, 11 Cush.

(Mass.) 1; 59 Am. Dec. 131; Wilhelm v. Voss, 118 Mich. 106; 76 N. W. 308; McLaughlin v. Austin, 104 Mich. 489; 62 N. W. 719; Lamont v. La Fevre, 96 Mich. 175; 55 N. W. 687; Bice v. Building Co., 96 Mich. 24; 55 N. W. 382; Herendeen Mfg. Co. v. Moore, 66 N. J. L. 74; 48 Atl. 525; Crawford v. Edison, 45 O. S. 239; 13 N. E. 80.

² Franks v. Stevens, 82 Mich. 192; 46 N. W. 369; Lewis v. Mfg. Co., 156 Pa. St. 217; 27 Atl. 20. In Wilhelm v. Voss, 118 Mich. 106; 76 N. W. 308, it was said that if B abandons his contract with C and looks to A alone, the statute of frauds does not apply, but that otherwise it does.

³ Ledbetter v. McGhees, 84 Ga. 227; 10 S. E. 727; Barras v. Coal Co., 38 Neb. 311; 56 N. W. 890; Mackey v. Smith, 21 Or. 598; 28 Pac. 974.

hand, A's promise, whether he is owner or contractor, leaves C still liable, and is merely a promise to pay C's debt in case C does not pay it, the statute of frauds applies.⁴ Thus where the subcontractor asked the owner on settlement with the contractor to withhold the amount due from such contractor to such subcontractor, and the owner replied that he would have to pay the contractor when he called for his money, it was held that if such answer purported to create any sort of liability it was liability for the debt of another.⁵

§634. Contracts of indemnity.

If A promises to indemnify B against certain liabilities, the question of the application of this clause of the statute of frauds depends on A's previous relation to such liability. If the liability is A's primarily and A induces B to assume this liability to C by promising to indemnify B, A's promise is to pay his own debt, not that of another, and the contract is not within the statute.¹ Thus if A induces B to become surety for him,² or for himself and X,³ though the business is conducted in the name of X alone,⁴ or to accept a bill of exchange drawn on B by A⁵ under promise by A to indemnify B against loss by reason

⁴ Warner v. Willoughby, 60 Conn. 468; 25 Am. St. Rep. 343; 22 Atl. 1014; Heggie v. Smith, 87 Ill. App. 141; Wookey v. Slemmons, 65 Ill. App. 553; Parker v. Dillingham, 129 Ind. 542; 29 N. E. 23; Gill v. Her- rick, 111 Mass. 501; Fuller, etc., Co. v. Houseman, 117 Mich. 553; 76 N. W. 77; Dupius v. Improvement Co., 88 Mich. 103; 50 N. W. 103; Birchall v. Neaster, 36 O. S. 331; Lewis v. Mfg. Co., 156 Pa. St. 217; 27 Atl. 20; Loftus v. Ivy, 14 Tex. Civ. App. 701; 37 S. W. 766.

⁵ Wood v. R. R., 131 N. C. 48; 42 S. E. 462.

¹ Lerch v. Gallup, 67 Cal. 595; 8 Pac. 322; Smith v. Delaney, 64 Conn. 264; 42 Am. St. Rep. 181; 29

Atl. 496; Tighe v. Morrison, 116 N. Y. 263; 5 L. R. A. 617; 22 N. E. 164; Mays v. Joseph, 34 O. S. 22; Evans v. Mason, 1 Lea (Tenn.) 26; Farnum v. Chapman, 61 Vt. 395; 18 Atl. 152; Barth v. Graf, 101 Wis. 27; 76 N. W. 1100.

² Barry v. Ransom, 12 N. Y. 462; Barth v. Graf, 101 Wis. 27; 76 N. W. 1100. See a similar principle in § 621.

³ Tighe v. Morrison, 116 N. Y. 263; 5 L. R. A. 617; 22 N. E. 164 (A and X being administrators).

⁴ Smith v. Delaney, 64 Conn. 264; 42 Am. St. Rep. 181; 29 Atl. 496.

⁵ Guild v. Conrad (1894), 2 Q. B. 885.

of such transaction, A's promise is not within the statute of frauds. So if A is already liable as surety for C, and he promises B to repay any money advanced by C to pay such debt, his promise is not within the statute.⁶

If A, in order to induce B to become surety for C, promises to indemnify him against any loss arising out of such suretyship, the question of the application of the statute of frauds depends on the view of such transaction taken by the courts. A's promise may be regarded as a promise to B to pay B's debt to the obligee. If this view of the essential nature of the transaction is entertained, A's promise is not within the statute of frauds.⁷ Other authorities look on A's promise as a promise to pay C's debt to B if C does not, and hence within the statute.⁸ Thus a promise by a payee to save certain makers harmless is within the statute,⁹ and so is a contract between creditors who are working together to collect their claims whereby they agree to pro rate any loss which either sustains in enforcing his claim.¹⁰ If A is surety for B and C, and to induce B to pay the entire

⁶ Sweet v. Colleton, 96 Mich. 391; 55 N. W. 984.

⁷ Marey v. Crawford, 16 Conn. 549; 41 Am. Dec. 158; Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162; overruling, Brush v. Carpenter, 6 Ind. 78; Mills v. Brown, 11 Ia. 314; George v. Hoskins (Ky.), 30 S. W. 406; Jones v. Letcher, 13 B. Mon. 363; Aldrich v. Ames, 9 Gray (Mass.) 76; Boyer v. Soules, 105 Mich. 31; 62 N. W. 1000; Esch v. White, 76 Minn. 220; 78 N. W. 1114; Fidelity, etc., Co. v. Lawler, 64 Minn. 144; 66 N. W. 143; Minick v. Huff, 41 Neb. 516; 59 N. W. 795; Cortelyou v. Hoagland, 40 N. J. Eq. 1; Sanders v. Gillespie, 59 N. Y. 250; Harrison v. Sawtel, 10 Johns. (N. Y.) 242; 6 Am. Dec. 337; Beaman v. Russell, 20 Vt. 205; 49 Am. Dec. 775; Faulkner v. Thomas, 48 W. Va. 148; 35 S. E. 915; Vogel v.

Melms, 31 Wis. 306; 11 Am. Rep. 608.

⁸ Spear v. Bank, 156 Ill. 555; 41 N. E. 164; affirming, 49 Ill. App. 509; May v. Williams, 61 Miss. 125; 48 Am. Rep. 80; Hurt v. Ford, 142 Mo. 283; 41 L. R. A. 823; 44 S. W. 228; Bissig v. Britton, 59 Mo. 204; 21 Am. Rep. 379; Hartley v. Sandford, 66 N. J. L. 627; 55 L. R. A. 206; 50 Atl. 454; reversing, 48 Atl. 1009; Kelsey v. Hibbs, 13 O. S. 340; Easter v. White, 12 O. S. 219; Nugent v. Wolfe, 111 Pa. St. 471; 56 Am. Rep. 291; 4 Atl. 15; Wolverton v. Davis, 85 Va. 64; 17 Am. St. Rep. 56; 6 S. E. 619.

⁹ Hurt v. Ford, 142 Mo. 283; 41 L. R. A. 823; 44 S. W. 228.

¹⁰ Spear v. Bank, 156 Ill. 555; 41 N. E. 164; affirming, 49 Ill. App. 509.

debt A agrees to indemnify him for one-half the amount, A's promise is within the statute.¹¹

The confusion in the American authorities is due largely to their adherence to different inconsistent English authorities. The original English rule was that such a contract was not within the statute.¹² This case was subsequently either distinguished or overruled,¹³ and finally *Green v. Creswell* was overruled¹⁴ and the original doctrine established. The vacillation in England has led, first, to the division in American cases already set forth; and, second, to an attempt on the part of some courts to distinguish the cases where A is also a surety with B from those where B becomes a surety and A does not.

If A is already liable as surety for C, and to induce B to sign as co-surety A promises to indemnify him against loss, some authorities hold that such promise is within the statute,¹⁵ others that it is not.¹⁶

Agreements between indorsers of the same instrument,¹⁷ or co-sureties,¹⁸ fixing the amounts of their respective liabilities, are generally held not to be within the statute.

If there is no specific liability of C's against the effect of which A promises B indemnity, A's promise is not within the statute.¹⁹ Hence A's promise to save B harmless from liability

¹¹ *Cheesman v. Wiggins*, 122 Ind. 352; 23 N. E. 945.

¹² *Thomas v. Cook*, 8 Barn. & Cres. 728 (where A was a party to the instrument).

¹³ *Green v. Creswell*, 10 Ad. & El. 453 (A was not a party). The court said that the doctrine of *Thomas v. Cook*, *supra*, "taken in its full extent would repeal the statute."

¹⁴ *Wildes v. Dudlow*, L. R. 19 Eq. 198.

¹⁵ *Wolverton v. Davis*, 85 Va. 64; 17 Am. St. Rep. 56; 6 S. E. 619.

¹⁶ *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Ferrell v. Maxwell*, 28 O. S. 383; 22 Am. Rep. 393.

¹⁷ *Phillips v. Preston*, 5 How. (U. S.) 278; *Weeks v. Parsons*, 176 Mass. 570; 58 N. E. 157; *Faulkner v. Thomas*, 48 W. Va. 148; 35 S. E. 915.

¹⁸ *Rose v. Wollenberg*, 31 Or. 269; 65 Am. St. Rep. 826; 39 L. R. A. 378; 44 Pac. 382.

¹⁹ See § 617.

"If a promise of indemnity be not collateral to the liability of some other person to the same party to whom the promise is made it is not within the statute." *Beaman v. Russell*, 20 Vt. 205; in syllabus, quoted in *Merchant v. O'Rourke*, 111 Ia. 351, 355; 82 N. W. 759.

on corporate stock,²⁰ or a contract to insure,²¹ or re-insure,²² are none of them within the statute.

IV. CONTRACTS IN CONSIDERATION OF MARRIAGE.

§635. Contracts in consideration of marriage.

This clause of the statute is held not to include contracts to intermarry.¹

According to some authorities it does not include contracts between two persons about to intermarry concerning their respective property rights,² nor indeed any promise which does not rest upon marriage as its sole consideration.³ Such contracts may, however, be affected by the clause in the statute of frauds with reference to conveyances of realty or some interest therein.⁴ In other jurisdictions contracts between parties about to intermarry adjusting their respective property rights are within this clause of the statute.⁵ All courts agree that this

²⁰ *Merchant v. O'Rourke*, 111 Ia. 351; 82 N. W. 759.

²¹ *Eames v. Ins. Co.*, 94 U. S. 621; *Franklin Ins. Co. v. Colt*, 20 Wall (U. S.) 560; *King v. Cox*, 63 Ark. 204; 37 S. W. 877; *Ins. Co. v. Kuessner*, 164 Ill. 275; 45 N. E. 540; *Western Assurance Co. v. McAlpin*, 23 Ind. App. 220; 77 Am. St. Rep. 423; 55 N. E. 119; *Davenport v. Ins. Co.*, 17 Ia. 276; *Phoenix Ins. Co. v. Ireland*, 9 Kan. App. 644; 58 Pac. 1024; *Howard Ins. Co. v. Owens*, 94 Ky. 197; 21 S. W. 1037; *Sanford v. Ins. Co.*, 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883; *Campbell v. Ins. Co.*, 73 Wis. 100; 40 N. W. 661; *Angell v. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322.

²² *Bartlett v. Ins. Co.*, 77 Ia. 155; 41 N. W. 601.

¹ *Caylor v. Roe*, 99 Ind. 1; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; 17 Am. Dec. 44.

² *Riley v. Riley*, 25 Conn. 154;

Rainbolt v. East, 56 Ind. 538; 26 Am. Rep. 40; *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663; 31 L. R. A. 810; 34 S. W. 489. Such promise is said to be "not in consideration of marriage although it was made in contemplation of marriage." *Riley v. Riley*, 25 Conn. 154, 159. "The contract in this case between the parties was not made in consideration of marriage, but rather in contemplation of marriage, and the consideration was the mutual relinquishment of prospective property rights." *Rainbolt v. East*, 56 Ind. 538, 539; 26 Am. Rep. 40.

³ *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404; 47 N. W. 615.

⁴ *Rainbolt v. East*, 56 Ind. 538; 26 Am. Rep. 40.

⁵ *Keady v. White*, 168 Ill. 76; 48 N. E. 314; affirming, 69 Ill. App. 405; *Powell v. Meyers* (Ky.), 64 S. W. 428; *Finch v. Finch*, 10 O. S. 501; *Stanley v. Madison*, 11 Okla.

clause includes contracts for conveying anything of value upon the sole consideration of marriage,⁶ even if no realty is to be conveyed and the contract is to be performed within the year.⁷

V. CONTRACT OR SALE OF LANDS, TENEMENTS OR HEREDITA- MENTS.

§636. Scope of clause.

The wording of this clause of the statute shows the legislative intention to include contracts of every sort which affect the title to realty or any interest therein. Accordingly a discussion of this clause necessarily involves two general topics: First, what are included in the words "lands, tenements or hereditaments or any interest in or concerning them"; and, second, what contracts affect such interests so as to come within this clause of the statute.

In discussing the wording of this clause it is generally assumed that words "contract or sale" are misused for "contract for the sale." It is dangerous to construe a statute on the theory that the legislature misused language. The statute of frauds was passed in England after much consideration, and the clause in question has been adopted by the legislatures of many states in the exact words of the English statute. The construction of this section includes releases, creation of liens and contracts for the possession of realty within the meaning of "contract or sale." It may at least be open to conjecture whether so broad a scope would at the outset have been given to the words "contract for the sale."

288; 66 Pac. 280; Hannon v. Hounihan, 85 Va. 429; 12 S. E. 157.

⁶ Lloyd v. Fulton, 91 U. S. 479; Peek v. Peek, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; Moore v. Allen, 26 Colo. 197; 77 Am. St. Rep. 255; 57 Pac. 698; McAnnulty v. McAnnulty, 120 Ill.

26; 60 Am. Rep. 552; 11 N. E. 397; Brenner v. Brenner, 48 Ind. 262; White v. Bigelow, 154 Mass. 593; 28 N. E. 904; Chase v. Fitz, 132 Mass. 359; Manning v. Riley, 52 N. J. Eq. 39; 27 Atl. 810; Henry v. Henry, 27 O. S. 121.

⁷ Brenner v. Brenner, 48 Ind. 262.

§637. Duration of estates included in this clause.—Freeholds.

Any estate in realty is included within the meaning of the words under discussion. Thus estates in fee¹ or for life² are, of course, included.

§638. Estates for years.

An oral contract to lease realty for a term of years is within the statute if not specifically excepted therefrom.¹ Hence a written contract for a lease, subsequently, before acceptance, modified over the telephone and accepted orally as modified, is within the statute.² So an oral contract to extend a lease for years,³ or to assign a lease for years,⁴ or to surrender a lease for

¹McKinnon v. Mixon, 128 Ala. 612; 29 So. 690; Manning v. Pippen, 86 Ala. 357; 11 Am. St. Rep. 46; 5 So. 572; Pond v. Sheean, 132 Ill. 312; 8 L. R. A. 414; 23 N. E. 1018; Austin v. Davis, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; Jackson v. Myers, 120 Ind. 504; 22 N. E. 90; 23 N. E. 86; McLennan v. Boutell, 117 Mich. 544; 76 N. W. 75; McDonald v. Maltz, 78 Mich. 685; 44 N. W. 337; Fergusson v. Improvement Co., 56 Minn. 222; 57 N. W. 480; Taylor v. Von Schroeder, 107 Mo. 206; 16 S. W. 675; Bloomfield State Bank v. Miller, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569; Jordan v. Furnace Co., 126 N. C. 143; 78 Am. St. Rep. 644; 35 S. E. 247; Kling v. Bordner, 65 O. S. 86; 61 N. E. 148; Cleveland v. Evans, 5 S. D. 53; 58 N. W. 8; Swash v. Sharpstein, 14 Wash. 426; 32 L. R. A. 796; 44 Pac. 862.

²Such as dower, Brown v. Rawlings, 72 Ind. 505; Gordon v. Gordon, 54 N. H. 152; Keeler v. Tatnell, 23 N. J. L. 62. Even if unassigned; Finch v. Finch, 10 O. S. 501.

¹Bailey v. Ferguson, 39 Ill. App. 91; Emery v. Terminal Co., 178 Mass. 172; 86 Am. St. Rep. 473; 59 N. E. 763; Smalley v. Mitchell, 110 Mich. 650; 68 N. W. 978; Smith v. Phillips, 69 N. H. 470; 43 Atl. 183; Unglish v. Marvin, 128 N. Y. 380; 28 N. E. 634; Browning v. Berry, 107 N. C. 231; 10 L. R. A. 726; 12 S. E. 195; Jordan v. Furnace Co., 126 N. C. 143; 78 Am. St. Rep. 644; 35 S. E. 247; Davis v. Pollock, 36 S. C. 544; 15 S. E. 718; Schulz v. Schirmer (Tex.), 49 S. W. 246; Utah Optical Co. v. Keith, 18 Utah 464; 56 Pac. 155.

²Wiessner v. Ayer, 176 Mass. 425; 57 N. E. 672. (The written offer was not accepted, and the offer as accepted was partly oral.)

³Sidebotham v. Holland (1895), 1 Q. B. 378; Emery v. Terminal Co., 178 Mass. 172; 86 Am. St. Rep. 473; 59 N. E. 763.

⁴Chicago Attachment Co. v. Machine Co., 142 Ill. 171; 15 L. R. A. 754; 31 N. E. 438; affirming on rehearing, 28 N. E. 959; reversing, 25 N. E. 669. (Distinguishing Webster v. Nichols, 104 Ill. 160, as a

years,⁵ or to sublet realty held by lease,⁶ are each of them within the statute.

A complication in the law of estates for years arises out of exceptions to the statute of frauds specifically made in their favor, and of questions of the effect of such exceptions or of part performance upon the clause of the statute concerning contracts not to be performed within the year. Short leases, usually of from one to three years, are in some jurisdictions specifically excepted from the operation of the statute of frauds.⁷ The original statute of frauds excepted leases for three years or less.⁸ The proviso that the rent reserved in such leases must amount to "two-thirds part at the least of the thing demised" refers to two-thirds of the rental value and not of the fee.⁹ Where such a statute is in force an additional statute making such short leases valid without acknowledgment and the like does not prevent them from being excepted from the statute of frauds.¹⁰ Under a statute of frauds which excepts leases for a year from its operation as far as it deals with realty, a contract for a lease for a year to begin in the future is not within the operation of the clause concerning interests in realty.¹¹ Whether it is a contract which cannot be performed within a year from the date of the making thereof, and hence within another clause of the statute, is a question upon which the courts have divided. Some courts hold that such contracts are not within the clause of the statute concerning contracts which cannot be performed within the year.¹² Two reasons are advanced for this view:

case in which the oral assignment of a lease was upheld because the statute of frauds was not pleaded.) *Kingsley v. Siebrecht*, 92 Me. 23; 69 Am. St. Rep. 486; 42 Atl. 249; *Penney v. Lynn*, 58 Minn. 371; 59 N. W. 1043; *Nally v. Reading*, 107 Mo. 350; 17 S. W. 978; *Tiefenbrun v. Tiefenbrun*, 65 Mo. App. 253.

⁵ *Rees v. Lowy*, 57 Minn. 381; 59 N. W. 310.

⁶ *Fratcher v. Smith*, 104 Mich. 537; 62 N. W. 832.

⁷ *Hosli v. Yokel*, 57 Mo. App. 622.

⁸ *Childers v. Talbott*, 4 N. M. 336; 16 Pac. 275.

⁹ *Childers v. Lee*, 5 N. M. 576; 12 L. R. A. 67; 25 Pac. 781; *Childers v. Talbott*, 4 N. M. 336; 16 Pac. 275.

¹⁰ *Ward v. Hinckley*, 26 Wash. 539; 67 Pac. 220.

¹¹ *Higgins v. Gager*, 65 Ark. 604; 47 S. W. 848; *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; 18 N. W. 219.

¹² *Higgins v. Gager*, 65 Ark. 604; 47 S. W. 848; *Steininger v. Wil-*

First, that by specifically providing for leases for a year or more the legislature has manifested an intention to exempt such contracts altogether from the operation of the clause concerning contracts not to be performed within the year; second, that since taking possession under the lease is a performance of the contract, performance within the year is possible if the time at which the lease is to begin is within a year from the date of making the contract. In other jurisdictions a contract for a lease for a year to begin in the future is held to be within the clause concerning contracts not to be performed within the year.¹³ A contract for a lease for an indefinite time which may extend beyond a year,¹⁴ as a contract for the use of land by A until she receives out of the profits the amount sufficient to pay her for caring for promisor's father¹⁵ is within the statute. So a contract for a lease to end with an event which must in the course of nature last beyond a year, as a lease for one year, tenant to put in a crop of wheat, the harvesting of which cannot be finished for fifteen months after the term begins,¹⁶ is within the statute.

An oral lease for one year with the privilege of three has been held a lease for more than one year and hence within the statute.¹⁷ On the other hand, if a tenant holds over under an oral agreement for temporary occupation after the expiration of a lease which provided for a term of one year with an option for

liams, 63 Ga. 475; *St. Joseph Hydraulic Co. v. Paper Co.*, 156 Ind. 665; 59 N. E. 995; *Jones v. Marcy*, 49 Ia. 188; *Sobey v. Brisbee*, 20 Ia. 105; *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; 18 N. W. 219; *McCroy v. Toney*, 66 Miss. 233; 2 L. R. A. 847; 5 So. 392; *Ward v. Hasbrouck*, 169 N. Y. 407; 62 N. E. 434; *Becar v. Flues*, 64 N. Y. 518; *Young v. Dake*, 5 N. Y. 463; 55 Am. Dec. 356.

¹³ *White v. Levy*, 93 Ala. 484; 9 So. 164; *Cochran v. Ward*, 5 Ind. App. 89, 97; 51 Am. St. Rep. 229; 29 N. E. 795; 31 N. E. 581 (con-

struing the Illinois statute); *Greenwood v. Strother*, 91 Ky. 482; 16 S. W. 138; *Brosius v. Evans*, — Minn. —; 97 N. W. 373; *Cook v. Redman*, 45 Mo. App. 397; *Beiler v. Devoll*, 40 Mo. App. 251.

¹⁴ *Contra*, if terminable at will. *Hirsch v. Kohn*, 20 Ill. App. 330.

¹⁵ *Smalley v. Mitchell*, 110 Mich. 650; 68 N. W. 978.

¹⁶ *Carney v. Mosher*, 97 Mich. 554; 56 N. W. 935.

¹⁷ *Hand v. Osgood*, 107 Mich. 55; 61 Am. St. Rep. 312; 30 L. R. A. 379; 64 N. W. 867.

three, such oral agreement may be shown to relieve such tenant from liability for rent for the term of three years.¹⁸

If a written lease for a certain term provides that upon giving notice the lease is to continue for a given term further, the additional term depends for its validity upon the written lease. The notice, therefore, which fixes the right to the additional term is not within the statute of frauds.¹⁹ Thus even if a contract for an estate in realty can be executed only by an agent authorized in writing, a notice of the sort specified may be given by an agent without written authority.²⁰ So an agreement in the written lease providing for fixing the rent for the renewal period by having the property leased valued by appraisers, the rent to be a certain percentage of such value, does not make the renewal rest on oral agreement and is not within the statute.²¹ If a lease is made for more than one year in such form as not to be in compliance with the statute, though if for one year only, it would be within the statute, such lease cannot be separated and held valid for one year.²²

§639. Possessory rights and land certificates.

A possessory right to realty is an estate therein even if it may be thereafter adjudged to be inferior to the right of one claiming under paramount title. Accordingly a contract which deals with possessory rights is within the statute,¹ and as squatter's rights² or pre-emption rights,³ to specified realty, which are rights to hold possession as against all except the United States,

¹⁸ *Storch v. Harvey*, 45 Kan. 39; 25 Pac. 220.

¹⁹ *McClelland v. Rush*, 150 Pa. St. 57; 24 Atl. 354.

²⁰ *Sheppard v. Rosenkrans*, 109 Wis. 58; 83 Am. St. Rep. 886; 85 N. W. 199. (Decided under the Illinois statute, and distinguishing *Kollock v. Scribner*, 98 Wis. 104, as a case where the option was to "renew" or "extend" the old lease which was held to contemplate a new lease.)

²¹ *Norton v. Gall*, 95 Ill. 533; 35 Am. Rep. 173.

²² *Boderre v. Den*, 106 Cal. 594; 39 Pac. 946; *Talamo v. Spitzmiller*, 120 N. Y. 37; 17 Am. St. Rep. 607; 8 L. R. A. 221; 23 N. E. 980; *Thomas v. Nelson*, 69 N. Y. 121.

¹ *Lester v. White*, 44 Ill. 464; *East Omaha Land Co. v. Hansen*, 117 Ia. 96; 90 N. W. 705; *Hayes v. Skidmore*, 27 O. S. 331.

² *Hayes v. Skidmore*, 27 O. S. 331.

³ *Lester v. White*, 44 Ill. 464.

and upon certain conditions to acquire legal title from the United States, and yet give neither legal nor equitable interests in the realty.⁴ So an oral contract whereby one in possession agrees to surrender possession to one who claims such realty if a pending case is decided in favor of such claimant is not a lease, but is a contract for the transfer of realty and hence within the statute.⁵ So a contract between grantor and grantee reserving to grantor possession of the realty conveyed until part of the purchase money should be paid is within the statute.⁶ So in jurisdictions where a mortgagee has the right of possession of the realty in question before breach of the condition an oral agreement that the mortgagor should retain possession is within the statute.⁷

A certificate from the government securing a certain amount of land to the holder is not within the statute as long as it is not located as a specific tract.⁸ When once located it becomes an interest in realty.⁹

§640. Contracts concerning land of third person.

This clause includes contracts whereby A contracts with B to cause an interest in C's realty to be conveyed to B.¹ It is immaterial, under the language of the statute whether the realty which is the subject of the contract belongs to the promisor or not.

§641. Equitable estates.

Equitable estates in realty, as well as legal estates, are within this clause of the statute.¹ Thus if A has a valid contract with

⁴ *Lester v. White*, 44 Ill. 464.

⁵ *East Omaha Land Co. v. Hansen*, 117 Ia. 96; 90 N. W. 705.

⁶ *Gilbert v. Bulkley*, 5 Conn. 262; 13 Am. Dec. 57.

⁷ *Norton v. Webb*, 35 Me. 218.

⁸ *Reed v. McGrew*, 5 Ohio 375; *Miller v. Roberts*, 18 Tex. 16; 67 Am. Dec. 688; *Staley v. Hankla* (Tex. Civ. App.), 43 S. W. 20.

⁹ *Hughes v. Moore*, 7 Cranch. (U. S.) 176; *Masterson v. Little*, 75 Tex. 682; 13 S. W. 154.

¹ *Deiderick v. Alexander*, 58 Kan. 56; 48 Pac. 594; *Haeberle v. Day*, 61 Mo. App. 390.

¹ *Hughes v. Moore*, 7 Cranch. (U. S.) 176; *Richards v. Richards*, 9 Gray (Mass.) 313; *Scott v. McFarland*, 13 Mass. 309; *Wendover v.*

B for the purchase of certain realty, which is sufficient in equity to give A an equitable interest in such realty, a contract whereby A agrees to transfer his interest in such contract to X is within the statute.² So if A has bought an interest in realty at an execution sale,³ or a sale in foreclosure,⁴ a contract whereby he attempts to transfer such interest to X is within the statute.⁵ Hence if A and B have made a contract whereby A agrees to sell realty to B, and this contract is such as to pass to B either a legal or an equitable interest in such realty, an oral rescission of this contract is within the statute of frauds.⁶ However, under a contract which requires an interest in land to be transferred only by act or operation of law or by conveyance in writing subscribed by the party granting, it has been held that a surrender of a contract for the sale of realty, made by vendee to vendor with intent of both parties to extinguish vendee's equity, is a compliance with the statute.⁷ In most jurisdictions a conveyance absolute on its face cannot be turned into an express trust by oral agreement.⁸ In Ohio the courts have said that an oral contract may create an express trust, although the conveyance is absolute on its face,⁹ if the declaration of the trust

Baker, 121 Mo. 273; 25 S. W. 918; Bedell v. Tracy, 65 Vt. 494; 26 Atl. 1031; Cauble v. Worsham, 96 Tex. 86; 97 Am. St. Rep. 871; 70 S. W. 737.

² Richards v. Richards, 9 Gray (Mass.) 313.

³ Littell v. Jones, 56 Ark. 139; 19 S. W. 497; Whiting v. Butler, 29 Mich. 122.

⁴ Cox v. Roberts, 25 Ind. App. 252; 57 N. E. 937.

⁵ Whether the execution sale itself is within the statute see § 665.

⁶ Catlett v. Dougherty, 21 Ill. App. 116; Fisher v. Koontz, 110 Ia. 498; 80 N. W. 551 (citing Devin v. Himer, 29 Ia. 297; Dunlap v. Thomas, 69 Ia. 358; 28 N. W. 637; Stem v. Nysonger, 69 Ia. 512; 29 N. W. 433; Harlan v. Harlan, 102 Ia. 701; 72 N. W. 286); Grunow v.

Salter, 118 Mich. 148; 76 N. W. 325; Sanborn v. Murphy, 86 Tex. 437; 25 S. W. 610; affirming, 5 Tex. Civ. App. 509; 25 S. W. 459; Cunningham v. Cunningham, 46 W. Va. 1; 32 S. E. 998.

⁷ Hogue v. Ins. Co., 116 Wis. 656; 93 N. W. 849.

⁸ Sherman v. Sandell, 106 Cal. 373; 39 Pac. 797; Feeny v. Howard, 79 Cal. 525; 12 Am. St. Rep. 162; 4 L. R. A. 826; 21 Pac. 984; Hasshagen v. Hasshagen, 80 Cal. 514; 22 Pac. 294; Burden v. Sheridan, 36 Ia. 125; 14 Am. Rep. 505; Sturtevant v. Sturtevant, 20 N. Y. 39; 75 Am. Dec. 371.

⁹ Mannix v. Purcell, 46 O. S. 102; 15 Am. St. Rep. 562; 2 L. R. A. 753; 19 N. E. 572; Harvey v. Gardner, 41 O. S. 642; Ryan v. O'Connor, 41 O. S. 368; Mathews v. Leaman,

is contemporaneous with the conveyance.¹⁰ An implied trust can be proved by oral evidence.¹¹ As a rule, from the nature of the case, oral evidence is the only kind that is available in such cases, and to exclude it would be substantially the same as to refuse to enforce implied trusts.

In some jurisdictions a trust which can be shown only by oral evidence cannot be released even to the holder of the legal title by oral agreement.¹² If A has acquired the legal title to realty of which B is the owner in equity, under such circumstances that A may be held as trustee for B, as where A gets a patent from the government by making a wrongful use of the name of B, who owned a plat and a certificate of survey of such realty,¹³ a contract whereby B releases his claim to such realty is within the statute.

However, if a trust can be shown only by oral evidence, oral evidence is admissible to rebut such trust,¹⁴ and in some jurisdictions this rule has been extended so that oral evidence which does not deny the original existence of the trust is admitted to show that it has been released to the holder of the legal title,¹⁵ or to show that additional terms have been added to the trust by oral agreement.¹⁶ Under this view an oral agreement between A, who has agreed orally to buy realty from B and has been put in possession, and is to have the legal title on the payment of a certain sum, whereby it is further agreed that B is to retain the

24 O. S. 615. In many of these cases, however, either the evidence was in writing or the facts were such as to create an implied trust.

10 Russell v. Bruer, 64 O. S. 1; 59 N. E. 740.

11 Corr's Appeal, 62 Conn. 403; 26 Atl. 478; Towle v. Wadsworth, 147 Ill. 80; 30 N. E. 602; 35 N. E. 73; Maroney v. Maroney, 97 Ia. 711; 66 Pac. 911; Ripley v. Seligman, 88 Mich. 177; 50 N. W. 143; Newton v. Taylor, 32 O. S. 399; Currence v. Ward, 43 W. Va. 367; 27 S. E. 329.

12 Hughes v. Moore, 7 Cranch (U.

S.) 176; Darling v. Butler, 45 Fed. 332; 10 L. R. A. 469.

13 Hughes v. Moore, 7 Cranch. (U. S.) 176.

14 Livermore v. Aldrich, 5 Cush. (Mass.) 431; Wiser v. Allen, 92 Pa. St. 317.

15 Rogers v. Tyley, 144 Ill. 652; 32 N. E. 393; Stall v. Jones, 47 Neb. 706; 66 N. W. 653; Shaw v. Wallbridge, 33 O. S. 1; Temple v. Dodge, 11 Tex. Civ. App. 42; 31 S. W. 686.

16 Alemania, etc., Co. v. Franzreb, 56 O. S. 493; 47 N. E. 497.

legal title as security for a further sum loaned by B to A, is not within the statute.¹⁷

§642. Creation of mortgage or lien.

If a debt is incurred by an owner of realty under such circumstances that it does not become a lien upon such realty by the operation of law, an oral agreement by such owner that such debt shall be a lien upon such realty is a contract for an interest in realty, and is accordingly within the statute.¹ Thus an oral contract to give a mortgage,² as by deposit of title deeds,³ to modify a mortgage already given so as to secure debts other than those for which it was given,⁴ to pledge land for advances,⁵ as for advances made by a third person to enable promisor to pay his grantor for the realty⁶ or for indemnity against a breach of the covenants of warranty of a deed conveying other realty,⁷ a contract creating a mechanic's lien in a manner not provided

¹⁷ *Alemania, etc., Co. v. Franzreb*, 56 O. S. 493; 47 N. E. 497.

¹ *Driver v. Broad* (1893), 1 Q. B. 744; affirming (1893) 1 Q. B. 539; *Spies v. Price*, 91 Ala. 166; 8 So. 405; *Merchant v. Cook*, 7 App. D. C. 391; *Pierce v. Parrish*, 111 Ga. 725; 37 S. E. 79; *Vose v. Strong*, 144 Ill. 108; 33 N. E. 189; *Slack v. Collins*, 145 Ind. 569; 42 N. E. 910; *McCue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100; *Bender v. Zimmerman*, 122 Mo. 194; 26 S. W. 973; *Curle's Heirs v. Eddy*, 24 Mo. 117; 66 Am. Dec. 699; *Bloomfield State Bank v. Miller*, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569.

² To mortgage the fee, *Hackett v. Watts*, 138 Mo. 502; 40 S. W. 113; *Bloomfield State Bank v. Miller*, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569; *Brown v. Drew*, 67 N. H. 569; 42 Atl. 177; *Boehl v. Wadgymer*, 54 Tex. 589. *Contra*, *Roberge v. Winne*, 144 N. Y. 709; 39 N. E. 631. In this case A

gave B a worthless mortgage as part of an executed contract to exchange realty. A subsequently agreed to give B another mortgage on other realty. This contract was held not to be within the statute. The case was decided by a divided court and is not reported in full.

³ *Bloomfield State Bank v. Miller*, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569.

⁴ *Williams v. Hill*, 19 How. (U. S.) 246; *Pierce v. Parrish*, 111 Ga. 725; 37 S. E. 79; *Irwin v. Hubbard*, 49 Ind. 350; 19 Am. Rep. 679. A contract that a satisfied judgment shall stand as a lien for future advances is within the statute. *Truscott v. King*, 6 N. Y. 147.

⁵ *Curle's Heirs v. Eddy*, 24 Mo. 117; 66 Am. Dec. 699.

⁶ *Spies v. Price*, 91 Ala. 166; 8 So. 405; *McCue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100.

⁷ *Bender v. Zimmerman*, 122 Mo. 194; 26 S. W. 973.

for by statute,⁸ and a contract to give to one who is to perform certain services a certain per cent of the increase in the value of promisor's realty as compensation therefor,⁹ are all within this clause of the statute.

Assuming, then, that a mortgage or lien can be created only in compliance with this clause of the statute, we find four other questions involving the application of the statute of frauds to mortgages: (1) if the instrument is a deed in form can oral evidence be used to show that it is really a mortgage? (2) Can the right of redemption be created or extended by oral contract? (3) Can the equity of redemption be released orally? and (4) Can the mortgage be released orally? In each of the last three cases the mortgage may be created by (1) an instrument in form a mortgage, or (2) an instrument in form an absolute deed.

(1) A deed of realty, absolute on its face, may be shown by extrinsic evidence to be in reality a mortgage as between the parties thereto in a suit in equity.¹⁰ This is an illustration of

⁸ *Slack v. Collins*, 145 Ind. 569; 42 N. E. 910.

⁹ *Vose v. Strong*, 144 Ill. 108; 33 N. E. 189 (where treated as an equitable lien on the realty).

¹⁰ *Peugh v. Davis*, 96 U. S. 332; *Morris v. Nixon*, 1 How. (U. S.) 118; *Glass v. Heeronymus*, 125 Ala. 140; 82 Am. St. Rep. 225; 28 So. 71; *Reeves v. Abercrombie*, 108 Ala. 535; 19 So. 41; *Adams v. Hopkins* (Cal.), 69 Pac. 228; *Vance v. Anderson*, 113 Cal. 532; 45 Pac. 816; *Parsons v. Camp*, 11 Conn. 525; *Pitts v. Maier*, 115 Ga. 281; 41 S. E. 570; *German Ins. Co. v. Gibe*, 162 Ill. 251; 44 N. E. 490; *Brown v. Follette*, 155 Ind. 316; 58 N. E. 197; *Rogers v. Davis*, 91 Ia. 730; 59 N. W. 265; *Seiler v. Bank*, 86 Ky. 128; 5 S. W. 536; *Cullen v. Cary*, 146 Mass. 50; 15 N. E. 131; *Carveth v. Winegar*, — Mich. —; 94 N. W. 381; *Backus v. Burke*, 63

Minn. 272; 65 N. W. 459; *Gregg v. Kommers*, 22 Mont. 511; 57 Pac. 92; *Fahay v. Bank*, 1 Neb. Unoff. 89; 95 N. W. 505; *First National Bank v. Sargeant*, 65 Neb. 594; 91 N. W. 595; *Kemp v. Small*, 32 Neb. 318; 49 N. W. 169; *Stoddard v. Whiting*, 46 N. Y. 627; *Fuller v. Jenkins*, 130 N. C. 554; 41 S. E. 706; *Yingling v. Redwine*, 12 Okla. 64; 69 Pac. 810; *Lovejoy v. Chapman*, 23 Or. 571; 32 Pac. 687; *Hickman v. Cantrell*, 9 Yerg. (Tenn.) 172; 30 Am. Dec. 396; *Hexter v. Urwitz*, 6 Tex. Civ. App. 580; 25 S. W. 1101; *Herrick v. Teachout*, 74 Vt. 196; 52 Atl. 432; *Tuggle v. Berkeley*, 101 Va. 83; 43 S. E. 199; *Shank v. Groff*, 43 W. Va. 337; 27 S. E. 340; *Beebe v. Loan Co.*, 117 Wis. 328; 93 N. W. 1103; *Jordan v. Warner*, 107 Wis. 539; 83 N. W. 946.

the principle already discussed,¹¹ namely, that an implied trust may be proved orally. While the legal title may pass under the deed, the facts and circumstances of the transfer create the relation of mortgagor and mortgagee. This relationship grows out of the facts of the case and does not depend on the express oral agreement of the parties that the conveyance is a mortgage. Such agreement, of course, strengthens the case made by evidence of the circumstances of the conveyance. However, the holding of equity that an absolute conveyance is a mortgage when intended as security for a debt is so independent of the agreement between the parties that no effect will be given to an express contemporaneous oral contract which provides that if the debt is not paid when due no equity of redemption shall remain in the mortgagor,¹² since such a provision is contrary to public policy and void.¹³ The question of the effect of the parol evidence rule on the right to show that a deed absolute on its face is in fact a mortgage is discussed elsewhere.¹⁴

Whether in jurisdiction where equitable defenses cannot be interposed in actions at law, a deed absolute on its face can be shown to be a mortgage in an action at law is another question. According to some authorities such evidence is inadmissible at law.¹⁵ Thus the grantor cannot sue the grantee at law for slander of title for saying that the grantor has, after the execution of such deed, no title to such realty.¹⁶ In a few jurisdictions such evidence was held to be admissible.¹⁷ The reasons for excluding this evidence at law are in part that such evidence violates the statute of frauds, and in part that it violates the parol evidence rule. The most forcible reason, however, is that such evidence at most tends to show only an equitable title, with which, in general, a court of law has nothing to do. Ac-

¹¹ See § 641.

¹² *Fahay v. Bank*, 1 Neb. Unoff. 89; 95 N. W. 505.

¹³ See § 192; and see Ch. XVII.

¹⁴ See § 1199.

¹⁵ *Bragg v. Massie*, 38 Ala. 89; 79 Am. Dec. 82; *Thomas v. McCormack*, 9 Dana (Ky.) 108; *Hurley v. Donovan*, 182 Mass. 64; 64 N. E.

685; *Harper v. Ross*, 10 All. (Mass.) 332; *Abbott v. Hanson*, 24 N. J. L. 493.

¹⁶ *Hurley v. Donovan*, 182 Mass. 64; 64 N. E. 685.

¹⁷ *Hayworth v. Worthington*, 5 Blackf. (Ind.) 361; 35 Am. Dec. 126; *Fuller v. Parrish*, 3 Mich. 211.

cordingly in jurisdictions where equitable defenses may be interposed in actions at law no trouble is found in admitting evidence of this sort.

§643. Lien created by operation of law.

If the lien is created by the operation of the law and not by the agreement of the parties, the statute of frauds does not, of course, apply to its creation. Thus a vendor's implied lien on realty may be proved by oral evidence.¹

§644. Contract for reconveyance of mortgaged realty.

(2) A contract for the reconveyance of realty conveyed by an instrument which is in form a deed, but in reality a mortgage, on payment of the debt to secure which the instrument is given is not within the statute, since under such circumstances the duty to reconvey exists independent of contract.¹ If, on the other hand, the conveyance is a deed in reality as well as in form, a contract to reconvey on the happening of some further event is within the statute.² So a contract for redemption of realty conveyed by a deed, which is in law and equity a deed as distinguished from a mortgage, is within the statute.³

If the instrument is a mortgage on its face, it is impossible for any question to arise as to creating the right of redemption by oral contract. The question does often arise, however, as to the possibility of extending the period of redemption by oral contract. Since in most jurisdictions a mortgage is treated for most purposes as a lien to secure a debt and not as a convey-

¹ White v. Downs, 40 Tex. 225; Halvorsen v. Halvorsen, — Wis. —; 97 N. W. 494.

¹ Hodges v. Verner, 100 Ala. 612; 13 So. 679; Olds v. Marshall, 93 Ala. 138; 8 So. 284; Spies v. Price, 91 Ala. 166; 8 So. 405; Peagler v. Stabler, 91 Ala. 308; 9 So. 157; Bates v. Kelly, 80 Ala. 142; Mitchell v. Wellman, 80 Ala. 16; Morrow v. Jones, 41 Neb. 867; 60 N. W. 369;

Mussey v. Bates, 65 Vt. 449; *sub nomine*, Mussey v. Yates, 21 L. R. A. 516; 27 Atl. 167.

² Brock v. Brock, 90 Ala. 86; 9 L. R. A. 287; 8 So. 11.

³ Goree v. Clements, 94 Ala. 337; 10 So. 906; Gibbs v. Ins. Co., 123 Ill. 136; 13 N. E. 842. (In this last case, furthermore, the party seeking to enforce the contract had not performed his part.)

ance of an estate in realty a contract extending the period of redemption is not within the statute of frauds.⁴

§645. Release of equity of redemption.

(3) With reference to the oral release of an equity of redemption, if the realty in question is encumbered by a mortgage which shows on its face that it is a mortgage, a contract for the sale or release of the equity or redemption of such realty is a contract for the sale of lands and is within this clause of the statute.¹

If, however, the mortgage is in outward form an absolute deed, which can be shown to be a mortgage only by extrinsic oral evidence, if at all,² a contract for the release of such an equity of redemption to the holder of the legal title is not within the statute.³

§646. Release or assignment of liens.

However created, a lien is not an interest in land, but merely a security for payment of a debt. From this it follows that (4) a contract to release a mortgage is not within this clause of the statute.¹ Thus a contract to extinguish the lien of the mortgage on all the realty² or to release certain land from the operation of

⁴ *Turpie v. Lowe*, 158 Ind. 314; 92 Am. St. Rep. 310; 62 N. E. 484; *Martin v. Martin*, 16 B. Mon. (Ky.) 8; *Brown v. Lawton*, 87 Me. 83; 32 Atl. 733; *Swon v. Stevens*, 143 Mo. 384; 45 S. W. 270.

¹ *Borcherdt v. Favor*, — Colo. App. —; 66 Pac. 251; *Scott v. McFarland*, 13 Mass. 309; *Wendover v. Baker*, 121 Mo. 273; 25 S. W. 918; *Montpelier, etc., Co. v. Follett*, — Neb. —; 94 N. W. 635; *Kelley v. Stanberry*, 13 Ohio 408; *Bedell v. Tracy*, 65 Vt. 494; 26 Atl. 1031.

² *Kemp v. Small*, 32 Neb. 318; 49 N. W. 169.

³ *McMillan v. Jewett*, 85 Ala.

476; 5 So. 145; *Cramer v. Wilson*, 202 Ill. 83; 66 N. E. 869; *Baxter v. Pritchard*, — Ia. —; 98 N. W. 372; *Stall v. Jones*, 47 Neb. 706; 66 N. W. 653; *Shaw v. Walbridge*, 33 O. S. 1.

¹ *Seymour v. Mackay*, 126 Ill. 341; 18 N. E. 552; *Brooks v. Jones* (Ia.), 82 N. W. 434; *Stevenson v. Adams*, 50 Mo. 475; *Hemmings v. Doss*, 125 N. C. 400; 34 S. E. 511; *Taylor v. Taylor*, 112 N. C. 27; 16 S. E. 924; *Bean v. Bean*, 28 S. C. 607; 5 S. E. 827.

² *Winnemucca First National Bank v. Kreig*, 21 Nev. 404; 32 Pac. 641.

the mortgage³ is enforceable, though oral. So contracts to release pre-existing liens as to waive a mechanic's lien⁴ or to assign a vendor's lien⁵ or a contract concerning the relative priority of liens⁶ are none of them within the clause of the statute. So it has been held that if A has a vendor's lien on realty conveyed by him to B and X pays B's debt to A under an oral agreement with B that X shall have a lien on such realty to secure such payment, the contract is not within the statute of frauds, and can be enforced on the theory of subrogation.⁷ So a contract for the sale of a judgment,⁸ or for setting a decree aside,⁹ or for restricting the execution to be issued on a judgment already rendered,¹⁰ or for releasing the lien of a judgment,¹¹ are none of them contracts for the sale of realty, though they may affect title to realty collaterally.

§647. Contract to acquire legal title to protect existing interest.

A contract by which one party agrees to acquire the legal title by purchase at a judicial sale and to recognize and protect a pre-existing equitable interest of another in such land is not within the statute, where the legal title has been acquired under such contract. A contract whereby A agrees to purchase and does purchase mortgaged realty at a foreclosure sale and hold it subject to B's right to redeem it is not within the statute of frauds,¹

³ Hemmings v. Doss, 125 N. C. 400; 34 S. E. 511.

⁴ Hughes v. Lansing, 34 Or. 118; 75 Am. St. Rep. 574; 55 Pac. 95.

⁵ Allen v. Caylor, 120 Ala. 251; 74 Am. St. Rep. 31; 24 So. 512.

⁶ Townsend v. White, 102 Ia. 477; 71 N. W. 337; Loewen v. Forsee, 137 Mo. 29; 59 Am. St. Rep. 489; 38 S. W. 712; reversing on rehearing, 35 S. W. 1138.

⁷ Allen v. Caylor, 120 Ala. 251; 74 Am. St. Rep. 31; 24 So. 512.

⁸ Goldbeck v. Bank, 147 Pa. St. 267; 23 Atl. 565.

⁹ Whitehead v. Jones, 197 Pa. St. 511; 47 Atl. 978.

¹⁰ City of Natchez v. Vandervelde, 31 Miss. 706; 66 Am. Dec. 581.

¹¹ Winberry v. Koonce, 83 N. C. 351.

¹ Turpie v. Lowe, 158 Ind. 314; 92 Am. St. Rep. 310; 62 N. E. 484; Butt v. Butt, 91 Ind. 305; Reyman v. Mosher, 71 Ind. 596; Fishback v. Green, 87 Ky. 107; 7 S. W. 881; Griffen v. Coffey, 9 B. Mon. (Ky.) 452; 50 Am. Dec. 519; Leahey v. Witte, 123 Mo. 207; 27 S. W. 402; Turner v. Johnson, 95 Mo. 431; 6 Am. St. Rep. 62; 7 S. W. 570; Brown v. Jackson (Tex. Civ. App.), 40 S. W. 162; McGinnis v. Cook, 57 Vt. 36; 52 Am. Rep. 115.

as where the mortgagee agrees to buy it in for the amount of the debt if the mortgagor agrees to pay costs and attorney's fees,² or a third person agrees to buy the realty and then sell it and apply the proceeds to the mortgage debt and costs, the balance if any to go to the mortgagor.³ So a contract whereby one of two joint mortgagees is to buy in the mortgaged property at judicial sale for the benefit of both is not within the statute;⁴ nor is a contract whereby a second mortgagee agrees to buy in the property and pay off the first mortgage.⁵ So a contract whereby a vendor of realty allows such realty to be sold under proceedings foreclosing his lien⁶ is not within the statute. So where realty is sold on an order of the Probate Court, entered by consent in an action to pay the debts of the decedent, the oral contract under which such order was entered by consent may be shown.⁷

In some of these cases the person whose interest was to be protected took possession of the realty and such part performance took the contract out of the statute.⁸ This element of part performance by change of possession is not, however, a necessary element to the validity of such contracts. They are held not within the statute on the same principle that a deed absolute in form may be shown to be a mortgage. The purchaser under such a contract is held as trustee for the adversary party to prevent him from retaining the benefits of the fraud by means of which he has acquired the legal title.⁹ Furthermore, they are

² *McQuat v. Cathcart*, 84 Ind. 567. *Contra*, *Levis v. Kengla*, 8 App. D. C. 230; citing *May v. Sloan*, 101 U. S. 231.

³ *Murphy v. Murphy*, 84 Ill. App. 292; *Jones National Bank v. Price*, 37 Neb. 291; 55 N. W. 1045; *McGinnis v. Cook*, 57 Vt. 36; 52 Am. Rep. 115.

⁴ *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Rep. 794.

⁵ *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62; 7 S. W. 570.

⁶ *Morris v. Gaines*, 82 Tex. 255; 17 S. W. 538.

⁷ *Suber v. Richards*, 61 S. C. 393; 39 S. E. 540.

⁸ *Morgan v. Battle*, 95 Ga. 663; 22 S. E. 689; *Fishback v. Green*, 87 Ky. 107; 7 S. W. 881; *Watts v. Witt*, 39 S. C. 356; 17 S. E. 822. See § 719, *et seq.*

⁹ *Leahey v. Witte*, 123 Mo. 207; 27 S. W. 402; *Tatem v. Powell*, 50 N. J. Eq. 316; 24 Atl. 436. "The statute of frauds cannot be invoked by one who purchases with such an agreement, and this for the further reason that the statute was never designed to aid a party in the per-

substantially contracts to extend the period of redemption.¹⁰

If, however, such a contract is made after the sale, so that the purchaser does not acquire the legal title under such contract, the statute of frauds applies.¹¹ However, if the purchaser acquires the legal title, subject to the right of the mortgagor to redeem, given him by the statute under which the property is sold, an oral contract to extend such period of redemption is not within the statute.¹² A contract made after the time of redemption has expired to convey the realty to another is within the statute.¹³

If the person to whom by the oral contract the realty is to be conveyed has no interest therein outside of his contract, the statute applies.¹⁴ While such contracts are usually made with reference to judicial sales, the same principles apply to private sales. A contract whereby A agrees to furnish B money to enable him to redeem mortgaged realty, and B agrees to and does convey to A, and A further agrees to sell such realty and pay the balance over to B is not within the statute.¹⁵

§648. Partnership realty.

Whether a partnership can be formed by oral contract for the purpose of dealing in realty and for sharing the profits and losses out of such dealing is a question on which there is great diversity of judicial opinion. The courts do not agree either on the general question of the application of the statute of frauds or upon the proper classification of contracts of this sort with

petration of a fraud but was intended to prevent frauds." *Turner v. Johnson*, 95 Mo. 431, 447; 6 Am. St. Rep. 62; 7 S. W. 570.

¹⁰ See § 646. *Griffen v. Coffey*, 9 B. Mon. (Ky.) 452; 50 Am. Dec. 519.

¹¹ *Junkins v. Lovelace*, 72 Ala. 303. (The contract in this case seems to have been made after the sale. The court said that the contract was not proved, even by the oral evidence.) *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769;

11 L. R. A. 323; 14 S. W. 209.

¹² *Turpie v. Lowe*, 158 Ind. 314; 92 Am. St. Rep. 310; 62 N. E. 484; *Sheridan v. Nation*, 159 Mo. 27; 59 S. W. 972.

¹³ *Littell v. Jones*, 56 Ark. 139; 19 S. W. 497 (citing, *Lucas v. Nichols*, 66 Ill. 41; *Whiting v. Butler*, 29 Mich. 122).

¹⁴ *Pierce v. Clarke*, 71 Minn. 114; 73 N. W. 522.

¹⁵ *Byers v. Locke*, 93 Cal. 493; 27 Am. St. Rep. 212; 29 Pac. 119.

reference to the application of the statute. The cases upon this subject may, however, be grouped into classes in such a way that the general weight of authority in each class can be indicated.

(1) A contract which does not provide for vesting any interest in the land itself in the partnership, but which does provide for a division of the profits on a resale of the land, in consideration of services in managing or selling it, and the like, is generally held not to be within the statute.¹ Thus an oral contract whereby a grantee of realty agrees in consideration of the conveyance to him to sell the realty conveyed and to divide the profits with the grantor is not within the statute after the realty is conveyed to a third person,² even if the contract to sell the realty could not have been enforced.³ Contracts of this class are much like contracts to pay an agent for his services in selling realty, which are held not to be within the statute.⁴ Thus in one of the cases cited, A, the owner of realty, conveyed it to B, his agent, for its sale, as a matter of convenience, B to sell the realty and account to A for the proceeds. The contract was held not within the statute.⁵

(2) A contract between two or more persons to buy land not then owned by any one of them on behalf of the partnership,

¹ *Stuart v. Mott*, 23 Can. S. C. 153, 384; *Wright v. Smith*, 105 Fed. 841; 45 C. C. A. 87; *McElroy v. Swope*, 47 Fed. 380; *McClintock v. Thweatt*, — Ark. —; 73 S. W. 1093; *Price v. Sturgis*, 44 Cal. 591; *Von Trotha v. Bamberger*, 15 Colo. 1; 24 Pac. 883; *Bunell v. Taintor*, 4 Conn. 568; *Kilbourn v. Latta*, 5 Mack (D. C.) 304; 60 Am. Rep. 373; *Miller v. Kendig*, 55 Ia. 174; 7 N. W. 500; *Bruns v. Spalding*, 90 Md. 349; 45 Atl. 194; *Petrie v. Torrent*, 88 Mich. 43; 49 N. W. 1076; *Snyder v. Wolford*, 33 Minn. 175; 53 Am. Rep. 22; 22 N. W. 254; *Pitman v. Hodge*, 67 N. H. 101; 36 Atl. 605; *Robbins v. McKnight*, 1 Halst. (N. J.) 642; 45 Am. Dec. 406; *Coffin v. McIntosh*, 9 Utah 315; 34

Pac. 247; *Knauss v. Cahoon*, 7 Utah 182; 26 Pac. 295; *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *Treat v. Hiles*, 68 Wis. 344; 60 Am. Rep. 858; 32 N. W. 517.

² *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398; *Parker v. Siple*, 76 Ind. 345; *Miller v. Kendig*, 55 Ia. 174; 7 N. W. 500; *Linscott v. McIntire*, 15 Me. 201; 33 Am. Dec. 602; *Hall v. Hall*, 8 N. H. 129; *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; 6 S. E. 264.

³ *Miller v. Kendig*, 55 Ia. 174; 7 N. W. 500; *Linscott v. McIntire*, 15 Me. 201; 33 Am. Dec. 602.

⁴ See § 664.

⁵ *Collins v. Tillou*, 26 Conn. 368; 68 Am. Dec. 398.

to resell it and divide the profits and losses is in most jurisdictions held not to be within this clause of the statute.⁶ Even contracts to buy a specific tract of realty, resell it and divide the profits are held not to be within the statute,⁷ or to acquire an estate for years in a particular mine.⁸

The courts which take this view of these contracts do not always agree as to grounds on which their decisions rest. It is "a close question" and beset with difficulties.⁹ The reason generally assigned is that as the lands are to be purchased with partnership funds a resulting trust arises, no matter to whom the legal title is conveyed, and irrespective of any contract, and that as the profits are to be divided the contract does not affect any interest in the realty itself. Another reason assigned is that after one partner has received the proceeds of the sale, he is estopped from denying the contract under which he acquired it.¹⁰ Some courts have said that the contract to sell the land is unenforceable, but that after the sale the contract to divide the proceeds is enforceable.¹¹

⁶ Dale v. Hamilton, 5 Hare 369; Bates v. Babcock, 95 Cal. 479; 29 Am. St. Rep. 133; 16 L. R. A. 745; 30 Pac. 605; Meagher v. Reed, 14 Colo. 335; *sub nomine*, Reed v. Meagher, 9 L. R. A. 455; 24 Pac. 681; Van Housen v. Copeland, 180 Ill. 74; 54 N. E. 169; affirming 79 Ill. App. 139; Speyer v. Desjardins, 144 Ill. 641; 36 Am. St. Rep. 473; 32 N. E. 283; Allison v. Perry, 130 Ill. 9; 22 N. E. 492; affirming, 28 Ill. App. 396; Holman v. McCrary, 51 Ind. 358; 19 Am. Rep. 735; Richards v. Grinnell, 63 Ia. 44; 50 Am. Rep. 727; 18 N. W. 668; Fountain v. Menard, 53 Minn. 443; 39 Am. St. Rep. 617; 55 N. W. 601; Newell v. Cochran, 41 Minn. 374; 43 N. W. 84; Perronette v. Pryme, 34 N. J. Eq. 26; Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550; Flower v. Barnekoff, 20 Or. 132; 11 L. R. A. 149; 25 Pac. 370; Daven-

port v. Buchanan, 6 S. D. 376; 61 N. W. 47; Case v. Seger, 4 Wash. 492; 30 Pac. 646.

⁷ Bates v. Babcock, 95 Cal. 479; 29 Am. St. Rep. 133; 16 L. R. A. 745; 30 Pac. 605; Dudley v. Littlefield, 21 Me. 418; Fountain v. Menard, 53 Minn. 443; 39 Am. St. Rep. 617; 55 N. W. 601; Williams v. Gillies, 75 N. Y. 197; Chester v. Dickerson, 54 N. Y. 1; 13 Am. Rep. 550.

⁸ Meagher v. Reed, 14 Colo. 335; *sub nomine*, Reed v. Meagher, 9 L. R. A. 455; 24 Pac. 681.

⁹ Speyer v. Desjardins, 144 Ill. 641; 36 Am. St. Rep. 473; 32 N. E. 283.

¹⁰ Flower v. Barnekoff, 20 Or. 132; 11 L. R. A. 149; 25 Pac. 370.

¹¹ Sprague v. Bond, 108 N. C. 382; 13 S. E. 143; Smith v. Putnam, 107 Wis. 155; 82 N. W. 1077; 83 N. W. 288.

In some jurisdictions contracts for the purchase of realty, to vest in the partnership in fixed proportions, are within the statute.¹²

In Wisconsin it is "settled and not open to discussion" that partnership contracts for the purchase of realty are within the statute.¹³ Contracts of this class are much like contracts whereby A agrees to convey to B a part of the realty which he is about to buy from X, which contracts are generally held to be within the statute.¹⁴

(3) A contract by which land already owned by one is to be put into partnership assets is within the statute.¹⁵

§649. Contracts to convey partnership realty.

While realty bought with partnership funds is treated for some purposes as personalty, a contract to convey an interest therein is within the statute.¹ However a contract to take a new partner into a firm which owns realty has been held not to be within the statute.²

§650. Mining claims.

A contract to locate mining claims and divide the profits therefrom illustrates the diversity of judicial opinion as to partnership contracts for dealing in realty; being held in some jurisdictions to be within the statute of frauds¹ and in others

¹² *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619; 28 N. W. 676.

¹³ *Seymour v. Cushway*, 100 Wis. 580; 69 Am. St. Rep. 957; 76 N. W. 769; *McMillen v. Pratt*, 89 Wis. 612; 62 N. W. 588; *Clarke v. McAuliffe*, 81 Wis. 104; 51 N. W. 83; *Bird v. Morrison*, 12 Wis. 138. To the same effect see *Smith v. Burnham*, 3 Sumner (U. S.) 435; *Everhart's Appeal*, 106 Pa. St. 349.

¹⁴ See § 662.

¹⁵ *Goldstein v. Nathan*, 158 Ill. 641; 42 N. E. 72; affirming 57 Ill. App. 389. (A contract by two own-

ers of land in severalty, bought with their several funds, to form a partnership for the sale of such lands and a division of the profits therefrom.) *Carothers v. Alexander*, 74 Tex. 309; 12 S. W. 4; and see to the same effect, *Groome's Estate*, 94 Cal. 69; 29 Pac. 487.

¹ *Gray v. Smith*, L. R. 43 Ch. D. 208; *Carothers v. Alexander*, 74 Tex. 309; 12 S. W. 4; *Brewer v. Cropp*, 10 Wash. 136; 38 Pac. 866.

² *Marsh v. Davis*, 33 Kan. 326; 6 Pac. 612.

¹ *Craw v. Wilson*, 22 Nev. 385; 40

not.² If there was no prior contract for locating such claims for the joint benefit of the parties to the contract, a contract after location, whereby the locator transfers his right to another in whole or in part, is within the statute.³

§651. Easements.

"Any interest" in lands includes easements and incorporeal hereditaments. If an easement passes under a conveyance of specific realty as appurtenant thereto, no separate written contract for the enjoyment thereof is necessary.¹ If an easement does not pass as appurtenant to realty conveyed, a contract to create or to convey an easement in realty,² such as a contract creating a right to use water taken from the land of another,³ or a contract creating the right to carry water across the lands of another,⁴ or to overflow the land of another,⁵ or to attach booms to trees on the land of another,⁶ or a contract creating a

Pac. 1076. But *Welland v. Huber*, 8 Nev. 203, seems to be decided on the opposite principle.

² *Mortiz v. Lavelle*, 77 Cal. 10; 11 Am. St. Rep. 229; 18 Pac. 803; *Gore v. McBrayer*, 18 Cal. 583; *McYlette v. Brennan*, 20 Colo. 242; 38 Pac. 75; *Meagher v. Reed*, 14 Colo. 335; *sub nomine*, *Reed v. Meagher*, 9 L. R. A. 455; 24 Pac. 681; *Murley v. Ennis*, 2 Colo. 300; *Hirbour v. Reeding*, 3 Mont. 15; *Welland v. Huber*, 8 Nev. 203; *Eberle v. Carmichael*, 8 N. M. 696; 47 Pac. 717; affirming on rehearing, 8 N. M. 169; 42 Pac. 95; *Raymond v. Johnson*, 17 Wash. 232; 61 Am. St. Rep. 908; 49 Pac. 492.

³ *Moore v. Hamerstag*, 109 Cal. 122; 41 Pac. 805; *Garthe v. Hart*, 73 Cal. 541; 15 Pac. 93; *Goller v. Fett*, 30 Cal. 481; *Reagan v. McKibben*, 11 S. D. 270; 76 N. W. 943.

¹ *Noojin v. Cason*, 124 Ala. 458; 27 So. 490.

² *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 168; 5 L.

R. A. 209; 22 N. E. 73; *Foss v. Newbury*, 20 Or. 257; 25 Pac. 669; *Long v. Mayberry*, 96 Tenn. 378; 36 S. W. 1040; *Nunnally v. Iron Co.*, 94 Tenn. 397; 28 L. R. A. 421; 29 S. W. 361.

³ *Hayes v. Fine*, 91 Cal. 391; 27 Pac. 772; *Dorris v. Sullivan*, 90 Cal. 279; 27 Pac. 216; *McGinness v. Stanfield*, 7 Ida. 23; 59 Pac. 936; *Weare v. Chase*, 93 Me. 264; 44 Atl. 900; *Morse v. Wellesley*, 156 Mass. 95; 30 N. E. 77.

⁴ *Deyo v. Ferris*, 22 Ill. App. 154; *Murray v. Gibson*, 21 Ill. App. 488; *New Iberia, etc., Co. v. Romero*, 105 La. 439; 29 So. 876; *Schultz v. Huffman*, 127 Mich. 276; 86 N. W. 823; *Pifer v. Brown*, 43 W. Va. 412; 49 L. R. A. 497; 27 S. E. 399.

⁵ *Wilmington, etc., Co. v. Evans*, 166 Ill. 548; 46 N. E. 1083; *Newcomb v. Royce*, 42 Neb. 323; 60 N. W. 552; *Harris v. Miller*, Meigs (Tenn.) 158; 33 Am. Dec. 138.

⁶ *Smith v. Atkins*, 110 Ky. 119; 53 L. R. A. 790; 60 S. W. 930.

right of way over the land of another,⁷ or a contract to open a street extending beyond the realty conveyed by promisor,⁸ or through the realty in question,⁹ are within this clause of the statute. Thus a contract whereby one railroad agrees to sell to another its road-bed, together with its rolling stock, is within the statute.¹⁰ However, it has been held that an oral contract to construct¹¹ or to dedicate¹² a street is not within the statute of frauds. A contract to construct a street if the promisee would buy lots in the promisor's land and erect a house thereon is looked on as a contract for work and labor.¹³ A parol dedication operates as a Common-Law conveyance to the public.¹⁴ While a contract to dig a well is *per se* a contract for work and labor,¹⁵ a contract to dig a well on the line between two adjoining tracts, each owner to have the right to use the well, is a contract for an easement and hence within the statute.¹⁶

A contract by the owner of realty by which he agrees not to make a specified use of certain realty is within the statute.¹⁷ On the other hand, a personal contract by an owner of realty not to carry on a certain kind of business on certain realty

⁷ Phoenix Ins. Co. v. Haskett, 64 Kan. 93; 67 Pac. 446; Barnes v. Beverly (Ky.), 32 S. W. 174; Cole v. Hadley, 162 Mass. 579; 39 N. E. 279; Morse v. Wellesly, 156 Mass. 95; 30 N. E. 77. As the right of way of a railway. Pitkin v. R. R., 2 Barb. Ch. (N. Y.) 221; 47 Am. Dec. 320.

⁸ Hall v. Fisher, 126 N. C. 205; 35 S. E. 425.

⁹ Richter v. Irwin, 28 Ind. 26.

¹⁰ Cumberland, etc., Ry. v. Ry., — Ky. —; 77 S. W. 690.

¹¹ Drew v. Wiswall, 183 Mass. 554; 67 N. E. 666.

¹² Mann v. Bergmann, 203 Ill. 406; 67 N. E. 814.

¹³ Drew v. Wiswell, 183 Mass. 554; 67 N. E. 666.

¹⁴ Mann v. Bergmann, 203 Ill. 406; 67 N. E. 814.

¹⁵ See § 656.

¹⁶ Plunkett v. Meredith, — Ark. —; 77 S. W. 600.

¹⁷ Rice v. Roberts, 24 Wis. 461; 1 Am. Rep. 195. Thus a contract by A to build a warehouse on his own land and to allow B to store goods therein free of charge in consideration of B's agreeing never to construct a warehouse on his own land is within the statute. Clanton v. Scruggs, 95 Ala. 279; 10 So. 757. *Contra*, Ware v. Langmade, 9 Ohio C. C. 85; 6 Ohio C. D. 43, where a contract between adjoining owners of oil and gas lands not to drill within two hundred feet of the line between them was held not to be within the statute.

is not within the statute.¹⁸ If he were to dispose of all the realty owned by him, his contract not to engage in business would be just as binding as ever and just as important to the promisee. The distinction between these last two classes of cases is that in the first, the contract is primarily with reference to the use of the realty, while in the second, it is primarily with reference to the personal conduct of the promisor.

§652. Party walls and fences.

Whether contracts to erect and maintain party walls and fences are contracts within the statute of frauds depends on whether they are regarded as contracts creating easements or as contracts for work and labor. If a contract provides for the erection, maintenance and permanent use of a party wall, it is looked upon as a contract creating an easement, and within the statute of frauds.¹ It has been doubted whether a contract by the owner of adjoining realty to pay one-half of the cost of a party wall built on the division line, was within the statute at all.² If the oral contract imposes no greater liability, and a liability in no way different from that imposed by statute, such oral contract is enforceable.³ An oral agreement with reference to the permanent maintenance of a division fence;⁴ as a contract whereby A releases B from his liability for one-half of the cost of maintaining such fence, and B releases to A his interest therein⁵ is within the statute; while a contract imposing a personal liability merely, as an agreement by grantee in part consideration of the conveyance to build a fence between

¹⁸ Hall v. Solomon, 61 Conn. 476; 29 Am. St. Rep. 218; 23 Atl. 876; Leinaw v. Smart, 11 Humph. (Tenn.) 308.

¹ Tillis v. Treadwell, 117 Ala. 445; 22 So. 983; Price v. Lien, 84 Ia. 590; 51 N. W. 52; Rice v. Roberts, 24 Wis. 461; 1 Am. Rep. 195.

² Stult v. Sweesy, 48 Neb. 767; 67 N. W. 748. (After the wall is constructed under such contract, a new promise to pay one-half of

the cost is held enforceable.)

³ Swift v. Calnan, 102 Ia. 206; 63 Am. St. Rep. 443; 37 L. R. A. 462; 71 N. W. 233.

⁴ Rudisill v. Cross, 54 Ark. 519; 26 Am. St. Rep. 57; 16 S. W. 575; Knox v. Tucker, 48 Me. 373; 77 Am. Dec. 233; Kellogg v. Robinson, 6 Vt. 276; 27 Am. Dec. 550.

⁵ Rudisill v. Cross, 54 Ark. 519; 26 Am. St. Rep. 57; 16 S. W. 575.

the land conveyed and the land of grantor,⁶ is not within the statute.

§653. Contracts for licenses.

A license is an authority given to one person to do some act upon the land of the licensor, without passing any estate in such land.¹ Such authority is ordinarily revocable at the will of the licensor,² unless especial circumstances of estoppel exist³ or unless it is coupled with some other interest in the same realty.⁴ If revocable, it is also revoked by the death of either party,⁵ or by a sale of the licensor's interest,⁶ or by a contract for the sale thereof.⁷ Acts done under a revocable license cannot be made trespasses by a revocation of the license,⁸ and in this consists the chief importance of the oral revocable license.

A license is not, therefore, within the statute of frauds, and an oral contract for a license is not affected by the statute.⁹

⁶ *Dodder v. Snyder*, 110 Mich. 69; 67 N. W. 1101.

¹ *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675; *De Montague v. Bacharach*, 181 Mass. 256; 63 N. E. 435; *Rockport v. Granite Co.*, 177 Mass. 246; 51 L. R. A. 779; 58 N. E. 1017; *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 168; 5 L. R. A. 209; 22 N. E. 73; *Cook v. Stearns*, 11 Mass. 533; *Ainsworth v. Stone*, 73 Vt. 101; 50 Atl. 805.

² *Hitchens v. Shaller*, 32 Mich. 496; *Whittmore v. R. R.*, 174 Mass. 363; 54 N. E. 867; *Hodgkins v. Tarrington*, 150 Mass. 19; 15 Am. St. Rep. 168; 22 N. E. 73; *Ewing v. Rhea*, 37 Or. 583; 82 Am. St. Rep. 783; 52 L. R. A. 140; 62 Pac. 790.

³ *Legg v. Horn*, 45 Conn. 409; *Hiers v. Mill Haven Co.*, 113 Ga. 1002; 39 S. E. 444; *Wilson v. Chalfant*, 15 Ohio 248; 45 Am. Dec.

574; *Ainsworth v. Stone*, 73 Vt. 101; 50 Atl. 805.

⁴ *Greenwood v. School District*, 126 Mich. 81; 85 N. W. 241; *Boland v. O'Neal*, 81 Minn. 15; 83 Am. St. Rep. 362; 83 N. W. 471.

⁵ *Lambe v. Manning*, 171 Ill. 612; 49 N. E. 509; *Spacy v. Evans*, 152 Ind. 431; 52 N. E. 605; *Emerson v. Shores*, 95 Me. 237; 85 Am. St. Rep. 404; 49 Atl. 1051; *Hallett v. Parker*, 68 N. H. 598; 39 Atl. 433; *Eckert v. Peters*, 55 N. J. Eq. 379; 36 Atl. 491.

⁶ *Fish v. Capwell*, 18 R. I. 667; 49 Am. St. Rep. 807; 29 Atl. 840.

⁷ *Bruley v. Garvin*, 105 Wis. 625; 81 N. W. 1038.

⁸ *Hodgkins v. Farrington*, 150 Mass. 19; 15 Am. St. Rep. 168; 5 L. R. A. 209; 22 N. E. 73; *Cheever v. Pearson*, 16 Pick. (Mass.) 273; *Metcalf v. Hart*, 3 Wyom. 513; 31 Am. St. Rep. 122; 27 Pac. 900; 31 Pac. 407.

⁹ *De Montague v. Bacharach*, 181

This discussion of licenses has been solely with reference to the effect of the statute of frauds on oral contracts for a license. Whether a license may have become irrevocable or not, or whether on revocation any liability attaches, are questions which are not here considered. The statute of frauds is often invoked, however, in cases where an irrevocable license is claimed, but as this question is one of an executed grant, it is rather a question for real property law than for contracts. What contracts concern licenses only, and what attempt to create easements or leases under the form of licenses by oral agreement is a question on which there is some divergent of judicial opinion. The right of control of the premises by the licensor has been suggested as the essential distinction. On this distinction a contract to let a public hall for four specified days at a certain price,¹⁰ or a contract by a boarding house keeper to furnish a man and his family with board and three specified rooms, together with light and heat,¹¹ have been held to be licenses, and hence enforceable though oral. Permission to cut timber and remove crops has been held a license.¹² Permission to make use of a wall on promisor's land as a permanent means of support for timbers of a building of promisee's has been held a contract for an easement and within the statute.¹³ An agreement in consideration of permission to make a temporary change in the channel of an artificial water-course to restore it to its original channel on request, is not within the statute.¹⁴

Mass. 256; 63 N. E. 435; Johnson v. Wilkinson, 139 Mass. 3; 52 Am. Rep. 698; 29 N. E. 62; White v. Maynard, 111 Mass. 250; 15 Am. Rep. 28; Turner v. Stanton, 42 Mich. 506; 4 N. W. 204; Olmstead v. Abbott, 61 Vt. 281; 18 Atl. 315.

¹⁰ Johnson v. Wilkinson, 139 Mass. 3; 52 Am. Rep. 698; 29 N. E. 62. On the other hand a contract for the use of a church edifice as a place of worship when not occupied by the religious society which owned it, has been held a contract for a lease and hence within the statute. Brumfield

v. Carson, 33 Ind. 94; 5 Am. Rep. 184.

¹¹ White v. Maynard, 111 Mass. 250; 15 Am. Rep. 28.

¹² Whitmarsh v. Walker, 1 Met. (Mass.) 313.

¹³ Hodgkins v. Farrington, 150 Mass. 19; 15 Am. St. Rep. 168; 5 L. R. A. 209; 22 N. E. 73. *Contra*, that such a contract is for a mere license. Russell v. Hubbard, 59 Ill. 335.

¹⁴ Hamilton, etc., Co. v. R. R., 29 O. S. 341.

§654. Fixtures.

Contracts for the sale of fixtures which are held to be part of the realty are within this clause;¹ while contracts for the sale of such fixtures as are removable and are held to be personalty are not within this clause.² If, however, a fixture which is treated as realty is to be severed by the vendor and delivered by him to the vendee, a contract for the sale of such fixture is not within the statute. Thus a contract for the sale of a dwelling house to be severed from the realty and delivered on rollers³ is not within the statute. As in the case of growing trees,⁴ some jurisdictions seem to hold that an oral agreement between vendor and vendee for the sale as a chattel of a fixture which is ordinarily part of the realty may operate as a conversion thereof into personalty so far that it is not within this section of the statute.⁵ A contract to permit the removal of personalty annexed to realty of lessor by lessee, but still remaining personalty, is not within this clause of the statute.⁶

§655. Trees and crops.

Growing trees, other than trees in a nursery, are held in most jurisdictions to be realty. Accordingly a contract for the sale of growing trees, as such, to be removed by the vendee

¹ *Towson v. Smith*, 13 App. D. C. 48; *Smith v. Price*, 39 Ill. 28; 89 Am. Dec. 284; *Aldrich v. Husband*, 131 Mass. 480; *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Connor v. Coffin*, 22 N. H. 538; *Bond v. Coke*, 71 N. C. 97.

² *Bostwick v. Leach*, 3 Day (Conn.) 476; *Brown v. Roland*, 11 Tex. Civ. App. 648; 33 S. W. 273.

³ *Long v. White*, 42 O. S. 59. To the same effect, see *Rogers v. Cox*, 96 Ind. 157; 49 Am. Rep. 152; *Keyson v. School District*, 35 N. H. 477. The case of *Meyers v. Schemp*, 67 Ill. 469, in which a contract for the sale of the ruins of a burned building was held within the statute, has

been treated as hopelessly contradictory to the above cases. It seems in the latter case that vendee was to remove the property sold. Whether the court was correct in holding such articles as scattered brick to be realty, the question of who was to sever or remove the property sold is the point of distinction between the two classes of cases.

⁴ See § 655.

⁵ *McCracken v. Hall*, 7 Ind. 30; *South Baltimore Co. v. Muhlbach*, 69 Md. 395; 1 L. R. A. 507; 16 Atl. 117.

⁶ *Broaddus v. Smith*, 121 Ala. 335; 77 Am. St. Rep. 61; 26 So. 34.

is within this clause of the statute.¹ So a contract for the sale of growing wild grass is within the statute.²

Some American courts follow the rule which, after much vacillation, was finally adopted by the English courts,³ that if the parties in contracting contemplate the sale of growing trees solely as chattels and do not intend that they shall remain attached to the realty for an indefinite or unreasonable time, and do not intend that they shall derive a benefit from allowing them to remain attached to the realty, the contract is not within this clause of the statute.⁴

Some jurisdictions hold that if the contract for the sale of growing trees contemplates an immediate severance of them from the soil, they are to be treated as personalty and hence not within this clause of the statute,⁵ while if they are to be removed at the discretion of the vendee they are realty, and within the statute.⁶ If the contract requires the vendor to

¹ Alabama Mineral Land Co. v. Jackson, 121 Ala. 172; 77 Am. St. Rep. 46; 25 So. 709; Garner v. Mahoney, 115 Ia. 356; 88 N. W. 828; Wiggins v. Jackson (Ky.), 73 S. W. 779; Broussard v. Verret, 43 La. Ann. 929; 9 So. 905; White v. King, 87 Mich. 107; 49 N. W. 518; Kileen v. Kennedy, — Minn. —; 97 N. W. 126; Walton v. Lowery, 74 Miss. 484; 21 So. 243; Nelson v. Lawson, 71 Miss. 819; 15 So. 798; Harrell v. Miller, 35 Miss. 700; 72 Am. Dec. 154; Kingsley v. Holbrook, 45 N. H. 313; 86 Am. Dec. 173; Putney v. Daly, 6 N. H. 430; 25 Am. Dec. 470; Slocum v. Seymour, 36 N. J. L. 138; 13 Am. Rep. 432; Drake v. Howell, 133 N. C. 162; 45 S. E. 539; Clark v. Guest, 54 O. S. 298; 43 N. E. 862; Hirth v. Graham, 50 O. S. 57; 40 Am. St. Rep. 641; 19 L. R. A. 721; 33 N. E. 90; Fluharty v. Mills, 49 W. Va. 446; 38 S. E. 521; Seymour v. Cushway, 100 Wis. 580; 69 Am. St. Rep. 957; 76 N. W.

769. So an oral reservation of growing trees from a conveyance of the realty is within the statute. Jones v. Timmons, 21 O. S. 596.

² Kirkeby v. Erickson, — Minn. —; 96 N. W. 705.

³ Lavery v. Pursell, L. R. 39 Ch. Div. 508; Marshall v. Green, L. R. 1 C. P. Div. 35.

⁴ Boßwick v. Leach, 3 Day (Conn.) 476; Cain v. McGuire, 13 B. Mon. (Ky.) 340; Byasse v. Reese, 4 Met. (Ky.) 372; 83 Am. Dec. 481; Tilford v. Dotson, 106 Ky. 755; 51 S. W. 583; Cutler v. Pope, 13 Me. 377; Leonard v. Medford, 85 Md. 666; 37 L. R. A. 449; 37 Atl. 365; Smith v. Bryan, 5 Md. 141; 59 Am. Dec. 104; Nettleton v. Sikes, 8 Met. (Mass.) 34; Claflin v. Carpenter, 4 Met. (Mass.) 580; 38 Am. Dec. 381.

⁵ Robbins v. Farwell, 193 Pa. St. 37; 44 Atl. 260; McClintock's Appeal, 71 Pa. St. 365.

⁶ Pattison's Appeal, 61 Pa. St.

sever and deliver the trees, they are treated as personalty and such contract is not, therefore, within this clause of the statute.⁷ If a valid written contract is entered into between A, the owner of realty, and B, whereby B acquires the right to sever and remove certain standing timber, such timber is so far to be regarded as personalty that a contract between B and X whereby B agrees to give X a lien on such timber for advances to be made by X to B is not within this section of the statute.⁸

A contract for the sale of such growing crops as are held to be personalty is not within this clause of the statute⁹ nor is an oral reservation of them.¹⁰ Thus a contract for the sale of timothy seed is not within the statute.¹¹ In West Virginia growing wheat is treated as realty within the meaning of the statute of frauds.¹²

§656. Contracts for work on realty.

A contract to do work on the land of another is not within this section of the statute of frauds, even if the work consists in annexing something to the realty, as planting crops,¹ erecting a barn,² or digging a well,³ or drilling an oil-well.⁴ Nor does

294; 100 Am. Dec. 637; Huff v. McCauley, 53 Pa. St. 206; 91 Am. Dec. 203.

⁷ Dorris v. King (Tenn. Ch. App.), 54 S. W. 683; Kleebe v. Bard, 7 Wash. 41; 34 Pac. 138.

⁸ Helfrech, etc., Co. v. Honaker, (Ky.), 76 S. W. 342.

⁹ Smock v. Smock, 37 Mo. App. 56.

¹⁰ Benner v. Bragg, 68 Ind. 338; Flynt v. Conrad, Phil. Law, 61 N. C. 190; 93 Am. Dec. 588; Youmans v. Caldwell, 4 O. S. 71; Baker v. Jordan, 3 O. S. 438; Backenstoss v. Stahler, 33 Pa. St. 251; 75 Am. Dec. 592. *Contra*, Fiske v. Soule, 87 Cal. 313; 25 Pac. 430; Chapman v. Veach, 32 Kan. 167; 4 Pac. 100; McIlvaine v. Harris, 20 Mo. 457; 64 Am. Dec. 196.

¹¹ Wimp v. Early, — Mo. App. —; 78 S. W. 343.

¹² Kerr v. Hill, 27 W. Va. 576. (This decision follows Crews v. Pendleton, 1 Leigh (Va.) 297; 19 Am. Dec. 750, in holding that growing wheat passes with the land if no reservation is made. It goes beyond the latter case, it holding that even a reservation of it or contract concerning it is to be treated as dealing with realty.)

¹ State v. Sanders, 52 S. C. 580; 30 S. E. 616.

² Scales v. Wiley, 68 Vt. 39; 33 Atl. 771.

³ Plunkett v. Meredith, — Ark. —; 77 S. W. 600. (A contract for the permanent use of such well may be a contract for an easement.)

⁴ Haight v. Connors, 149 Pa. St. 297; 24 Atl. 302.

the statute include promises by a land-owner to pay for improvements erected on his own realty by some other person,⁵ or made by another on public land which the promisor afterwards acquires.⁶ A contract to remove earth from a tract of land is not within the statute if the primary object of the parties was the removal of the earth, as this is a contract for work and labor; but if a contract primarily for the earth itself, it is within the statute.⁷

§657. What contracts are within this clause.

The "contract or sale" referred to in this clause is one which creates or transfers an estate or interest. The first test to apply, therefore, in determining the effect of this clause of the statute upon a contract is whether or not the contract creates, modifies or destroys interests of the parties in realty. If the interests in realty which belong to the parties to the contract are the same under the contract as without it, the contract is not within the statute.¹ Thus where A grants an easement to a railroad in writing, and orally reserves the right to use a spring on the tract included in such grant, such oral reservation is not within the statute, as A had a pre-existing legal right to such spring.² Another illustration of this principle is a contract providing for the right of redemption of property conveyed by an instrument which is in form a deed, but in reality a mortgage. Such a contract is not within the statute.³

So the statute of frauds does not apply to adverse possession during the statutory period, even if oral evidence is necessary

⁵ Godeffroy v. Caldwell, 2 Cal. 489; 56 Am. Dec. 360; Clark v. Shultz, 4 Mo. 235; Frear v. Hardenbergh, 5 Johns. (N. Y.) 272; 4 Am. Dec. 356; Thouvenin v. Lea, 26 Tex. 612.

⁶ Zickafoss v. Hulick, 1 Morris (Ia.) 175; 39 Am. Dec. 458.

⁷ Welever v. Detwiler Co., 16 Ohio C. C. 680; 8 Ohio C. D. 668.

¹ Smith v. Holloway, 124 Ind. 329; 24 N. E. 886; Swift v. Calnan, 102 Ia. 206; 63 Am. St. Rep. 443; 37 L. R. A. 462; 71 N. W. 233; Mussey v. Bates, 65 Vt. 449; *sub nomine*, Mussey v. Yates, 21 L. R. A. 516; 27 Atl. 167.

² Smith v. Holloway, 124 Ind. 329; 24 N. E. 886.

³ See § 644.

to connect the different adverse possessions and to show that they have been continuous.⁴

§658. Contracts to convey or devise realty.

This clause of the statute includes contracts which create or convey any interest in or concerning realty except such interests as may be specifically or impliedly excepted therefrom by statute. It includes contracts to convey realty or some estate therein *inter vivos*.¹ Thus a contract by a husband to convey community real estate to his wife is within the statute.² So an oral contract whereby a number of heirs agree that if a co-heir will defend a suit brought against them and save them from all costs, he shall have all the realty inherited by them from their common ancestor, is within the statute.³ Thus an oral executory contract to partition realty among co-tenants,⁴ or to exchange realty,⁵ is within the statute. So is an oral contract to warrant title to realty,⁶ or to submit to arbitration a question

⁴ Illinois Steel Co. v. Budzisz, 106 Wis. 499; 80 Am. St. Rep. 54; 48 L. R. A. 830; 81 N. W. 1027 (rehearing denied), 82 N. W. 534.

¹ McKinnon v. Mixon, 128 Ala. 612; 29 So. 690; Tolleson v. Blackstock, 95 Ala. 510; 11 So. 284; Lyons v. Bass, 108 Ga. 573; 34 S. E. 721; Jackson v. Myers, 120 Ind. 504; 22 N. E. 90; 23 N. E. 86; Hershman v. Pascal, 4 Ind. App. 330; 30 N. E. 932; Bishop v. Martin (Ky.), 65 S. W. 807; Fuqua v. Fuqua (Ky.), 16 S. W. 353; McLennan v. Boutell, 117 Mich. 544; 76 N. W. 75; McDonald v. Maltz, 78 Mich. 685; 44 N. W. 337; Fargusson v. Improvement Co., 56 Minn. 222; 57 N. W. 480; Watson v. Ry., 46 Minn. 321; 48 N. W. 1129; Taylor v. Von Schraeder, 107 Mo. 206; 16 S. W. 675; Bloomfield State Bank v. Miller, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75

N. W. 569; Vick v. Vick, 126 N. C. 123; 35 S. E. 257; Jordan v. Furnace Co., 126 N. C. 143; 78 Am. St. Rep. 644; 35 S. E. 247; Reed v. Adams, 172 Pa. St. 127; 33 Atl. 700; Bowen v. Sayles, 23 R. I. 34; 49 Atl. 103; Cleveland v. Evans, 5 S. D. 53; 58 N. W. 8; Lombard Investment Co. v. Carter, 7 Wash. 4; 38 Am. St. Rep. 861; 34 Pac. 209.

² Churchill v. Stephenson, 14 Wash. 620; 45 Pac. 28.

³ Howton v. Gilpin (Ky.), 69 S. W. 766.

⁴ Berry v. Seawell, 65 Fed. 742; 13 C. C. A. 101.

⁵ Purcell v. Miner, 4 Wall. (U. S.) 513; Webb v. Ballard, 90 Ala. 357; 7 So. 443; Dennis v. Kuster, 57 Kan. 215; 45 Pac. 602; Newlin v. Hoyt, — Minn. —; 98 N. W. 323.

⁶ Bishop v. Little, 5 Greenl. (Me.) 362; Aird v. Alexander, 72 Miss. 358; 18 So. 478; Kelly v. Pal-

involving title to realty.⁷ It also includes contracts to devise realty.⁸ Since the question of the application of the statute to contracts to devise seems to turn on the nature of the property of decedent, owned by him at his death when his will takes effect, the statute applies if decedent's property, owned by him at his death, is realty,⁹ and does not apply if it is personalty.¹⁰ A contract not to make a will to affect the interests of a given heir is within the statute as being a negative method of contracting for a conveyance of realty.¹¹

§659. Releases.

A release of an interest in realty is within the statute, whether the release attempts to pass a fee,¹ or a life estate,² or a term of years,³ or an equitable interest.⁴ So an agreement by an heir

mer, 42 Neb. 423; 60 N. W. 924.

⁷ Stork v. Cannady, 3 Litt. (Ky.) 399; 14 Am. Dec. 76 (obiter).

⁸ Manning v. Pippen, 86 Ala. 357; 11 Am. St. Rep. 46; 5 So. 572; Pond v. Sheean, 132 Ill. 312; 8 L. R. A. 414; 23 N. E. 1018; Alerding v. Allison, 31 Ind. App. 397; 68 N. E. 185; Orth v. Orth, 145 Ind. 184; 57 Am. St. Rep. 185; 32 L. R. A. 298; 42 N. E. 277; rehearing denied, 145 Ind. 206; 57 Am. St. Rep. 201; 32 L. R. A. 308; 44 N. E. 17; Austin v. Davis, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; Hamilton v. Thirston, 93 Md. 213; 48 Atl. 709; Emery v. Burbank, 163 Mass. 326; 47 Am. St. Rep. 456; 28 L. R. A. 57; 39 N. E. 1026; De Moss v. Robinson, 46 Mich. 62; 41 Am. Rep. 144; 8 N. W. 712; Teske v. Dittberner, 63 Neb. 607; 88 N. W. 658; Smith v. Smith, 28 N. J. L. 208; 78 Am. Dec. 49; Blount v. Washington, 108 N. C. 230; 12 S. E. 1008; Kling v. Bordner, 65 O. S. 86; 61 N. E. 148; Shahan v. Swan, 48 O. S. 25; 29 Am. St. Rep. 517;

26 N. E. 222; Richardson v. Orth, 40 Or. 252; 66 Pac. 925; 69 Pac. 455; Swash v. Sharpstein, 14 Wash. 426; 32 L. R. A. 796; 44 Pac. 862; *In re Sheldon's Estate*, — Wis. —; 97 N. W. 524.

⁹ Austin v. Davis, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890.

¹⁰ Turnipseed v. Sirrine, 57 S. C. 559; 76 Am. St. Rep. 580; 35 S. E. 757; rehearing denied, 35 S. E. 1035.

¹¹ Dicken v. McKinley, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134.

¹ Hughes v. Moore, 7 Cranch (U. S.) 176; Brands v. De Witt, 44 N. J. Eq. 545; 6 Am. St. Rep. 909; 10 Atl. 181; 14 Atl. 894.

² As dower, Brown v. Rawlings, 72 Ind. 505; Wright v. De Graff, 14 Mich. 164; Gordon v. Gordon, 54 N. H. 152.

³ Lammott v. Gist, 2 H. & G. (Md.) 433; 18 Am. Dec. 295.

⁴ Hughes v. Moore, 7 Cranch (U. S.) 176; Fisher v. Koontz, 110 Ia.

whereby he releases his expectancy in his ancestor's estate falls within this clause of the statute.⁵

§660. Reservations.

An oral reservation of an interest in realty is as much within the statute as an oral contract to convey.¹ Thus an oral reservation of growing trees,² or a right of pasture,³ is within the statute.

§661. Contracts to purchase realty.

This clause of the statute includes contracts to purchase realty as well as contracts to sell it.¹ It makes no difference as to the application of the statute which party to the contract is attempting to enforce it.

§662. Purchase from one, under contract to sell to another.

If A buys land from X with A's own money, and takes the title in his own name, under a contract with B to convey such realty to B when B should pay to A the price of such realty, A's contract is within the statute.¹ Thus if a A agrees to buy at foreclosure sale for B, who has probably no interest in the realty, such contract is within the statute.² The same rule obtains where B is to pay a part of the purchase price and to

498; 80 N. W. 551; *Grunow v. Salter*, 118 Mich. 148; 76 N. W. 325.

⁵ *Gary v. Newton*, 201 Ill. 170; 66 N. E. 267.

¹ *Fiske v. Soule*, 87 Cal. 313; 25 Pac. 430; *Smith v. Price*, 39 Ill. 28; 89 Am. Dec. 284; *Dodder v. Snyder*, 110 Mich. 69; 67 N. W. 1101.

² *Dodder v. Snyder*, 110 Mich. 69; 67 N. W. 1101 (citing *Adams v. Watkins*, 103 Mich. 431; 61 N. W. 774; *Vanderkarr v. Thompson*, 19 Mich. 82); *Jones v. Timmons*, 21 O. S. 596.

³ *Dodder v. Snyder*, 110 Mich. 69; 67 N. W. 1101.

¹ *Williams v. Gibson*, 84 Ala. 228; 5 Am. St. Rep. 368; 4 So. 350; *Schlanker v. Smith*, 27 Mo. App. 516.

¹ *McDearmon v. Burnham*, 158 Ill. 55; 41 N. E. 1094; *Rogers v. Simmons*, 55 Ill. 76; *Benge v. Benge* (Ky.), 23 S. W. 668; *Nagengast v. Alz*, 93 Md. 522; 49 Atl. 333; *Randall v. Constans*, 33 Minn. 329; 23 N. W. 530.

² *McDearmon v. Burnham*, 158 Ill. 55; 41 N. E. 1094. A different rule would seem to apply if B has an interest in the realty, such as that of mortgagor.

See § 647.

receive a part interest in the realty.³ Thus where A and B agreed to buy at an executor's sale a tract of land lying between their respective holdings and divide such tract equally between them, such contract is within the statute.⁴ Thus if A is B's agent and buys land with A's money, A's promise to convey to B is within the statute.⁵ Indeed a contract whereby A agrees to buy land for B, as B's agent, is within the statute as long as B's money is not actually expended in the purchase of such property.⁶ Some authorities, however, hold that such breach of contract by an agent amounts to a constructive fraud, and makes him trustee of an implied trust. Where this theory is adopted the statute of frauds has, of course, no application in equity.⁷ If the parties are in a fiduciary relation outside of the mere contract of agency, such breach of contract may be treated as constructive fraud.⁸ In this case the statute of frauds will not prevent relief in equity.⁹

³ *Dunphy v. Ryan*, 116 U. S. 491; *McElroy v. Swope*, 47 Fed. 380; *Robbins v. Kimball*, 55 Ark. 414; 29 Am. St. Rep. 45; 18 S. W. 457; *Roughton v. Rawlings*, 88 Ga. 819; 16 S. E. 89; *Morton v. Nelson*, 145 Ill. 586; 32 N. E. 916; 31 N. E. 168; *Furber v. Page*, 143 Ill. 622; 32 N. E. 444; *Parsons v. Phelan*, 134 Mass. 109; *Schultz v. Waldons*, 60 N. J. Eq. 71; 47 Atl. 187; *Levy v. Brush*, 45 N. Y. 589; *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *Walker v. Tyler*, 94 Va. 532; 27 S. E. 434. Cases of this class where A buys land from X under contract to convey a part thereof to B, should be studied in connection with oral contracts to form a partnership to deal in realty.

See § 648.

⁴ *Roughton v. Rawlings*, 88 Ga. 819; 16 S. E. 89.

⁵ *James v. Smith* (1891), 1 Ch. 384; *Burden v. Sheridan*, 36 Ia.

125; 14 Am. Rep. 505; *Fowke v. Slaughter*, 3 A. K. Mar. (Ky.) 56; 13 Am. Dec. 133; *Nagengast v. Alz*, 93 Md. 522; 49 Atl. 333; *Bourke v. Callanan*, 160 Mass. 195; 35 N. E. 460; *Nestal v. Schmid*, 29 N. J. Eq. 458; *Watson v. Erb*, 33 O. S. 35; *Whiting v. Dyer*, 21 R. I. 278; 43 Atl. 181.

⁶ *James v. Smith* (1891), 1 Ch. 384; *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619; 28 N. W. 676; *Nesbitt v. Cavender*, 27 S. C. 1; 2 S. E. 702.

⁷ *Irvine v. Marshall*, 20 How. (U. S.) 558; *Boswell v. Cunningham*, 32 Fla. 277; 21 L. R. A. 54; 13 So. 354; *Rose v. Hayden*, 35 Kan. 106; 57 Am. Rep. 145; 10 Pac. 554.

⁸ See ch. XI.

⁹ *Valette v. Tedens*, 122 Ill. 607; 3 Am. St. Rep. 502; 14 N. E. 52; *Haight v. Pearson*, 11 Utah 51; 39 Pac. 479.

§663. Conveyance under contract to reconvey to grantor.

If A conveys realty to B in reliance on B's oral promise to reconvey, B's promise is within this clause of the statute.¹

This rule assumes that apart from the contract, the conveyance leaves no equitable interest of any kind in A. If A then has any right it depends solely on the oral contract, and this contract cannot be enforced under the statute of frauds. Thus if A is a mortgagor and conveys his equity to B on B's promise to reconvey on payment of the amount of the debt within a given time, it may be difficult to determine whether A's conveyance is still a mortgage or an absolute deed. If the latter, B's promise to reconvey is unenforceable.² An exception to this rule exists in some jurisdictions where the parties to the contract are in confidential relations. A breach of such contract is held to be fraud "independent of any element of actual fraud,"³ and a constructive trust arises. The statute of frauds does not apply therefore.⁴ The breach of such contract is not fraud and does not create a constructive trust in the absence of confidential relations.⁵ A delivery of a deed by A to B in escrow for C, on condition that C will deed certain property to X in return for the property deeded by A to C, has been held not to be a contract within this clause of the statute.⁶

¹ *Goree v. Clements*, 94 Ala. 337; 10 So. 906; *Peagler v. Stabler*, 91 Ala. 308; 9 So. 157; *Brock v. Brock*, 90 Ala. 86; 9 L. R. A. 287; 8 So. 11; *Ellis v. Hill*, 162 Ill. 557; 44 N. E. 858; *Hurley v. Donovan*, 182 Mass. 64; 64 N. E. 685; *Rose v. Bank*, 165 Mass. 273; 43 N. E. 93; *Smith v. Marsh*, — Mich. —; 93 N. W. 1091; *Poppe v. Poppe*, 114 Mich. 649; 68 Am. St. Rep. 503; 72 N. W. 612; *Veeder v. Trust Co.*, 61 Neb. 892; 86 N. W. 982; *Guntert v. Guntert* (Tenn. Ch. App.), 37 S. W. 890; *Lancaster v. Richardson*, 13 Tex. Civ. App. 682; 35 S. W. 749; *Caffey v. Caffey*, 12 Tex. Civ. App. 616; 35 S. W. 738.

² *Goree v. Clements*, 94 Ala. 337; 10 So. 906.

³ *Brison v. Brison*, 90 Cal. 323; 27 Pac. 186.

⁴ *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; 17 Pac. 689.

⁵ See cases cited in this section.

⁶ *Simons v. Bedell*, 122 Cal. 341; 68 Am. St. Rep. 35; 55 Pac. 3. It does not appear clearly whether the conveyance by C to X was a condition precedent to the delivery of A's deed by B to C. A's death was one condition on which such deed was to be delivered. The court divided on the question of the statute of frauds, the minority holding on the authority of *Wittenbrock v. Cass*,

§664. Contract to pay commission to agent for sale of realty.

A contract to pay an agent a commission in money or other personalty for finding a purchaser for realty does not give the agent any interest in realty and is not within this clause of the statute.¹ A contract to pay the agent in money if the consideration for the property sold, in excess of the money thereon, was paid in money, and if the consideration therefor was other realty, a proportional share thereof is a contract for the conveyance of an interest in realty and within this clause of the statute.² By special statute in some jurisdictions contracts to pay a broker a commission for procuring a purchaser for realty is within the statute of frauds.³ Such a statute has no application where the agent has performed the contract on his part, the realty has been conveyed and the agent seeks to recover his commissions;⁴ nor does it include a contract to pay an agent for examining realty and advising his principal whether to buy it or not;⁵ nor does it include a contract between two brokers to co-operate in making a sale and to divide their commissions.⁶

110 Cal. 1; 42 Pac. 300, that the contract was within the statute.

¹ Hannan v. Prentiss, 124 Mich. 417; 83 N. W. 102; Carr v. Leavitt, 54 Mich. 540; 20 N. W. 576; Vaughn v. McCarthy, 59 Minn. 199; 60 N. W. 1075; Snyder v. Wolford, 33 Minn. 175; 53 Am. Rep. 22; 22 N. W. 251; Rice-Dwyer, etc., Co. v. Ruhman, 68 Mo. App. 503; Griffith v. Woolworth, 28 Neb. 715; 44 N. W. 1137; Spengeman v. Building Association, 60 N. J. L. 357; 37 Atl. 723; Lamb v. Baxter, 130 N. C. 67; 40 S. E. 850; Abbott v. Hunt, 129 N. C. 403; 40 S. E. 119; McLaughlin v. Wheeler, 1 S. D. 497; 47 N. W. 816.

² Russell v. Briggs, 165 N. Y. 500; 53 L. R. A. 556; 59 N. E. 303.

³ King v. Benson, 22 Mont. 256; 56 Pac. 280. By special statute in California an "agreement authorizing or employing an agent or broker to purchase or sell real estate, for compensation or commission" is invalid unless in writing, and this includes an oral contract to pay an agent for services in procuring an exchange of land. Shanklin v. Hall, 100 Cal. 26; 34 Pac. 636.

⁴ Griffith v. Woolworth, 28 Neb. 715; 44 N. W. 1137.

⁵ Wilson v. Morton, 85 Cal. 598; 24 Pac. 784.

⁶ Gorham v. Hieman, 90 Cal. 346; 27 Pac. 289.

§665. Public extra-judicial and judicial sales.

A sale of realty at public auction is within the statute as long as the sale is extra-judicial.¹ Thus a sale at public auction under a power of sale in a mortgage is within the statute of frauds.² An executor's sale under a power given by a will is not within the statute.³ Hence, while the auctioneer may make the memorandum required by the statute as the agent of both parties⁴ he must do so at the time that the sale is made. If he makes it afterwards,⁵ or not at all,⁶ or if he makes an oral contract with a prospective bidder with reference to the sale of the realty⁷ the statute applies.

A judicial sale, made by order of the court and under its supervision is provided for by statute and is a matter of record. The statute of frauds is therefore held not to apply to such sales.⁸

However, a sale made in pursuance of an order of a court, and made by an officer of the court, may still be an extra judicial sale if it is not made under the direction and supervision of the court.⁹ The test for determining whether a sale of this sort is a judicial sale or an extra-judicial sale, seems to be whether the proceedings of the officer under the order of

¹ Seymour v. Loan Association, 116 Ga. 285; 94 Am. St. Rep. 131; 42 S. E. 518; O'Donnell v. Leeman, 43 Me. 158; 69 Am. Dec. 54; Boyd v. Greene, 162 Mass. 566; 39 N. E. 277; Lobit v. McClave, 8 Tex. Civ. App. 531; 28 S. W. 726; Ralphsnyder v. Shaw, 45 W. Va. 680; 31 S. E. 953; Crowley v. Hicks, 98 Wis. 566; 74 N. W. 348.

² Seymour v. Loan Association, 116 Ga. 285; 94 Am. St. Rep. 131; 42 S. E. 518.

³ Warehime v. Graf, 83 Md. 98; 34 Atl. 364.

⁴ See § 692.

⁵ Ralphsnyder v. Shaw, 45 W. Va. 680; 31 S. E. 953; Crowley v. Hicks, 98 Wis. 566; 74 N. W. 348.

⁶ Lobit v. McClave, 8 Tex.

Civ. App. 531; 28 S. W. 726.

⁷ Boyd v. Greene, 162 Mass. 566; 39 N. E. 277.

⁸ Halleck v. Guy, 9 Cal. 181; 70 Am. Dec. 643; Chandler v. Morey, 195 Ill. 596; 63 N. E. 512 (by special statute); Watson v. Violet, 2 Duv. (Ky.) 332; Warehime v. Graf, 83 Md. 98; 34 Atl. 364; Armstrong v. Vroman, 11 Minn. 142; Emley v. Drumm, 36 Pa. St. 123; Cash v. Tozer, 1 Watts & S. (Pa.) 519; Robertson v. Smith, 94 Va. 250; 64 Am. St. Rep. 723; 26 S. E. 579.

⁹ Carroll v. Powell, 48 Ala. 298; Bozzaz v. Rowe, 30 Ill. 198; 83 Am. Dec. 184; Ruckle v. Barbour, 48 Ind. 274; Wolfe v. Sharp, 10 Rich. L. (S. C.) 60; Dawson v. Miller, 20 Tex. 171; 70 Am. Dec. 380.

sale are to be submitted to the court for confirmation or not. Accordingly a sale by a commissioner of a court of chancery,¹⁰ or by a sheriff on execution,¹¹ or by an executor or administrator under order of a court of probate powers,¹² have all been held to be judicial sales where such sales must be reported to the court for confirmation, and hence not within the statute. On the other hand where confirmation was not required by the local procedure, a sale by an administrator under order of the probate court,¹³ or a sale on execution,¹⁴ have been held to be within the statute of frauds, on the theory that although a license had to be obtained from the court in the first instance, the sale was not within the control of the court as to any subsequent steps, and hence was not a judicial sale.

§666. Effect of variation in statute.

The scope of this clause of course depends on the wording thereof in the particular statute under discussion. Accordingly, under a statute which omits the words "any interest in or concerning" lands, an oral agreement to create an easement,¹ and an oral agreement to create a mortgage,² are not within such statute, as they are not contracts for the sale of lands, although they create some interest therein.

¹⁰ *Watson v. Violet*, 2 Duv. (Ky.) 332; *Robertson v. Smith*, 94 Va. 250; 64 Am. St. Rep. 723; 26 S. E. 579.

¹¹ *Armstrong v. Vioman*, 11 Minn. 112; *Emley v. Drum*, 36 Pa. St. 123; *Cash v. Tozer*, 1 Watts & S. (Pa.) 519.

¹² *Halleck v. Guy*, 9 Cal. 181; 70 Am. Dec. 643; *Howard v. Howard*, 96 Ky. 445; 29 S. W. 285; *Fulton v. Moore*, 25 Pa. St. 468; *King v. Gunnison*, 4 Pa. St. 171.

¹³ *Bozza v. Rowe*, 30 Ill. 198; 83 Am. Dec. 184; *Dawson v. Miller*, 20

Tex. 171; 70 Am. Dec. 380. (This doctrine was invoked in order to demonstrate that the auctioneer was the agent of both vendor and vendee.)

¹⁴ *Remington v. Linthicum*, 14 Pet. (U. S.) 84; *Ridgway v. Ingram*, 50 Ind. 145; 19 Am. Rep. 706; *Barney v. Patterson*, 6 Harr. & J. (Md.) 182; *Tombs v. Basye*, 65 Mo. App. 30.

¹ *Warner v. Ry.*, 164 U. S. 418. (Decided under the Texas statute.)

² *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172; 35 S. W. 32.

VI. CONTRACTS NOT TO BE PERFORMED WITHIN THE SPACE OF ONE YEAR FROM THE MAKING THEREOF.

§667. Subject-matter included.

This clause of the statute classifies contracts according to the time of performance. By the weight of authority contracts of every kind of subject-matter may be included within its terms.

In some jurisdictions, however, contracts concerning certain classes of subject-matter are not looked upon as being within this clause. Since contracts for the sale of an interest in realty are provided for in another section of this statute, the question has arisen whether they may also fall within the section affecting contracts not to be performed within the year, or whether the clause affecting contracts concerning realty is exclusive. The weight of authority is that such contracts may fall within the clause affecting contracts not to be performed within the year.¹ In New York a statute authorizing oral leases for a year, is held to take contracts for realty out of the operation of the clause affecting contracts not to be performed within the year.² Under substantially similar statutes other courts have reached an opposite conclusion.³

In some jurisdictions a contract to marry is held not to

¹ *Bain v. McDonald*, 111 Ala. 269; 20 So. 77; *Wickson v. Mfg. Co.*, 128 Cal. 156; 79 Am. St. Rep. 36; 49 L. R. A. 141; 60 Pac. 764; *Comstock v. Ward*, 22 Ill. 248; *Cooney v. Murray*, 45 Ill. App. 463; *Wolf v. Dozer*, 22 Kan. 436; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Engler v. Schneider*, 66 Minn. 388; 69 N. W. 139; *Johnson v. Albertson*, 51 Minn. 333; 53 N. W. 642; *Jellett v. Rhode*, 43 Minn. 166; 7 L. R. A. 671; 45 N. W. 13; *McCroy v. Toney*, 66 Miss. 233; 2 L. R. A. 847; 5 So. 392; *White v. Holland*, 17 Or. 3; 3 Pac. 573; *Pulse v. Hamer*, 8 Or.

251; *Whiting v. Opera House Co.*, 88 Pa. St. 100.

² *Ward v. Hasbrouck*, 169 N. Y. 407; 62 N. E. 434; *Becar v. Flues*, 64 N. Y. 518; *Young v. Dake*, 5 N. Y. 463; 55 Am. Dec. 356. A similar view seems to be held in Indiana. *Huffman v. Starks*, 31 Ind. 474; and in Michigan, *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; 18 N. W. 219; and in New Mexico, *Childers v. Talbott*, 4 N. M. 336; 16 Pac. 275.

³ *Bain v. McDonald*, 111 Ala. 269; 20 So. 77; *Wickson v. Mfg. Co.*, 128 Cal. 156; 79 Am. St. Rep. 36; 49 L. R. A. 141; 60 Pac. 764.

be within the statute,⁴ but the weight of authority is opposed to this view.⁵

§668. General scope of clause.

This clause of the statute includes contracts which by their terms cannot be performed within one year from the date on which they are made.¹ Applying this rule to the adjudicated cases we find that this clause of the statute has received a very narrow construction, the courts almost without exception aiming to exclude from its application as many classes of cases as possible. To have this clause of the statute apply the contract must be one that "by its very terms shows that it was not to be completed within the year."² The restriction imposed by the more conservative courts is that the contract must by its terms when "fairly and reasonably interpreted" admit of performance within the year to fall without the statute.³ If the contract is one which by its terms may be performed within the year or may be performed after the year, according to circumstances, it is not within this clause of the statute,⁴ even if its

⁴ *Blackburn v. Mann*, 85 Ill. 222; *Lewis v. Tapman*, 90 Md. 294; 47 L. R. A. 385; 45 Atl. 459 (citing *Harrison v. Cage*, 1 Ld. Raym. 386; *Philpot v. Wallet*, 3 Lev. 65; *Cook v. Baker*, 1 Strange 34; *Ogden v. Ogden*, 1 Bland. 284); *Brick v. Gan-nar*, 36 Hun 52.

⁵ *Ullman v. Meyer*, 10 Fed. 241; *Nichols v. Weaver*, 7 Kan. 373; *Haslam v. Barge*, — Neb. —; 96 N. W. 245; *Derby v. Phelps*, 2 N. H. 515.

¹ *Haynes v. Mason*, 30 Ill. App. 85; *Miller v. Banking Co.*, 53 Mo. App. 430; *Schultz v. Tatum*, 35 Mo. App. 136; *Reynolds v. Bank*, 62 Neb. 747; 87 N. W. 912; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128; 38 Am. Dec. 620; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205; *Parkersburg Mill Co. v. R. R. Co.*, 50 W. Va. 94; 40 S. E. 328.

² *Kiene v. Shaeffing*, 33 Neb. 21,

23; 49 N. W. 773. To the same effect see *Walker v. Johnson*, 96 U. S. 424; *Bank v. Finnell*, 133 Cal. 475; 65 Pac. 976; *Hinkle v. Fisher*, 104 Ind. 84; 3 N. E. 624; *Saunders v. Kastenbine*, 6 B. Mon. (Ky.) 17; *Farwell v. Tillson*, 76 Me. 227; *Somerby v. Bunting*, 118 Mass. 279; 19 Am. Rep. 459; *Warren, etc., Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788; 23 N. E. 908; *Kimmins v. Oldham*, 27 W. Va. 258.

³ *Warren, etc., Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788; 23 N. E. 908.

⁴ *Bank v. Finnell*, 133 Cal. 475; 65 Pac. 976; *Durham v. Hiatt*, 127 Ind. 514; 26 N. E. 401; *Houghton v. Houghton*, 14 Ind. 505; 77 Am. Dec. 69; *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 80; *Lapham v. Whipple*, 8 Met. (Mass.) 59; 41 Am. Dec. 487; *Barton v. Gray*, 57 Mich.

performance within the year is not expected or even probable.⁵ Thus an indefinite term of employment which lasts three and a half years, is not within the statute;⁶ nor is a contract for one year's employment brought with the statute by a vague promise to pay a better salary for the ensuing year if possible.⁷ So a contract is not within the statute if by its terms the parties contemplate performance within the year, but add extra time for emergencies, and so exceed the year.⁸

§669. Contracts to be performed on one side within the year.

In most jurisdictions it is held that the statute has no application to a contract which is to be performed on one side within the year and on the other side not within the year.¹ Some juris-

622; 24 N. W. 638; Warren, etc., Co. v. Holbrook, 118 N. Y. 586; 16 Am. St. Rep. 788; 23 N. E. 908; Moore v. Fox, 10 Johns. (N. Y.) 244; 6 Am. Dec. 338; Walker v. R. R., 26 S. C. 80; 1 S. E. 366; Long Mfg. Co. v. Gray, 13 Tex. Civ. App. 172; 35 S. W. 32. "In order to bring a case within the operation of the statute of frauds, there must be an express and specific stipulation in the contract that it is not to be performed within the year, or it must appear therefrom that it was not the intention of the parties that the agreement should be performed within that period." Powder River Livestock Co. v. Lamb, 38 Neb. 339, 348; 56 N. W. 1019.

⁵ Woodall v. Mfg. Co., 9 Colo. App. 198; 48 Pac. 670; Russell v. Slade, 12 Conn. 455; Wiggins v. Keizer, 6 Ind. 252; Aiken v. Nogle, 47 Kan. 96; 27 Pac. 825; Cole v. Singerly, 60 Md. 348; Reynolds v. Bank, 62 Neb. 747; 87 N. W. 912; Powder River Livestock Co. v. Lamb, 38 Neb. 339; 56 N. W. 1019; Warren, etc., Co. v. Holbrook, 118 N. Y. 586; 16 Am. St. Rep. 788; 23 N. E.

908; Kent v. Kent, 62 N. Y. 560; 20 Am. Rep. 502.

⁶ Kiene v. Shaeffing, 33 Neb. 21; 49 N. W. 773.

⁷ Woodall v. Mfg. Co., 9 Colo. App. 198; 48 Pac. 670.

⁸ Jones v. Pouch, 41 O. S. 146.

¹ Miles v. New Zealand, etc., Co., 32 Ch. Div. 266; Donellan v. Read, 3 Barn. & Adol. 899; Trimble v. Lanktree, 25 Ont. 109; McDonald v. Crosby, 192 Ill. 283; 61 N. E. 505; Lowman v. Sheets, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351; Houghton v. Houghton, 14 Ind. 505; 77 Am. Dec. 69; Smalley v. Greene, 52 Ia. 241; 35 Am. Rep. 267; 3 N. W. 78; Mackey v. Thisler, 7 Kan. App. 276; 53 Pac. 767; McDowell v. Miller, 1 Kan. App. 666; 42 Pac. 402; Dant v. Head, 90 Ky. 255; 29 Am. St. Rep. 369; 13 S. W. 1073; Botkin v. Land Co. (Ky.), 66 S. W. 747; Langan v. Iverson, 78 Minn. 299; 80 N. W. 1051; Blanding v. Sargent, 33 N. H. 239; 66 Am. Dec. 720; Durfee v. O'Brien, 16 R. I. 213; 14 Atl. 857; Sheehy v. Adarene, 41 Vt. 541; 98 Am. Dec. 623; Grace v. Lynch, 80 Wis. 166; 49 N. W.

dictions hold that such contracts are within the statute of frauds.² Their view seems to be correct on sound principle, though overborne by weight of authority. The courts that hold such contracts are not within the statute seem to have confused the right to recover property parted with under an unenforceable contract with the right to enforce the contract.³

Among the cases held not to be within the statute because performance on one side is to be made within the year, are the following: A contract whereby A delivers to B a certain number of sheep, and B agrees to deliver back double the number at a time longer than one year from the making of the contract;⁴ a contract whereby A conveys a lease and a trade-mark to B, and B agrees to pay one hundred dollars a year for eight years in consideration of the trade-mark,⁵ a contract whereby a grantee assumes and agrees to pay a debt of grantor not due for more than a year; an oral promise to indemnify against liability on a bond which is to take effect in the future and continue in force a year;⁶ a contract to repay,

751; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; 32 N. W. 551; *Treat v. Hiles*, 68 Wis. 344; 60 Am. Rep. 858; 32 N. W. 517; *McTalland v. Sanford*, 26 Wis. 595. This rule was laid down in England in *Donellan v. Read*, 3 B. & A. 899. was doubted in *Souch v. Strawbridge*, 2 M. G. & S. 808, was nevertheless followed in *Cherry v. Hemming*, 4 Exch. 631, and was criticised but held to be too firmly settled to be overthrown in *Miles v. New Zealand, etc., Co.*, 32 L. R. Ch. D. 266. See the historical discussion of the doctrine in *Kendall v. Garneau*, in which after summing up the history of the doctrine in England and America the court held that the Nebraska legislature, in adopting the statute, adopted the English rule as a settled principle of construction, saying: "We here adopt the English rule, not as being a correct

construction of their statute, but because we are convinced that in the light of history it is the construction which our legislature intended should be adopted." *Kendall v. Garneau*, 55 Neb. 403, 408; 75 N. W. 852.

² *Marcy v. Marcy*, 9 All. (Mass.) 8; *Pierce v. Pierce*, 28 Vt. 34.

³ See § 749 *et seq.*

⁴ *Trimble v. Lanktree*, 25 Ont. 109; *Contra*, *Dietrich v. Hoefelmeier*, 128 Mich. 145; 87 N. W. 111.

⁵ *Dant v. Head*, 90 Ky. 255; 29 Am. St. Rep. 369; 13 S. W. 1073.

⁶ *Reynolds v. Bank*, 62 Neb. 747; 87 N. W. 912; *Langdan v. Iverson*, 78 Minn. 299; 80 N. W. 1051; *Kendall v. Garneau*, 55 Neb. 403; 75 N. W. 852. But an agreement to pay "at its maturity" a note due in more than one year is within the statute, even if the maker or guarantor might by exercising an option to

at an interval of time greater than a year, money already borrowed,⁷ and a contract of subscription to corporate stock which passes title at once, though payment is not to be completed or the certificate to issue for more than one year.⁸

A contract to execute an instrument within the year, which will, when executed, affect the rights of the parties for a period longer than a year, has been held not within this clause of the statute; such as an oral agreement to execute a written lease for the term of three years, within seven months,⁹ or to dismiss a suit and execute a new contract extending payment for five years.¹⁰

§670. Contracts to last a year from a future date.

A contract which is to last for a year from the time that performance begins, and the performance of which is to begin at a day subsequent to the day on which it is made, is not a contract which can be performed within a year from the date of the making thereof, and accordingly is within this clause of the statute.¹ Thus a contract of employment for a year to begin in the future,² an oral agreement to lease property for

pay before maturity pay the note within the year. *McKeany v. Black*, 117 Cal. 587; 49 Pac. 710.

⁷ *Fernald v. Gilman*, 123 Fed. 797; *McDonald v. Crosby*, 192 Ill. 283; 61 N. E. 505.

⁸ *Reed v. Gold*, — Va. —; 45 S. E. 868.

⁹ *Eaton v. Whitaker*, 18 Conn. 222; 44 Am. Dec. 586. (The court suggested that a contract to convey the fee in seven months was capable of performance in less than a year, hence a contract to lease for three years must be.)

¹⁰ *Julian v. Bauer*, 82 Ill. App. 157 (citing *Peter v. Compton*, *Skinner* 353; 1 Smith. Lead. Cas. 351 [marginal paging]; *Walker v. Johnson*, 96 U. S. 424).

¹ *Wickson v. Mfg. Co.*, 128 Cal.

156; 79 Am. St. Rep. 36; 49 L. R. A. 141; 60 Pac. 764; *Cooney v. Murray*, 45 Ill. App. 463; *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415; *Frery v. Sterling*, 99 Mass. 461; *Reynolds v. Bank*, 62 Neb. 747; 87 N. W. 912.

² *Strong v. Bent*, 31 N. S. 1; *Meyer v. Roberts*, 46 Ark. 80; 55 Am. Rep. 567; *Fish v. Glass*, 54 Ill. App. 655; *Caldwell v. Huntington*, 132 Ind. 92; 31 N. E. 566; *Shumate v. Farlow*, 125 Ind. 359; 9 L. R. A. 657; 25 N. E. 432; *Clark County v. Howell*, 21 Ind. App. 495; 52 N. E. 769; *Kleeman v. Collins*, 9 Bush. (Ky.) 460; *Davis v. Ins. Co.*, 127 Mich. 559; 86 N. W. 1021; *Lally v. Lumber Co.*, 85 Minn. 257; 88 N. W. 846; *Kansas City, etc., Ry. v. Conlee*, 43 Neb. 121; 61 N. W. 111;

a year, to begin in the future,³ or a promise to abstain from a certain business for a year, to begin in the future,⁴ are all within this clause of the statute. If the statute specifically authorizes an oral lease for a term not longer than one year, an oral lease for one year, to begin in the future, is valid.⁵ However, an oral agreement made in March, to leave ice in an ice-house on the expiration of the renewed lease thereof, a year from the first of April thereafter, has been held not within the statute, since the ice must be put in during the season for ice-cutting, which ends within a year from the time of making the contract.⁶

§671. Computation of the year.

If any appreciable interval of time is to intervene between the making of the contract and the time of performance, no matter how slight, and the contract is by its terms not to be performed until at least a year from the time that performance

Jellett v. Rhode, 43 Minn. 166; 7 L. R. A. 671; 45 N. W. 13; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; 43 Am. Rep. 39; *Hillhouse v. Jennings*, 60 S. C. 373; 38 S. E. 599; *Mendelsohn v. Banov*, 57 S. C. 147; 35 S. E. 499; *Duckett v. Pool*, 33 S. C. 238; 11 S. E. 689; *Moody v. Jones* (Tex. Civ. App.), 37 S. W. 379; *Lee v. Hill*, 87 Va. 497; 24 Am. St. Rep. 666; 12 S. E. 1052; *Draheim v. Evison*, 112 Wis. 27; 87 N. W. 795. The view taken in the above cases, holding that a contract of employment may be within the statute of frauds, seems inconsistent with that taken by the cases cited elsewhere (see § 676) that such contracts are not within the statute since they are discharged by the death of either party.

² *Bain v. McDonald*, 111 Ala. 269; 20 So. 77; *Wickson v. Mfg. Co.*, 128 Cal. 156; 79 Am. St. Rep. 36; 49 L.

R. A. 141; 60 Pac. 764; *Comstock v. Ward*, 22 Ill. 248; *Thomas v. Manus* (Ky.), 64 S. W. 446; *Hitt v. Greaser*, 71 Mo. App. 206; *White v. Holland*, 17 Or. 3; 3 Pac. 373. *Contra*, *Higgins v. Gager*, 65 Ark. 604; 47 S. W. 848; *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; 18 N. W. 219; *McCroy v. Toney*, 66 Miss. 233; 2 L. R. A. 847; 5 So. 392.

⁴ *Higgins v. Gager*, 65 Ark. 604; 47 S. W. 848.

⁵ *Hayes v. Arrington*, 108 Tenn. 494; 68 S. W. 44.

⁶ *Brown v. Throop*, 59 Conn. 596; 13 L. R. A. 646; 22 Atl. 436. (While this was probably the performance intended, it was not that contracted for. It made no difference where the ice came from if it was left in the ice house when the lease expired. The court upheld the contract by a strained construction.)

begins, the statute applies.¹ Thus in a contract to last for a year from the time that performance begins an interval of two,² three,³ seven⁴ or twelve⁵ days, or of one,⁶ two,⁷ or three⁸ months, brings the contract within this clause of the statute.⁹ A contract to last a year, commencing with the date of the contract, is not within this clause of the statute. A contract to last a year beginning on the day after the making of the contract is not within the statute, since by the rules controlling computation of time, the day on which the contract is made must be excluded in computing the year.¹⁰ In order to come within the statute, the contracts must by its terms definitely postpone performance to a future date. If performance may or may not begin at once, or if by subsequent agreement performance is postponed, but the original contract contemplated that performance would begin at once, the contract is not within the statute.¹¹ A contract to keep books for a year, and to work for one month to see if both parties will be satisfied, is a contract the performance of which may begin on the date of the contract and last for one year, and is not, therefore, within the statute.¹² A contract by A to work for B for one year, to begin as soon as A is released by his present employer, is one of which the performance may begin at once, and is not, therefore, within the statute, though six days elapsed in fact before performance

¹ Wickson v. Mfg. Co., 128 Cal. 156; 79 Am. St. Rep. 36; 49 L. R. A. 141; 60 Pac. 764; Mendelsohn v. Banov, 57 S. C. 147; 35 S. E. 499.

² Reynolds v. Bank, 62 Neb. 747; 87 N. W. 912.

³ Wickson v. Mfg. Co., 128 Cal. 156; 79 Am. St. Rep. 36; 49 L. R. A. 141; 60 Pac. 764.

⁴ Davis v. Ins. Co., 127 Mich. 559; 86 N. W. 1021; Sutcliffe v. Atlantic Mills, 13 R. I. 480; 43 Am. Rep. 39.

⁵ Kansas City, etc., Ry. v. Conlee, 43 Neb. 121; 61 N. W. 111.

⁶ Draheim v. Evison, 112 Wis. 27; 87 N. W. 795.

⁷ Lee v. Hill, 87 Va. 497; 24 Am.

St. Rep. 666; 12 S. E. 1052.

⁸ Mendelsohn v. Banov, 57 S. C. 147; 35 S. E. 499.

⁹ Aiken v. Nogle, 47 Kan. 96; 27 Pac. 825; Sanborn v. Ins. Co., 16 Gray (Mass.) 448; 77 Am. Dec. 419.

¹⁰ Britain v. Rossiter, 11 Q. B. Div. 123; Dickson v. Frisbee, 52 Ala. 165; 23 Am. Rep. 565; citing and following, Cawthorne v. Cordrey, 13 C. B. N. S. 406. *Contra*, McElroy v. Ludlum, 32 N. J. Eq. 828.

¹¹ Baltimore Breweries Co. v. Callahan, 82 Md. 106; 33 Atl. 460.

¹² A. B. Smith Co. v. Jones, 75 Miss. 325; 22 So. 802.

began.¹³ So, if the original contract requires performance within the year, a subsequent oral modification extending the time of performance more than a year from the date of the original contract, but less than a year from the date of the oral modification, does not bring the contract within the statute.¹⁴ The "making thereof" from which time the year is to be computed is the moment when the contract comes into existence, and not the time fixed for performance to begin on the one hand,¹⁵ nor the time at which the first offer was made on the other.¹⁶ Thus where certain promoters of a corporation assumed to make a contract on its behalf before it was formed, and the corporation adopted the contract after it was formed, the date of the adoption of the contract is the date from which the year is to be computed.¹⁷ A contract for a year's employment, to begin in the future, is within the statute, although payment therefor is to be made in monthly installments.¹⁸

§672. Contracts which cannot be performed within the year.

A contract which for its performance requires payment of money or delivery of property at intervals extending over a year from the date of making the contract is within the statute.¹ Thus a promise to pay money in thirteen² or in fourteen³ months; to pay one hundred dollars a year for four years;⁴ to pay money annually during the life of a contract for ten years;⁵ to repay the money paid for a patent-right in three years, if the profits during that time do not equal the purchase price;⁶ to

¹³ *Baltimore Breweries Co. v. Calahan*, 82 Md. 106; 33 Atl. 460. (In this case the writing was held sufficient to satisfy the statute.)

¹⁴ *Ward v. Matthews*, 73 Cal. 13; 14 Pac. 604.

¹⁵ *Blake v. Voigt*, 134 N. Y. 69; 30 Am. St. Rep. 622; 31 N. E. 256.

¹⁶ *McArthur v. Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653; 51 N. W. 216.

¹⁷ *McArthur v. Printing Co.*, 48 Minn. 319; 31 Am. St. Rep. 653; 51 N. W. 216.

¹⁸ *Kansas City, etc., Ry. v. Conlee*, 43 Neb. 121; 61 N. W. 111.

¹ *Jackson Iron Co. v. Concentrating Co.*, 65 Fed. 298; 12 C. C. A. 636; *De Montague v. Bacharach*, 181 Mass. 256; 63 N. E. 435.

² *Cowles v. Warner*, 22 Minn. 449.

³ *Tierman v. Granger*, 65 Ill. 351.

⁴ *Parks v. Francis*, 50 Vt. 626; 28 Am. Rep. 517.

⁵ *Jackson Iron Co. v. Concentrating Co.*, 65 Fed. 298; 12 C. C. A. 636.

⁶ *Lapham v. Whipple*, 8 Met. (Mass.) 59; 41 Am. Dec. 487.

extend a note for five years;⁷ to deliver personal property during two years,⁸ or at the end of four years;⁹ or to make exclusive use of a patent-right for seventeen years;¹⁰ to give an exclusive right to carry passengers from a certain wharf for three years;¹¹ a contract between the holder of certain overdue notes and the guarantor thereof that if the holder will foreclose the mortgage securing the notes and buy in the property, the guarantor will pay the amount due on the notes and the cost of foreclosure, if by the end of the period allowed for redemption after the sale, the debt is not paid and the property redeemed, where the redemption period is such as to postpone performance beyond the year;¹² a contract of employment for five years;¹³ and a contract to operate a telephone line for twenty years;¹⁴ are all contracts which fall within this clause of the statute. So a contract to advance money and supplies necessary to produce successive crops will, in the course of nature, extend over more than one year and is within the statute.¹⁵

§673. Contracts to be performed within a given time.

A contract by its terms to be performed "inside of a year" is clearly not within the statute.¹ If the time within which performance may be made is longer than one year, the principles applied to this subject by most courts would exclude such a contract from the statute, since by its terms it may be performed within the year. Some courts so hold,² though some courts take

⁷ *Morgan v. Wickliffe*, 110 Ky. 215; 61 S. W. 13; rehearing denied, 61 S. W. 1017.

⁸ *Kelley v. Thompson*, 175 Mass. 427; 56 N. E. 713. (A promise to deliver milk at a reduced price, to apply on a note due in two years, application to be made when note is due.)

⁹ *Dietrich v. Hoefelmeir*, 128 Mich. 145; 87 N. W. 111. (A promise by A to deliver to B a certain number of sheep, and by B to redeliver to A twice that number in four years.)

¹⁰ *Buhl v. Stevens*, 84 Fed. 922.

¹¹ *Green v. Steel Co.*, 75 Md. 109; 23 Atl. 139.

¹² *Veazie v. Morse*, 67 Minn. 100; 69 N. W. 637.

¹³ *Peck v. Machine Co.*, 196 Ill. 295; 63 N. E. 731; *Hanson v. Gunderson*, 95 Wis. 613; 70 N. W. 827.

¹⁴ *Bastin Telephone Co. v. Telephone Co.*, — Ky. —; 77 S. W. 702.

¹⁵ *Eikelman v. Perdew*, 140 Cal. 687; 74 Pac. 291.

¹ *Denn v. Peters*, 36 Or. 486; 59 Pac. 1109.

² *Lewis v. Tapman*, 90 Md. 294;

the opposite view.³ A contract made on November fourteenth to charter a tug for the ensuing season was held not within the statute, where the season began April first and ended December fifth.⁴

§674. Time of performance indefinite — may occur within the year.

Contracts for the performance of which no time is fixed, and which from their subject-matter admit of performance within the year, are not within this clause of the statute,¹ even if it is probable that the contract will be performed after the year.² Thus a contract to furnish goods to a new corporation exclusively, no time being specified,³ or a contract to marry in the future, no time being fixed,⁴ even if the parties may not anticipate marriage within the year,⁵ as where the marriage is to take place when promisor recovers his health,⁶ are not within the statute. So a contract in the fall of one year to raise and divide a crop of tobacco during the season of the following year;⁷ a contract made on June 5, 1883, to furnish material for four buildings, three of them to be erected in the season of 1883 and the fourth in the season of 1884;⁸ and a contract made

47 L. R. A. 385; 45 Atl. 459 (a contract to marry "within three years"); Kent v. Kent, 18 Pick. (Mass.) 569.

³ Mills v. O'Daniel (Ky.), 62 S. W. 1123. (A contract to accept a certain sum in full if paid "within two years" held within the statute.)

⁴ De Land v. Hall, — Mich. —; 96 N. W. 449.

¹ Devalinger v. Maxwell, — Del. —; 54 Atl. 684; Vocke v. Peters, 58 Ill. App. 338; Sprague v. Benson, 101 Ia. 678; 70 N. W. 731; Fain v. Turner, 96 Ky. 634; 29 S. W. 628; Neal v. Parker, — Md. —; 57 Atl. 213; Durgin v. Smith, 115 Mich. 239; 73 N. W. 361; Gault v. Brown, 48 N. H. 183; 2 Am. Rep.

210; Hintze v. Krabbenschmidt (Tex. Civ. App.), 44 S. W. 38.

² McConahey v. Griffey, 82 Ia. 564; 48 N. W. 983; MacElree v. Wolfersberger, 59 Kan. 105; 52 Pac. 69; Durgin v. Smith, 115 Mich. 239; 73 N. W. 361.

³ Durgin v. Smith, 115 Mich. 239; 73 N. W. 361.

⁴ Clark v. Reese, 26 Tex. Civ. App. 619; 64 S. W. 783.

⁵ MacElree v. Wolfersberger, 59 Kan. 105; 52 Pac. 69.

⁶ McConahey v. Griffey, 82 Ia. 564; 48 N. W. 983.

⁷ Burden v. Lucas (Ky.), 44 S. W. 86.

⁸ Sarles v. Sharlow, 5 Dak. 100; 37 N. W. 748.

in October, 1886, for the delivery of a quantity of corn, at a price to be fixed as the market price of corn in that county at any date that vendor chooses between the date of delivery and May, 1888,⁹ are all contracts which may be performed within a year from the date of making. So a contract to construct a street if the adversary party buy a lot and build on it, is not within the statute, as it may be performed within the year.¹⁰

§675. Performance on happening of uncertain event which may occur within the year.

If the contract provides for performance upon the happening of some event which may or may not take place within the year, such contract is not within the statute. Thus a contract to be performed on the sale of certain property, such as paying commissions,¹ or to divide profits,² as on the winding-up of a business,³ or a contract to construct a railroad,⁴ or to hold property until reimbursed out of the profits for certain improvements,⁵ or to continue "until I have made the net profit of \$50,000,"⁶ are none of them within the statute of frauds. So a contract of employment to last as long as the employee does faithful and honest work,⁷ or as long as his

⁹ Powder River Livestock Co. v. Lamb, 38 Neb. 339; 56 N. W. 1019.

¹⁰ Drew v. Wiswall, 183 Mass. 554; 67 N. E. 666.

¹ Bartlett v. Mystic River Corporation, 151 Mass. 433; 24 N. E. 780; Scribner v. Mfg. Co., 175 Mass. 536; 56 N. E. 603. (Citing Peters v. Inhabitants of Westboro, 19 Pick. 364; Lyon v. King, 11 Metc. 411; 45 Am. Dec. 219; Doyle v. Dixon, 97 Mass. 208; 93 Am. Dec. 80; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459; Bartlett v. River Corp., 151 Mass. 433; 24 N. E. 780; Carnig v. Carr, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117; Mc-

Gregor v. McGregor, 21 Q. B. Div. 424.) Jackson v. Higgins, 70 N. H. 637; 49 Atl. 574.

² Durham v. Hiatt, 127 Ind. 514; 26 N. E. 401; Jordan v. Miller, 75 Va. 442. So of a contract to buy and operate a quarry and divide the profits. Treat v. Hiles, 68 Wis. 344; 60 Am. Rep. 858; 32 N. W. 517.

³ Osment v. McElrath, 68 Cal. 466; 58 Am. Rep. 17; 9 Pac. 731.

⁴ Burns v. Chisholm, 32 N. B. 588.

⁵ Dailey v. Cain (Ky.), 13 S. W. 424.

⁶ Hodges v. Mfg. Co., 9 R. I. 482.

⁷ Louisville, etc., R. R. v. Offutt, 99 Ky. 427; 59 Am. St. Rep. 467; 36 S. W. 181.

services are satisfactory,⁸ or as long as both parties are "mutually satisfied,"⁹ or as long as the employee wishes to work,¹⁰ or as long as the employer continues in business,¹¹ is not within the statute. So a contract to occupy land until the lessor should demand possession¹² or should get another tenant,¹³ or a contract to marry when promisor regains his health,¹⁴ or to buy a note, payable in five years, from the payee if she should marry and need the money before it came due,¹⁵ are none of them within this clause of the statute. So a contract to be performed when certain stock is issued by a corporation is not within the statute.¹⁶

§676. Contracts to be performed during life.

Human life is uncertain and any person alive at a given time may die within a year from that time. On this principle a contract which by its terms is not to be performed for a longer period than during the life of a given person is held not to be within this clause of the statute.¹ Thus a contract to support one for life,² or to perform services for the life, either of the

⁸ *Sax v. R. R.*, 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; *Harrington v. Ry.*, 60 Mo. App. 223.

⁹ *Greene v. Harris*, 9 R. I. 401.

¹⁰ *Carter White Lead Co. v. Kinlin*, 47 Neb. 409; 66 N. W. 536; *East Line, etc., R. R. v. Scott*, 72 Tex. 70; 13 Am. St. Rep. 758; 10 S. W. 99.

¹¹ *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455; 50 S. W. 685; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409; 66 N. W. 536.

¹² *Hintze v. Krabbenschmidt* (Tex. Civ. App.), 41 S. W. 38.

¹³ *Drew v. Billings-Drew Co.*, — Mich. —; 92 N. W. 774.

¹⁴ *McConahey v. Griffey*, 82 Ia. 564; 48 N. W. 983.

¹⁵ *Hughes v. Frum*, 41 W. Va. 445; 23 S. E. 604.

¹⁶ *Gadsden v. Lance*, 1 McMullan's Eq. (S. C.) 87; 37 Am. Dec. 548.

¹ *Wooldridge v. Stern*, 42 Fed. 311; 9 L. R. A. 129; *Haussman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; 22 Atl. 1065; *Atchison, etc., R. R. v. English*, 38 Kan. 110; 16 Pac. 82; *Carr v. McCarthy*, 70 Mich. 258; 38 N. W. 241; *Weatherford, etc., Ry. v. Wood*, 88 Tex. 191; 28 L. R. A. 526; 30 S. W. 859; *Thomas v. Armstrong*, 86 Va. 323; 5 L. R. A. 529; 10 S. E. 6.

² *Harper v. Harper*, 57 Ind. 547; *Bull v. McCrear*, 8 B. Mon. (Ky.) 422; *Stowers v. Hollis*, 83 Ky. 544; *Eiseman v. Schneider*, 60 N. J. L. 291; 37 Atl. 623. (Citing *Peter v. Compton*, *Skinner* 353; 1 *Smith Lead. Cas.* 351; *Kind v. Hanna*, 9 B. Mon. 369; *Sword v. Keith*, 31 Mich. 247; *McConahey v. Griffey*, 82 Iowa 564; 48 N. W. 983; *Hutchinson v. Hutchinson*, 46 Me. 154; *Blanchard v. Weeks*, 34 Vt. 589;

person rendering them³ or of the person for whose benefit they are to be rendered,⁴ is not within this clause of the statute. Accordingly a contract for permanent employment is not within this clause of the statute.⁵ So a contract to furnish free transportation to one and his family for his life is not within the statute.⁶ A contract to make a will is not within this clause of the statute, since it may be performed at once and must be performed, if at all, during the life of the promisor.⁷ So a contract to pay money during the life of a given person is not within the statute.⁸ So a contract to pay money at the death of a certain person is not within this clause of the statute,⁹ even if the promisor is the person at whose death the money is payable, and the law for the administration of estates will give his administrator more than a year in which to pay the money.¹⁰ So a contract not to compete in business,¹¹ or in the practice of a profession,¹² can be performed within the life of the promisor and is, therefore, not within the statute. If the contract, by its terms, is to last for more than a year it is within the

Burney v. Ball, 24 Ga. 505; Houghton v. Houghton, 14 Ind. 505; 77 Am. Dec. 69; Bull v. McCrea, 8 B. Mon. (Ky.) 422; Howard v. Burgen, 4 Dana (Ky.) 137.)

³ Boggs v. Laundry Co., 86 Mo. App. 616.

⁴ Thomas v. Feese (Ky.), 51 S. W. 150; Smalley v. Mitchell, 110 Mich. 650; 68 N. W. 978; Updike v. Ten Broeck, 32 N. J. L. 105; Kent v. Kent, 62 N. Y. 560; 20 Am. Rep. 502.

⁵ Carnig v. Carr, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117.

⁶ Park v. Turnpike Co. (Ky.), 1 L. R. A. 198.

⁷ Bell v. Hewitt, 24 Ind. 280; Story v. Story (Ky.), 61 S. W. 279; rehearing denied, 62 S. W. 865; Thomas v. Feese (Ky.), 51 S. W. 150; Krell v. Codman, 154 Mass. 454; 26 Am. St. Rep. 260; 14

L. R. A. 860; 28 N. E. 578; Jilson v. Gilbert, 26 Wis. 637; 7 Am. Rep. 100. If realty is to pass by the will such contracts may come under another clause of the statute.

See § 658.

⁸ Wiggins v. Keizer, 6 Ind. 252; Hutchinson v. Hutchinson, 46 Me. 154.

⁹ Kent v. Kent, 62 N. Y. 560; 20 Am. Rep. 502; Westropp v. Westropp, 13 Ohio C. C. 244; 7 Ohio C. D. 14.

¹⁰ Westropp v. Westropp, 13 Ohio C. C. 244; 7 Ohio C. D. 14.

¹¹ Dickey v. Dickinson, 105 Ky. 748; 88 Am. St. Rep. 337; 49 S. W. 761; Lyon v. King, 11 Met. (Mass.) 411; 45 Am. Dec. 219; Zanturjian v. Boormazian, — R. I. —; 55 Atl. 199.

¹² Blanchard v. Weeks, 34 Vt. 589.

statute, even though the death of one party will operate as a discharge.¹³ So it has been held that a contract of employment, if by its terms to last for more than a year, is within the statute even if subject to be discharged by the death of either party within the year.¹⁴ Thus an oral agreement by employee not to leave his employer's service for two years,¹⁵ or an oral agreement that each of two partners shall pay half the wages of the employee for five years,¹⁶ or a contract of apprenticeship,¹⁷ which by their terms are for so long a period as to last more than a year from the date of the making thereof, are within this clause of the statute, even though the death of either party would discharge the contract. So a contract not to engage in business for a period of time greater than a year from the time of making the contract has been held to be within the statute.¹⁸ There is, however, a divergence of authority upon this last proposition. The principle that a contract which must be performed during the life of a person in being is not within this clause of the statute, has been carried so far that many courts have held that a contract which by its terms was to last for a period of time greater than the year was nevertheless not within this clause of the statute, if it was of such character that the death of one or both of the parties thereto would discharge liability thereunder.¹⁹ Thus a contract for personal services, which is discharged by the death of either party

¹³ "If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement fully performed, and its purpose fully carried out, it is not." *Doyle v. Dixon*, 97 Mass. 208, 212; 93 Am. Dec. 80.

¹⁴ *Bernier v. Mfg. Co.*, 71 Me. 506; 36 Am. Rep. 343; *Hill v. Hooper*, 1 Gray (Mass.) 131; *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. Rep. 708; 26 N. W. 139; *Milan v. Ry.* (Tex. Civ. App.), 37 S. W. 165; *Miller v. Wisener*, 45 W. Va. 59; 30 S. E. 237; *Hanson v. Gun-*

derson, 95 Wis. 613; 70 N. W. 827.

¹⁵ *Bernier v. Mfg. Co.*, 71 Me. 506; 36 Am. Rep. 343.

¹⁶ *Hanson v. Gunderson*, 95 Wis. 613; 70 N. W. 827.

¹⁷ *Barrett v. Riley*, 42 Ill. App. 258; *Baker v. Lauterback*, 68 Md. 61; 11 Atl. 703.

¹⁸ *Self v. Cordell*, 45 Mo. 345; *Gottschalk v. Witter*, 25 O. S. 76.

¹⁹ *Carnig v. Carr*, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117; *Weatherford, etc., Ry. v. Wood*, 88 Tex. 191; 28 L. R. A. 526; 30 S. W. 859; *Thomas v. Armstrong*, 86 Va. 323; 5 L. R. A. 529; 10 S. E. 6.

thereto,²⁰ or a contract to support and educate a minor until he comes of age,²¹ or until his apprenticeship is ended,²² or a contract not to engage in a certain business, whether for a definite term of years²³ or for such period as the vendee of the business shall continue it,²⁴ or for an indefinite period,²⁵ or a contract to give annual passes to A and his family for ten years, and to stop trains at his house for that period,²⁶ or a contract to keep a horse for a year from a future date, for the use of it,²⁷ or a contract to support a child till it reached a certain age, which event would occur more than a year after the contract was made,²⁸ are none of them within this clause of the statute.

§677. Contract for fixed period greater than the year, but terminable within the year.

If a contract, by its terms, is to continue beyond the year from the date of the making thereof, but by a further provision may be discharged or performed by the happening of some

²⁰ Hill v. Jamieson, 16 Ind. 125; 79 Am. Dec. 414; Pennsylvania Co. v. Dolan, 6 Ind. App. 109; 51 Am. St. Rep. 289; 32 N. E. 802; Sax v. R. R., 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314; Smalley v. Mitchell, 110 Mich. 650; 68 N. W. 978. It is said that this principle applies whether the term of service is definite or indefinite. Hill v. Jamieson, 16 Ind. 125; 79 Am. Dec. 414; Pennsylvania Co. v. Dolan, 6 Ind. App. 109; 51 Am. St. Rep. 289; 32 N. E. 802; Sax v. Ry., 125 Mich. 252; 84 Am. St. Rep. 572; 84 N. W. 314.

²¹ Wooldridge v. Stern, 42 Fed. 311; 9 L. R. A. 129; Peters v. Westborough, 19 Pick. (Mass.) 364; 31 Am. Dec. 142.

²² Myers v. Korb (Ky.), 50 S. W. 1108.

²³ Doyle v. Dixon, 97 Mass. 208; 93 Am. Dec. 80; Erwin v. Hayden (Tex. Civ. App.), 43 S. W. 610.

Contra, Higgins v. Gager, 65 Ark. 604; 47 S. W. 848.

²⁴ Cotton v. Crawford (Ky.), 44 S. W. 954.

²⁵ Hall v. Solomon, 61 Conn. 476; 29 Am. St. Rep. 218; 23 Atl. 876; Dickey v. Dickinson, 105 Ky. 748; 88 Am. St. Rep. 337; 49 S. W. 761; Carnig v. Carr, 167 Mass. 544; 57 Am. St. Rep. 488; 35 L. R. A. 512; 46 N. E. 117; Lyon v. King, 11 Met. (Mass.) 411; 45 Am. Dec. 219; Worthy v. Jones, 11 Gray (Mass.) 168; 71 Am. Dec. 696; Blanchard v. Weeks, 34 Vt. 589.

²⁶ Weatherford, etc., Ry. v. Wood, 88 Tex. 191; 28 L. R. A. 526; 30 S. W. 859; affirming, 29 S. W. 411.

²⁷ Martin v. Batchelder, 69 N. H. 360; 41 Atl. 83 (since the horse may die within the year from the date of making the contract).

²⁸ Wilhelm v. Hardman, 13 Md. 140; Peters v. Westborough, 19 Pick. (Mass.) 364; 31 Am. Dec. 142.

event before the end of the year, the weight of authority is that such contract is not within the statute of frauds, even if such contingency is not probable.¹ Thus a contract to last one year from a future date, but subject to be terminated at the option of either party within a year from the date of making such contract,² or one to last ninety-nine years, subject to be terminated at any time on three months' notice if the business should prove unprofitable;³ or one to last "five years, or so long as A shall continue to be agent of" a given corporation;⁴ or one to last "five years, or as long as A should continue in business,"⁵ are none of them within this clause of the statute. Such contracts are held by some courts to be within this clause of the statute.⁶

§678. Performance on happening of uncertain event which cannot reasonably happen within the year.

If the time of performance is fixed only by reference to the happening of a future event which, in the ordinary course of nature, cannot happen inside of a year, the contract is within the statute. Thus a contract in the spring of one year to raise potatoes during the following year, and to deliver them;¹ or a contract to buy a colt when it is four² or five³ months old, the contract being made when the period of gestation begins, and such period being so long that in the natural course of events

¹ Johnston v. Bowersock, 62 Kan. 148; 61 Pac. 740; Standard Oil Co. v. Denton (Ky.), 70 S. W. 282; Linscott v. McIntire, 15 Me. 201; 33 Am. Dec. 602; Lyon v. King, 11 Met. (Mass.) 411; 45 Am. Dec. 219; Peters v. Westborough, 19 Pick. (Mass.) 364; 31 Am. Dec. 142; Blanding v. Sargent, 33 N. H. 239; 66 Am. Dec. 720; Blake v. Voigt, 134 N. Y. 69; 30 Am. St. Rep. 622; 31 N. E. 256; Lockwood v. Barnes, 3 Hill (N. Y.) 128; 38 Am. Dec. 620.

² Estey v. Aldrich, 46 N. H. 127; Blake v. Voigt, 134 N. Y. 60; 30

Am. St. Rep. 622; 31 N. E. 256.

³ Johnston v. Bowersock, 62 Kan. 148; 61 Pac. 740.

⁴ Roberts v. Rockbottom Co., 7 Met. (Mass.) 46.

⁵ Standard Oil Co. v. Denton (Ky.), 70 S. W. 282.

⁶ Meyer v. Roberts, 46 Ark. 80; 55 Am. Rep. 567.

¹ Pitkin v. Noyes, 48 N. H. 294; 97 Am. Dec. 615; citing Emery v. Smith, 46 N. H. 151.

² Butler v. Shehan, 61 Ill. App. 561.

³ Groves v. Cook, 88 Ind. 169; 45 Am. Rep. 462.

the addition of four or five months thereto would carry it beyond the year are all held to be within this clause of the statute. Contracts which are intended by the parties as permanent arrangements, but which may be discharged within the year by some change of circumstances, are held by many courts not to be within this clause of the statute. Thus a contract by a railway company to keep up a switch for one as long as he needs it;⁴ or to keep up cattle-guards on A's land as long as the railroad is operated over such land;⁵ or to pay half the expenses of erecting gates and maintaining a watchman at the intersection of a steam railway and an electric railway,⁶ have none of them been held to be within this clause of the statute. The theory on which they are decided is that within the year the railway may change its location, go out of business, and the like, and thus discharge the contract. This reasoning is not followed by all the courts, however. Thus an oral agreement to stop cars permanently at a given point was held to be within the statute.⁷ A contract of insurance is generally held not to be within this clause of the statute of frauds,⁸ even if by its terms the insurance is to be in force for more than one year, as for three⁹ or five¹⁰ years. This rule rests on the theory that a loss may happen within the year, discharging the contract. If the contract of insurance is to be in force a year,¹¹ or is to be renewed from year to year,¹² the

⁴ Warner v. Ry., 164 U. S. 418; 508; 52 Am. St. Rep. 902; 21 S. E. reversing, 54 Fed. 922; Sweet v. Lumber Co., 56 Ark. 629; 20 S. W. 514.

⁵ Arkansas, etc., Ry. v. Whitley, 54 Ark. 199; 11 L. R. A. 621; 15 S. W. 465.

⁶ Richmond, etc., Ry. v. R. R., 96 Va. 670; 32 S. E. 787.

⁷ Pitkin v. R. R., 2 Barb. Ch. (N. Y.) 221; 47 Am. Dec. 320.

⁸ Franklin v. Ins. Co., 20 Wall. (U. S.) 560; Commercial Fire Ins. Co. v. Morris, 105 Ala. 498; 18 So. 34; Emery v. Ins. Co., 138 Mass. 398; Croft v. Ins. Co., 40 W. Va.

508; 52 Am. St. Rep. 902; 21 S. E. 854.

⁹ Sanford v. Ins. Co., 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883.

¹⁰ Wiebeler v. Ins. Co., 30 Minn. 464; 16 N. W. 363.

¹¹ Howard Ins. Co. v. Owen, 94 Ky. 197; 21 S. W. 1037; Sanborn v. Ins. Co., 16 Gray (Mass.) 448; 77 Am. Dec. 419.

¹² Phoenix Ins. Co. v. Ireland, 9 Kan. App. 644; 58 Pac. 1024; First Baptist Church v. Ins. Co., 19 N. Y. 305; s. c., 28 N. Y. 153.

statute clearly has no application. The courts are not unanimous on the foregoing propositions, however. The Massachusetts courts distinguish between contracts in which the happening of the event within the year prevents full performance and those in which it leaves the contract fully performed.¹³ Other authorities seem to make the same distinction, holding that discharge within the year, as distinguished from performance, does not keep the statute from applying to contracts whose performance is to be postponed beyond the year.¹⁴

VII. THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS.

§679. The seventeenth section.

The seventeenth section of the original statute of frauds provided: "And bee it further enacted by the authority aforesaid that from and after the said fower and twentieth day of June noe contract for the sale of any goods, wares or merchandises for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods soe sold and actually receive the same or give something in earnest to bind the bargaine, or in part of payment, or that some note or memorandum in writing of the said bargaine be made and signed by the partyes to be charged by such contract or their agents thereunto lawfully authorized."¹ This section has been substantially re-enacted in many of the states of the Union. Its effect upon contracts must therefore be considered in connection with the fourth section.

§680. What is a "contract for sale."

This section of the statute includes sale proper, that is, transfer of the title to personalty in consideration of a price in

¹³ See § 676.

¹⁴ *Packet Co. v. Sickles*, 5 Wall. (U. S.) 580; *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. Rep. 708; *Cowles v. Warner*, 26 N. W.

139; 22 Minn. 449; *Blanding v. Sargent*, 33 N. H. 239.

¹ English Statutes, Revised Edition. (By authority) I, 777.

money.¹ It also includes barter, or conveyance of the title to personalty in consideration of a conveyance, in return, of title to other personalty.² A contract to transfer the title to certain goods in payment of an antecedent debt is held to be a sale within the meaning of this section.³ Other contracts for paying a debt by transferring personalty have been held not to be within the statute. Thus a contract of employment by the terms of which the employee was to be paid partly in cash and partly in corporation stock is not a sale of such stock within the meaning of this section.⁴

A contract which does not attempt to pass title to a chattel from one of the contracting parties to the other, or to provide for passing such title, is not a contract of sale. Thus a contract between a debtor and his attaching creditor, by which the creditor agrees to account to the debtor for the cost price of the goods sold, no matter what the selling price might be, and to credit him with all sums received on book accounts;⁵ or a contract between two judgment-creditors that the property should be sold on execution issued on one of the judgments,⁶ are none of them within the statute.

A contract to give a chattel mortgage has been held not to be within the statute.⁷ So a contract to extend the time of paying the mortgage debt, even after foreclosure, is not within

¹ *Stewart v. Cook*, 118 Ga. 541; 45 S. E. 398.

² *Raymond v. Colton*, 104 Fed. 219; 43 C. C. A. 501; *Kuhns v. Gates*, 92 Ind. 66; *Dowling v. McKenney*, 124 Mass. 478; *Gorman v. Brossard*, 120 Mich. 611; 79 N. W. 903; *Harris Photographic Supply Co. v. Fisher*, 81 Mich. 136; 45 N. W. 661; *Ash v. Aldrich*, 67 N. H. 581; 39 Atl. 442.

³ *Norton v. Davison* (1899), 1 Q. B. 401; *Galbraith v. Holmes*, 15 Ind. App. 34; 43 N. E. 575; *Gorman v. Brossard*, 120 Mich. 611; 79 N. W. 903; *Brabin v. Hyde*, 32 N. Y. 519; *Milos v. Covacevich*, 40 Or. 239; 66

Pac. 914; *Norwegian Plow Co. v. Hawthorn*, 71 Wis. 529; 37 N. W. 825. Whether the agreement to apply the price of the goods to the debt amounts to a part payment or not is another question. See § 706.

⁴ *Spinney v. Hill*, 81 Minn. 316; 84 N. W. 116.

⁵ *Jacobs Sultan Co. v. Mercantile Co.*, 17 Mont. 61; 42 Pac. 109;

⁶ *Mygatt v. Tarbell*, 78 Wis. 351; 47 N. W. 618.

⁷ *Bates v. Wiggin*, 37 Kan. 44; 1 Am. St. Rep. 234; 14 Pac. 442; *Sparks v. Wilson*, 22 Neb. 112; 34 N. W. 111.

the statute.⁸ A clause in the original contract of sale providing for a rescission of the contract upon the happening of some event, the original vendor agreeing to take back the goods and refund the purchase-money, is not a sale within this section.⁹ A subsequent rescission of an executed contract of sale has been held not to be a sale. Thus where A sold and delivered to a firm of which he was a member, goods for which he was not paid, a subsequent oral contract of rescission as part of the contract of dissolution was held not within the statute.¹⁰ If, instead of a contract for rescission, the agreement is one for a re-sale, it is of course within the statute.¹¹

Executory contracts of sale, in which the title is not to pass till some future time, were held by the early English authorities not to be within the statute.¹² This view has been abandoned in England¹³ and has never been entertained in the United States. The statute is held here to include executory contracts of sale as well as executed contracts.¹⁴

§681. Contract for work and labor.

If the contract is essentially one for work and labor, and the title to personalty is not to pass as a result thereof, it is not within the statute. Thus a contract for publishing an advertisement,¹ or a contract to pay a commission to an agent for selling personal property, the amount to depend upon the price obtained,² are not within the statute. This principle applies

⁸ *Phelps v. Hendrick*, 105 Mass. 106.

⁹ *Williams v. Burgess*, 10 Ad. & E. 499; *Hilliard v. Weeks*, 173 Mass. 304; 53 N. E. 818; *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394; 5 L. R. A. 630; 22 N. E. 377; *Fay v. Wheeler*, 44 Vt. 292.

¹⁰ *Dickinson v. Dickinson*, 29 Conn. 600.

¹¹ *Boardman v. Cutter*, 128 Mass. 388.

¹² *Alexander v. Comber*, 1 H. Bl. 20; *Clayton v. Andrews*, 4 Burr. 2101. This principle was not neces-

sary in deciding these cases, since they may be as well explained by treating them as contracts for work and labor. See § 681.

¹³ *Rondeau v. Wyatt*, 2 H. Bl. 63.

¹⁴ *Weeks v. Crie*, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107; *Gilman v. Hill*, 36 N. H. 311; *Carman v. Smick*, 15 N. J. L. 252; *Ide v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698.

¹ *Goodland v. Le Clair*, 78 Wis. 176; 47 N. W. 268.

² *Hamilton v. Frothingham*, 59 Mich. 253; 26 N. W. 486.

where A agrees with B to buy goods from X and to divide them with B on being compensated therefor; but the courts are not harmonious in the results reached. If the contract is held to be essentially one of agency, in which A acts as B's agent, it is not within the statute,³ but if it is in effect a contract by A to buy and resell to B, it is within the statute.⁴

§682. Contract of sale distinguished from contract for work and labor.

It is often difficult to determine whether a contract is one for the sale of a chattel and so within the statute of frauds, or for work and labor, and so not within the statute. The courts do not agree as to the test for distinguishing these two classes of contracts. The following tests, different in form though not always differing in practical results, are the chief of those adopted by the courts: (1) According to some authorities if the goods to be delivered are not in existence, but are to be manufactured thereafter, the contract is not within the statute.¹ (2) In some states it is held that if any work must be performed upon the chattel sold before delivery, to put it in a condition different from what it was when the contract of sale was made, the contract is not a contract of sale.² So a contract to cut lumber and to deliver it, is not within the statute under this theory.³ By statute in some states, if "labor, skill or money are necessarily to be expended in producing or procuring" the chattel to be delivered, the contract is not one of sale. As construed, this statute applies only where special skill or labor is necessary. Hence a sale of growing grain, to be harvested

³ Hatch v. McBrien, 83 Mich. 159; 47 N. W. 214.

⁴ Mace v. Heath, 30 Neb. 620; 46 N. W. 918.

¹ Warren Chemical, etc., Co. v. Holbrook, 118 N. Y. 586; 16 Am. St. Rep. 788; 23 N. E. 908; Higgins v. Murray, 73 N. Y. 252; Cooke v. Mil-

lard, 65 N. Y. 352; Crookshank v. Burrell, 18 Johns. (N. Y.) 58; 9 Am. Dec. 187.

² Rentch v. Long, 27 Md. 188; Eichelberger v. McCauley, 5 Harr. & J. (Md.) 213; 9 Am. Dec. 514.

³ Bagby v. Walker, 78 Md. 239; 27 Atl. 1033.

and threshed by vendor,⁴ or a sale of corn, to be shelled and corn unfit for shelling to be thrown out,⁵ or a sale of corn to be sorted and put in bags,⁶ are all sales of chattels within such statute. (3) Another test applied by some courts is this: if, by the contract the vendor is to perform certain work personally, the contract is not one of sale,⁷ but if he can perform the contract by procuring the property to be delivered by him from such source as he pleases, the contract is one of sale.⁸ (4) A still different test is the following: if the goods are to be manufactured upon a special order and of a particular design, the contract is not one of sale,⁹ while, if the goods to be manufactured are such as are manufactured in the ordinary course of the manufacturer's business, and are marketable, the contract is one of sale.¹⁰ A contract to manufacture an article "to order and as a thing distinguished from the general business of the maker" is said not to be a sale.¹¹ Thus a contract to manufacture iron-work for a building,¹² or stone-work,¹³ or

* *Mighell v. Dougherty*, 86 Ia. 280; 41 Am. St. Rep. 511; 17 L. R. A. 755; 53 N. W. 402.

⁵ *Lewis v. Evans*, 108 Ia. 296; 79 N. W. 81. (Citing *Downs v. Ross*, 23 Wnd. (N. Y.) 270; *Hardell v. McCloske*, 1 Chand. (Wis.) 271; *Brown v. Sanborn*, 21 Minn. 402.)

⁶ *Dierson v. Petersmeyer*, 109 Ia. 233; 80 N. W. 389.

⁷ A contract for the sale of potatoes to be raised in the future. *Pitkin v. Noyes*, 48 N. H. 294; 2 Am. Rep. 218; 97 Am. Dec. 615. *Contra*, *Forsyth v. Mann*, 68 Vt. 116; 32 L. R. A. 788; 34 Atl. 481.

⁸ *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55.

⁹ *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112; *Brown, etc., Co. v. Wunder*, 64 Minn. 450; 32 L. R. A. 593; 67 N. W. 357; *Hientz v. Burkhard*, 29 Or. 55; 55 Am. St. Rep. 777; 31 L. R. A. 508; 43 Pac. 866; *Paget Sound Machinery Depot v. Rigby*, 13 Wash. 264; 43 Pac. 39;

Goss v. Heckert, — Wis. —; 97 N. W. 952.

¹⁰ *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656; 18 S. W. 965; *Williams-Hayward Shoe Co. v. Brooks*, 9 Wyom. 424; 64 Pac. 342. See for other cases recognizing this test *Flynn v. Dougherty*, 91 Cal. 669; 14 L. R. A. 230; 27 Pac. 1080; *Mwater v. Hough*, 29 Conn. 508; 79 Am. Dec. 229; *Lewis v. Evans*, 108 Ia. 296; 79 N. W. 81; *Abbott v. Gilchrist*, 38 Me. 260; *Mixer v. Howarth*, 21 Pick. (Mass.) 205; 32 Am. Dec. 256; *Lamb v. Crafts*, 12 Met. (Mass.) 353; *Gardner v. Joy*, 9 Met. (Mass.) 177; *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722; 13 N. W. 545.

¹¹ *Finney v. Apgar*, 31 N. J. L. 266, 270.

¹² *Hientz v. Burkhard*, 29 Or. 55; 54 Am. St. Rep. 777; 31 L. R. A. 508; 43 Pac. 866.

¹³ *Flynn v. Dougherty*, 91 Cal. 669; 14 L. R. A. 230; 27 Pac. 1080.

a contract to manufacture and erect a monument,¹⁴ or to manufacture lumber of special sizes, as for a narrow-gauge railroad,¹⁵ or to manufacture hoe-shanks according to a pattern to be furnished by the party ordering them,¹⁶ or to furnish and erect certain "patent portable houses,"¹⁷ are each held not to be contracts for the sale of goods with the statute of frauds. On the other hand, a contract to deliver shoes to be made to order, but of a kind suitable for the general trade,¹⁸ is a sale within the meaning of the statute. Where this distinction obtains a contract for an article to be made on special order, which will not be marketable when made, is not a sale of goods, though the manufacturer purchases most of the different parts of the article and puts them together.¹⁹ Where A agrees with B to order certain goods from X, to be made to order by him and delivered to A, who is to deliver them to B, some courts hold that the contract between A and B is a sale,²⁰ while others hold that it is not.²¹ (5) The test finally adopted in England is that the intention of the parties controls, and if they intend the contract primarily to result in transferring the title of a chattel from one person to another, the contract is one of sale, no matter by whom or how the chattel is to be produced. Thus in the leading case adopting this test,²² A made to order for B, two sets of false teeth to fit B's mouth. The contract was held to be a sale, though clearly the teeth were not marketable.

¹⁴ Forsyth v. Mann, 68 Vt. 116; 32 L. R. A. 788; 34 Atl. 481; Fox v. Utter, 6 Wash. 299; 33 Pac. 354.

¹⁵ Orman v. Hager, 3 N. M. 568; 9 Pac. 363.

¹⁶ Hight v. Ripley, 19 Me. 137.

¹⁷ Phipps v. McFarlane, 3 Minn. 109; 74 Am. Dec. 743.

¹⁸ Pratt v. Miller, 109 Mo. 78; 32 Am. St. Rep. 656; 18 S. W. 965; Williams - Hayward Shoe Co. v. Brooks, 9 Wyom. 424; 64 Pac. 342.

¹⁹ Puget Sound Machinery Depot

v. Rigby, 13 Wash. 264; 43 Pac. 39.

²⁰ Smalley v. Hamblin, 170 Mass. 380; 49 N. E. 626. This view was taken on the principle of Pitkin v. Noyes, 48 N. H. 294; 2 Am. Rep. 218; 97 Am. Dec. 615, that the personal services of the adversary party were not contracted for; but on the contrary, the work could be done by another.

²¹ Bird v. Muhlinbrink, 1 Rich. L. (S. C.) 199; 44 Am. Dec. 247.

²² Lee v. Griffin, 1 B. & S. 272.

§683. Contract to improve realty.

A contract to attach property to realty and to furnish labor for so doing is held not a contract for the sale of goods. Thus, contracts to erect a building,¹ a monument,² a bridge,³ or attaching stoking apparatus to boiler,⁴ or setting up a steam-heating apparatus in a factory,⁵ are none of them contracts of sale. This rule may be referred to the principle already given,⁶ that if an article is to be made upon a special order and of a particular design, the contract is not within the statute.

§684. Meaning of "goods, wares and merchandise."—Incorporeal personalty.

Whether the term "goods, wares and merchandise" includes incorporeal personalty which passes by assignment or by delivery of a written evidence thereof, such as notes, drafts, checks, bonds, stocks and the like, is a question on which there has always been a conflict. The English courts finally held that such forms of property were incapable of delivery and hence not within this section of the statute,¹ and this view has been followed in some jurisdictions in the United States. Thus subscriptions to stock in a corporation,² or a sale of an interest in a partnership,³ or a contract to sell a promissory note,⁴ are none of them within the statute. In other jurisdictions incorporeal personalty is classed with "goods, wares and merchandise."

¹ Flynn v. Dougherty, 91 Cal. 669; 14 L. R. A. 230; 27 Pac. 1080; Brown, etc., Co. v. Wunder, 64 Minn. 450; 32 L. R. A. 593; 67 N. W. 357; Scales v. Wiley, 68 Vt. 39; 33 Atl. 771.

² Forsyth v. Mann, 68 Vt. 116; 32 L. R. A. 788; 34 Atl. 481; Fox v. Utter, 6 Wash. 299; 33 Pac. 354.

³ McDonald v. Webster's Estate, 71 Vt. 392; 45 Atl. 895.

⁴ Underfeed Stoker Co. v. Salt Co. — Mich. —; 97 N. W. 950.

⁵ Putnam, etc., Co. v. Canfield,

25 R. L. 548; 56 Atl. 1033.

⁶ See § 682.

¹ Humble v. Mitchell, 11 Ad. & E. 205.

² Rogers v. Burr, 105 Ga. 432; 70 Am. St. Rep. 50; 31 S. E. 438; Des Moines Savings Bank v. Hotel Co., 88 Ia. 4; 55 N. W. 67; Webb v. Ry., 77 Md. 92; 39 Am. St. Rep. 396; 26 Atl. 113.

³ Sherley v. Sherley, 97 Ky. 512; 31 S. W. 275; Vincent v. Vieths, 60 Mo. App. 9.

⁴ Vawter v. Griffin, 40 Ind. 593.

Thus a contract to sell a bond and mortgage,⁵ promissory notes,⁶ or stock,⁷ or a chose in action which the assignor is to put in judgment,⁸ are each within the statute. A contract to resign an office is not a contract for the sale of goods, wares and merchandise.⁹ If the statute of frauds specifically includes "things in action" incorporeal personalty is thereby included. Thus an option to buy another option for the purchase of stock,¹⁰ or a contract to sell stock,¹¹ or land scrip,¹² are each within the statute. Even where contracts for the sale of incorporeal personal property in general is held to be within the statute, a contract for the transfer of an interest in a patent-right is not within the statute,¹³ nor is a contract to share the profits and losses arising out of the sale of stock theretofore owned by one of the parties.¹⁴

VIII. METHODS OF SATISFYING THE FOURTH SECTION OF THE STATUTE OF FRAUDS.

§685. When memorandum must be made.

The fourth section of the statute of frauds provides that no action shall be brought upon contracts of the classes therein enumerated unless the agreement or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized. The seventeenth section has a similar provision, coupled with alternative provisions to be discussed hereafter.¹ We will first consider the form and nature of the memorandum

⁵ Greenwood v. Law, 55 N. J. L. 168; 19 L. R. A. 688; 26 Atl. 134.

⁶ Gooch v. Holmes, 41 Me. 523; Baldwin v. Williams, 3 Met. (Mass.) 365.

⁷ North v. Forest, 15 Conn. 400; Mann v. Bishop, 136 Mass. 495.

⁸ French v. Schoonmaker, 69 N. J. L. 6; 54 Atl. 225.

⁹ Colton v. Raymond, 114 Fed. 863; 52 C. C. A. 382.

¹⁰ Walker v. Bamberger, 17 Utah 239; 54 Pac. 108.

¹¹ Tompkins v. Sheehan, 158 N. Y. 617; 53 N. E. 502.

¹² Smith v. Bouck, 33 Wis. 19.

¹³ Cook v. Electric Co., 118 Fed. 45; Somerby v. Buntin, 118 Mass. 279; 19 Am. Rep. 459.

¹⁴ Bullard v. Smith, 139 Mass. 492; 2 N. E. 86.

¹ See § 705 *et seq.*

required by the fourth and the seventeenth sections. It is clear that the statute does not require the contract to be in writing. It is sufficient if any note or memorandum thereof is in writing in the form specified.² The note or memorandum need not be made at the time that the oral contract is entered into. It may be made before the contract is entered into. Thus a written offer signed by the party to be charged, setting out the terms of the contract and subsequently accepted orally by the adversary party is a sufficient memorandum.³

It may be made subsequently up to the time that the action is brought.⁴ Thus letters written after the contract is made,⁵ even though at a long interval of time,⁶ or even after the breach

² *Ingraham v. Strong*, 41 Ill. App. 46. "The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute, informally made, of the agreement which may have but a verbal existence expressing briefly the essential terms and never intended to stand as and for the agreement itself." *Catterlin v. Bush*, 39 Or. 496, 501; 65 Pac. 1064; 59 Pac. 706.

³ *Bibb v. Allen*, 149 U. S. 481; *Brewer v. Horst-Lachmund Co.*, 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418; *Western Union Telegraph Co. v. R. R.*, 86 Ill. 246; 29 Am. Rep. 28; *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; *Williams v. Smith*, 161 Mass. 248; 37 N. E. 455; *Sanborn v. Flagler*, 9 All. (Mass.) 474; *Hickey v. Dole*, 66 N. H. 336; 49 Am. St. Rep. 614; 29 Atl. 792; *Thayer v. Luce*, 22 O. S. 62.

⁴ *Dominick v. Randolph*, 124 Ala. 557; 27 So. 481; *Lamkin v. Mfg. Co.*, 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042; *Whiton v. Whiton*, 179 Ill. 32; 53 N. E. 722; affirm-

ing 76 Ill. App. 553; *Miller v. R. R.*, 58 Kan. 189; 48 Pac. 853; *Tyler v. Onzts*, 93 Ky. 331; 20 S. W. 256; *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571; *McManus v. Boston*, 171 Mass. 152; 50 N. E. 607; *Merson v. Merson*, 101 Mich. 55; 59 N. W. 441; *Sheehy v. Fulton*, 38 Neb. 691; 41 Am. St. Rep. 767; 57 N. W. 395; *Gardels v. Klocke*, 36 Neb. 493; 54 N. W. 834; *Curtis v. Portsmouth*, 67 N. H. 506; 39 Atl. 439; *Argus Co. v. Albany*, 55 N. Y. 495; 14 Am. Rep. 296; *Townsend v. Kennedy*, 6 S. D. 47; 60 N. W. 164; *Ide v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698; *Newport News, etc., Co. v. Ry. Co.*, 97 Va. 19; 32 S. E. 789; *Prignon v. Daussat*, 4 Wash. 199; 31 Am. St. Rep. 914; 29 Pac. 1046.

⁵ *Bayne v. Wiggins*, 139 U. S. 210; *Pitcher v. Lowe*, 95 Ga. 423; 22 S. E. 678; *Lyons v. Wait*, 51 N. J. Eq. 60; *sub nom.*, *Lyons v. Pyatt*, 26 Atl. 334; *Townsend v. Kennedy*, 6 S. D. 47; 60 N. W. 164; *Ide v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698.

⁶ *Lee v. Butler*, 167 Mass. 426; 57 Am. St. Rep. 466; 46 N. E. 52; *Newkirk v. Place*, 47 N. J. Eq. 477; 21 Atl. 124.

of the contract if before suit thereon,⁷ may be such memoranda as will satisfy the statute. A memorandum is said, however, not to have a retroactive effect as far as the rights of third persons are concerned.⁸ A subsequent reduction to writing of an oral contract in consideration of marriage has been held invalid.⁹

A written contract executed after the verbal contract is a sufficient compliance with the statute, even though there is no new consideration for the written contract.¹⁰

It has been said that the memorandum must at least be made before action is brought upon the contract and cannot be made afterwards.¹¹ The correctness of this view may be doubted both on principle and on authority. If the statute of frauds is a rule of evidence there seems no good reason why the evidence should be limited to that in existence at the time of commencing the action. Written declarations against the interest of the party making them may be admitted in proper cases, even though made after the action has begun, and there seems to be no good reason why a different rule should obtain in cases controlled by the statute. Accordingly memoranda made after the action has begun have been held sufficient in some jurisdictions to satisfy the statute.¹² Thus a sheriff's return made after the jury was impanelled was held sufficient.¹³ So where the vendor files an answer admitting the oral contract and stating that he is willing to perform it, such answer is a sufficient memorandum.¹⁴ However, a pleading which sets up an oral contract but seeks to avoid it because it is oral, is not a memorandum within the meaning of the statute.¹⁵

⁷ *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571.

⁸ *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571; *Emery v. Terminal Co.*, 178 Mass. 172; 86 Am. St. Rep. 473; 59 N. E. 763.

⁹ *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552; 11 N. E. 397.

¹⁰ *Sheehy v. Fulton*, 38 Neb. 691; 41 Am. St. Rep. 767; 57 N. W. 395.

¹¹ *Gaines v. McAdam*, 79 Ill. App. 201.

¹² *Walker v. Walker* (Ky.), 55 S. W. 726.

¹³ *Remington v. Linthicum*, 14 Pet. (U. S.) 84.

¹⁴ *Walker v. Walker* (Ky.), 55 S. W. 726; and see *Sanders v. Bryer*, 152 Mass. 141; 9 L. R. A. 255; 25 N. E. 86.

¹⁵ *Davis v. Ross* (Tenn. Ch. App.), 50 S. W. 650.

§686. Undelivered instrument as memorandum.

If A and B enter into an oral contract within the statute of frauds, and A subsequently makes and signs a written memorandum of such contract, which memorandum is not delivered but is retained by him in his own custody, the weight of authority holds that such memorandum is not a compliance with the statute.¹ Some of the courts have been very positive in stating the uniform application of this rule.² Thus a deed not delivered,³ or delivered only in escrow,⁴ or a deed repudiated by the vendee and destroyed by his consent,⁵ or a mortgage,⁶ or lease,⁷ not delivered, are none of them sufficient memoranda.

In other jurisdictions a written undelivered memorandum has been held sufficient.⁸ In such jurisdictions a deed, though de-

¹ Day v. Lacasse, 85 Me. 242; 27 Atl. 124; Merriam v. Leonard, 6 Cush. (Mass.) 151; Sanborn v. Sanborn, 7 Gray (Mass.) 142; Grant v. Levan, 4 Pa. St. 393; Nichols v. Opperman, 6 Wash. 618; 34 Pac. 162.

² "We have been able to find no case in which a writing signed by a party and kept in his possession without a delivery has been held to be a compliance with the statute." Johnson v. Brook, 31 Miss. 17; 66 Am. Dec. 547; quoted in Steel v. Fife, 48 Ia. 99; 30 Am. Rep. 388. "We have made a pretty thorough search but have been unable to find any case which sustains the position that an undelivered deed may be treated as a memorandum in writing." Wier v. Batdorf, 24 Neb. 83, 89; 38 N. W. 22. "To make it operative it must have been executed and delivered to the plaintiffs, or to some one in their behalf." Parker v. Parker, 1 Gray (Mass.) 409, 411. "It is essential that the writing required by the statute be delivered." Nichols v. Opperman, 6 Wash. 618; 34 Pac. 162.

³ Lodgsdon v. Newton, 54 Ia. 448; 6 N. W. 740; Morrow v. Moore, 98 Me. 373; 57 Atl. 81; Parker v. Parker, 1 Gray (Mass.) 409; Comer v. Baldwin, 16 Minn. 172; Schneider v. Vogler (Neb.), 97 N. W. 1018; Wier v. Batdorf, 24 Neb. 83; 38 N. W. 22; Brown v. Brown, 33 N. J. Eq. 650; Wilson v. Winters, 108 Tenn. 398; 67 S. W. 800.

⁴ Kopp v. Reiter, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942; Day v. Lacasse, 85 Me. 242; 27 Atl. 124; Cogger v. Lansing, 43 N. Y. 550; Nichols v. Opperman, 6 Wash. 618; 34 Pac. 162; Popp v. Swanke, 68 Wis. 364; 31 N. W. 916.

⁵ Sullivan v. O'Neal, 66 Tex. 433; 1 S. W. 185.

⁶ Merriam v. Leonard, 6 Cush. (Mass.) 151.

⁷ Chesebrough v. Pingree, 72 Mich. 438; 1 L. R. A. 529; 40 N. W. 747.

⁸ Johnson v. Dodgson, 2 Mees. & W. 653; Drury v. Young, 58 Md. 546; 42 Am. Rep. 343; Hovekamp v. Elshoff, 3 Ohio N. P. 158.

livered in escrow,⁹ or though not delivered at all,¹⁰ is a sufficient memorandum. An undelivered deed has been treated as at least an admission of some contract to convey.¹¹ In some of the cases often cited on this point, the court either expressly avoids deciding the question,¹² or decides it in obiter.¹³ If the parties have entered into a contract a memorandum of which has been delivered, an undelivered deed may be read in connection with such memorandum to show the terms of the contract.¹⁴

Several questions, involved in these cases, are not always separated in discussion. First is the question whether the deed is so delivered as to constitute full performance on the part of the vendor.¹⁵ If full performance is had, it makes no difference whether the deed is a sufficient memorandum or not.¹⁶ If the deed is not delivered so as to constitute full performance, the question of its sufficiency as a memorandum becomes important. Such a deed may not be sufficient as a memorandum because it is not delivered. It may also be insufficient because it does not set forth the terms of the contract.¹⁷ Both these objections may exist at once, as where the deed is not delivered at all,¹⁸ or is delivered in escrow.¹⁹ In most of the adjudicated cases, however, holding that the deed is not a sufficient memorandum the court has discussed one or the other of these objections exclusively.

⁹ *Griel v. Lomax*, 89 Ala. 420; 6 So. 741.

¹⁰ *Jenkins v. Harrison*, 66 Ala. 345; *Work v. Cowhick*, 81 Ill. 317; *Bowles v. Woodson*, 6 Gratt. (Va.) 78.

¹¹ *Hart v. Carroll*, 85 Pa. St. 508; *McGibbony v. Burmaster*, 53 Pa. St. 332.

¹² *Steel v. Fife*, 48 Ia. 99; 30 Am. Rep. 388.

¹³ *Remington v. Linthicum*, 14 Pet. (U. S.) 84; *Harman v. Harman*, 70 Fed. 894; 17 C. C. A. 479.

¹⁴ *Thayer v. Luce*, 22 O. S. 62; approved but distinguished in *Wier v. Batdorf*, 24 Neb. 83; 38 N. W. 22; and *Nichols v. Opperman*, 6 Wash. 618; 34 Pac. 162; on the ground

of the existence of the memorandum delivered.

¹⁵ See § 714 *et seq.*

¹⁶ See § 713 *et seq.*

¹⁷ *Swain v. Burnette*, 89 Cal. 564; 26 Pac. 1093; *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942; *Overman v. Kerr*, 17 Ia. 485; *Parker v. Parker*, 1 Gray (Mass.) 409; *Ducett v. Wolf*, 81 Mich. 311; 45 N. W. 829; *Cagger v. Lansing*, 43 N. Y. 550; *Campbell v. Thomas*, 42 Wis. 437; 24 Am. Rep. 427.

¹⁸ *Swain v. Burnette*, 89 Cal. 564; 26 Pac. 1093.

¹⁹ *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942.

A will has been held to be a sufficient memorandum, though, of course, not delivered.²⁰ Where such an instrument contemplates immediate possession of certain realty by the promisee and his support of testatrix for her life, the contract is valid as a memorandum, though the propriety of calling it a will may be doubted.²¹ If a will is not held to be a sufficient memorandum, it is so held because it does not express the terms of the contract.²² No objection seems to be made to corporate records as memoranda, on the ground that they are not delivered.²³ Where insufficient as memoranda it is generally because they do not disclose a contract, but merely an intention to make one in the future. So a resolution to sell its property, adopted by a corporation, is insufficient as a memorandum of a contract of sale made in pursuance of such resolution.²⁴

§687. Form of memorandum.

If the memorandum sets forth the requisite facts, and is in writing and duly signed, its form is immaterial.¹ A memorandum showing all the terms of the contract is sufficient, although the parties intended to execute a formally drafted contract thereafter.² If the terms of the contract under which they are executed are sufficiently set forth therein, a deed,³ a will,⁴ a re-

²⁰ *Whiton v. Whiton*, 179 Ill. 32; 53 N. E. 722; affirming 76 Ill. App. 553. (An obiter, as the contract to bequeath personalty solely.) *Brinker v. Brinker*, 7 Pa. St. 53.

²¹ *Smith v. Tuit*, 127 Pa. St. 341; 14 Am. St. Rep. 851; 17 Atl. 995.

²² *Champlin v. Champlin*, 136 Ill. 309; 29 Am. St. Rep. 323; 26 N. E. 526; *Hale v. Hale*, 90 Va. 728; 19 S. E. 739.

²³ See § 687.

²⁴ *Cumberland, etc., Ry. v. Ry.* — Ky. —; 77 S. W. 690.

¹ *California Canneries Co. v. Scatena*, 117 Cal. 447; 49 Pac. 462; *McConnell v. Brillhart*, 17 Ill. 354;

65 Am. Dec. 661; *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671; *Singleton v. Hill*, 91 Wis. 51; 51 Am. St. Rep. 868; 64 N. W. 588.

² *Gray v. Smith*, L. R. 43 Ch. D. 208.

³ *Folmar v. Carlisle*, 117 Ala. 449; 23 So. 551. (In this case the deed and note given therefor were read together.) *Johnston v. Jones*, 85 Ala. 286; 4 So. 748; *Prignon v. Daussat*, 4 Wash. 199; 31 Am. St. Rep. 914; 29 Pac. 1046. (The deed recited that it was given in consideration of the promise of the grantee to marry the grantor.)

⁴ *Shroyer v. Smith*, 204 Pa. St.

ceipt,⁵ an assignment,⁶ or a note,⁷ as a bought and sold note,⁸ or a draft,⁹ or a sheriff's return,¹⁰ is a sufficient memorandum. A letter,¹¹ or a telegram,¹² addressed to the adversary party; or a letter written and signed by the party to the contract to be charged therewith, addressed not to the adversary party to the contract, but to another person, may be a sufficient memorandum.¹³ The records of a corporation if signed properly by an agent of the corporation and setting forth the terms of a contract sufficiently may be a sufficient memorandum.¹⁴ Examples of this principle are found in the records of a council of a public corporation,¹⁵ in the resolutions of a bridge committee,¹⁶ or the records of the board of directors of a private corporation, duly signed by the proper officers,¹⁷ as by the president and the

310; 54 Atl. 24. (Devising realty to the same person to whom it had already been conveyed by parol.)

⁵ Tyler v. Onzts, 93 Ky. 331; 20 S. W. 256; Merson v. Merson, 101 Mich. 55; 59 N. W. 441; Gardels v. Kloke, 36 Neb. 493; 54 N. W. 834.

⁶ McClintock v. Oil Co., 146 Pa. St. 144; 23 Atl. 211.

⁷ Reynolds v. Kirk, 105 Ala. 446; 17 So. 95.

⁸ Bibb v. Allen, 149 U. S. 481.

⁹ Neaves v. Mining Co., 90 N. C. 412; 47 Am. Rep. 529.

¹⁰ Remington v. Linthicum, 14 Pet. (U. S.) 84; Elfe v. Gadsden, 2 Rich. Law. (S. C.) 373.

¹¹ Mizell v. Bennett, 4 Jones L. (N. C.) 249; 69 Am. Dec. 744; Gulf, etc., Ry. v. Settegast, 79 Tex. 256; 15 S. W. 228.

¹² North v. Mendel, 73 Ga. 400; 54 Am. Rep. 879.

¹³ Miller v. R. R., 58 Kan. 189; 48 Pac. 853; Cunningham v. Williams, 43 Mo. App. 629; Peay v. Seigler, 48 S. C. 496; 59 Am. St. Rep. 731; 26 S. E. 885; Singleton

v. Hill, 91 Wis. 51; 51 Am. St. Rep. 868; 64 N. W. 588.

¹⁴ Greenville v. Waterworks Co., 125 Ala. 625; 27 So. 764; Lamkin v. Mfg. Co., 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042; Grimes v. Hamilton Co., 37 Ia. 290; McManus v. Boston, 171 Mass. 152; 50 N. E. 607; Argus Co. v. Albany, 55 N. Y. 495; 14 Am. Rep. 296; Marden v. Champlin, 17 R. I. 423; 22 Atl. 938.

¹⁵ Greenville v. Waterworks Co., 125 Ala. 625; 27 So. 764; Chase v. Lowell, 7 Gray (Mass.) 33; Curtis v. Portsmouth, 67 N. H. 506; 39 Atl. 439; Argus Co. v. Albany, 55 N. Y. 495; 14 Am. Rep. 296; Marden v. Champlin, 17 R. I. 423; 22 Atl. 938.

¹⁶ Rollins Investment Co. v. George, 48 Fed. 776.

¹⁷ Jones v. Victoria, etc., Co., L. R. 2 Q. B. D. 314; Lamkin v. Mfg. Co., 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042; Tufts v. Plymouth, etc., Co., 14 All. (Mass.) 407.

secretary.¹⁸ A pleading of fact, such as a bill in equity,¹⁹ or an answer,²⁰ may set up the contract so as to constitute a sufficient memorandum thereof. A deposition which one party to an action on an oral contract is compelled to give at the instance of the adversary party is not a memorandum of the contract though in writing and signed by such party.²¹

§688. Memorandum consisting of several writings.

The written contract or memorandum required by the statute does not necessarily consist of one writing alone. It may as well consist of two or more writings.¹ If the offer is made in one instrument and acceptance is made in another the two instruments may be considered together.² A letter written by one party to the other and an answer thereto by such other may constitute a sufficient memorandum, if signed by the respective party, and showing on their face that they refer to the same transaction, the terms of which are sufficiently set forth.³ Thus

¹⁸ *Newport News, etc., Co. v. Ry. Co.*, 97 Va. 19; 32 S. E. 789; *Central Land Co. v. Johnston*, 95 Va. 223; 28 S. E. 175.

¹⁹ *Sanders v. Bryer*, 152 Mass. 141; 9 L. R. A. 255; 25 N. E. 86; *Peevey v. Houghton*, 72 Miss. 918; 48 Am. St. Rep. 592; 18 So. 357; 17 So. 378. Except when the bill seeks to avoid the contract on the ground of the statute of frauds. *Davis v. Ross* (Tenn. Ch. App.), 50 S. W. 650.

²⁰ *Gough v. Williamson*, 62 N. J. Eq. 526; 50 Atl. 323; *Peay v. Seigler*, 48 S. C. 496; 59 Am. St. Rep. 731; 26 S. E. 885. Provided such answer does not plead the statute as a defense.

²¹ *Cash v. Clark*, 61 Mo. App. 636.

¹ *Strouse v. Elting*, 110 Ala. 132; 20 So. 123; *Turner v. Lorillard Co.*, 100 Ga. 645; 62 Am. St. Rep. 345; 28 S. E. 383; *McBrayer v. Cohen*, 92 Ky. 479; 18 S. W. 123; *Freeland*

v. Ritz, 154 Mass. 257; 26 Am. St. Rep. 244; 12 L. R. A. 561; 28 N. E. 226; *Olson v. Sharpless*, 53 Minn. 91; 55 N. W. 125; *Atlantic Phosphate Co. v. Sullivan*, 34 S. C. 301; 13 S. E. 539; *Anderson v. Mfg. Co.*, 30 Wash. 147; 70 Pac. 247.

² *Gerli v. Mfg. Co.*, 57 N. J. L. 432; 51 Am. St. Rep. 611; 30 L. R. A. 61; 31 Atl. 401.

³ *Cooper v. Gas Co.*, 127 Fed. 482; *Drovers' National Bank v. Bank*, 44 Fed. 183; *Alford v. Wilson*, 20 Fed. 96; *Thames Loan and Trust Co. v. Beville*, 100 Ind. 309; *Wills v. Ross*, 77 Ind. 1; 40 Am. Rep. 279; *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; *Surface v. Leffingwell*, 6 Kan. App. 319; 51 Pac. 73; *Williams v. Smith*, 161 Mass. 248; 37 N. E. 455; *Corning v. Loomis*, 111 Mich. 23; 69 N. W. 85; *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512; 57 N. W. 19; *Hickey v. Dole*, 66 N. H. 336.

an order sent by A on a blank form furnished by B, showing in detail the goods ordered by A from B, and a letter from B to A acknowledging the receipt of the order and promising to ship at once, make a sufficient memorandum.⁴ The same rule applies to letters and telegrams,⁵ or to telegrams interchanged between the parties,⁶ whereby an agreement is reached. So a reference in a memorandum to a deed,⁷ or to a decree of a court and to tax deeds and receipts,⁸ or to notes executed by a third person,⁹ may be sufficient to incorporate such document in the memorandum and thereby to supply deficiencies in the latter. Express reference from one instrument to another is not necessary if the two instruments show on their face that they refer to the same transaction.¹⁰ So a memorandum and a receipt,¹¹ or a power of attorney and a contract executed thereunder,¹² or book entries and checks,¹³ or letters and a subsequent deed,¹⁴ or a written lease signed by lessor and a subsequent written accept-

49 Am. St. Rep. 614; 31 Atl. 900; Peay v. Seigler, 48 S. C. 496; 59 Am. St. Rep. 731; 26 S. E. 885; Kearby v. Hopkins, 14 Tex. Civ. App. 166; 36 S. W. 506; Shrewsbury v. Tufts, 41 W. Va. 212; 23 S. E. 692; Singleton v. Hill, 91 Wis. 51; 51 Am. St. Rep. 868; 64 N. W. 588.

⁴ Wilkinson v. Mfg. Co., 67 Miss. 231; 7 So. 356.

⁵ Stevenson v. McLean, L. R. 5 Q. B. Div. 346; Bibb v. Allen, 149 U. S. 481; Ryan v. United States, 136 U. S. 68; Kleinhans v. Jones, 68 Fed. 742; 15 C. C. A. 644; Elbert v. Gas Co., 97 Cal. 244; 32 Pac. 9; Crystal, etc., Co. v. Butterfield, 15 Colo. App. 246; 61 Pac. 479; Smith v. Easton, 54 Md. 138; 39 Am. Rep. 355; Swallow v. Strong, 83 Minn. 87; 85 N. W. 942; Trevor v. Wood, 36 N. Y. 307; 93 Am. Dec. 511; Eckert v. Schoch, 155 Pa. St. 530; 26 Atl. 654; Watson v. Baker, 71 Tex. 739;

9 S. W. 867; Underwood v. Stack, 15 Wash. 497; 46 Pac. 1031.

⁶ Utley v. Donaldson, 94 U. S. 29; Brewer v. Horst-Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418; Gaines v. McAdam, 79 Ill. App. 201.

⁷ Hibbard v. Storage-Battery Co., 174 Mass. 296; 54 N. E. 658.

⁸ Everman v. Herndon (Miss.), 11 So. 652.

⁹ Rowell v. Dunwoodie, 69 Vt. 111; 37 Atl. 227.

¹⁰ White v. Breen, 106 Ala. 159; 32 L. R. A. 127; 19 So. 59.

¹¹ Oliver v. Hunting, L. R. 44 Ch. D. 205; Peay v. Seigler, 48 S. C. 496; 59 Am. St. Rep. 731; 26 S. E. 885.

¹² White v. Breen, 106 Ala. 159; 32 L. R. A. 127; 19 So. 59.

¹³ Baldwin v. Trowbridge, 62 N. J. Eq. 468; 50 Atl. 494.

¹⁴ Leonard v. Woodruff, 23 Utah 494; 65 Pac. 199.

ance signed by the lessee,¹⁵ or a letter, a telegram, and a deed,¹⁶ or a memorandum and a pleading,¹⁷ may show on their face that they refer to the same transaction, and hence may be read together. So a petition describing the route of a sewer, a resolution of the city council, and a bond, may show that they refer to a common subject matter, and be read together.¹⁸ It is not necessary that all the writings which constitute the memorandum should be signed by the party to be charged therewith. If one writing signed by such party so refers to another writing, which is either unsigned, or signed by some other party, as to connect the two, they may be read as one memorandum.¹⁹ Thus a reference in a signed memorandum to an unsigned contract,²⁰ or to a lease to be executed thereafter,²¹ or a reference in an order of the court binding on the county to a bid made by a contractor and signed by him alone,²² may connect such other instrument with the memorandum. So a letter signed by a vendee, and declining to perform the contract set forth in an unsigned memorandum, may be read in connection with such unsigned memorandum to prove such contract.²³ Physical connection of the signed memorandum with the instrument to which it refers may establish a connection in meaning. Thus an indorsement of assignment on the back of a deed,²⁴ or a stock certificate,²⁵ may be sufficient to supplement deficiencies of the assignment in description. So the deficiencies of a lease

¹⁵ *Woodruff v. Butler*, 75 Conn. 679; 55 Atl. 167.

¹⁶ *Underwood v. Stack*, 15 Wash. 497; 46 Pac. 1031.

¹⁷ *Sanders v. Bryer*, 152 Mass. 141; 9 L. R. A. 255; 25 N. E. 86.

¹⁸ *Stevens v. Muskegon*, 111 Mich. 72; 36 L. R. A. 777; 67 N. W. 227.

¹⁹ See the cases cited § 1115. *Wilkinson v. Mfg. Co.*, 67 Miss. 231; 7 So. 356; *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512; 57 N. W. 19; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89.

²⁰ *Swallow v. Strong*, 83 Minn. 87; 85 N. W. 942.

²¹ *Freeland v. Ritz*, 154 Mass. 257; 26 Am. St. Rep. 244; 12 L. R. A. 561; 28 N. E. 226. (If in fact executed before the action is brought.)

²² *Bryson v. Johnson County*, 109 Mo. 76; 13 S. W. 239.

²³ *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533; 2 L. R. A. 212; 8 S. E. 8.

²⁴ *Tunstall v. Cobb*, 109 N. C. 316; 14 S. E. 28.

²⁵ *Flowers v. Steiner*, 108 Ala. 440; 19 So. 321.

may be supplied from an annexed contract.²⁶ So signing a bond, attached to the contract for the performance of which it is executed may be equivalent to signing the contract.²⁷ While physical connection is helpful, it is not of itself sufficient to establish connection in meaning. Thus a receipt for part payment on a lot, the description of which is not given, is insufficient though on the back of the receipt is indorsed "The lot No. 14 Eakin avenue."²⁸ Since the memorandum cannot be in part oral, however, it is necessary to constitute a sufficient memorandum that the several writings should, either by express reference or by reference to the same subject matter, show on their face their connection one with the other. If oral evidence is necessary to connect them, they cannot be read together as one memorandum or contract under the statute.²⁹ So where the reference in the signed memorandum describes an instrument different from the unsigned instrument offered in evidence to supplement the signed memorandum, oral evidence is inadmissible to contradict the reference and to show that the unsigned instrument offered was the one intended by the parties. Thus where the signed memorandum referred to specifications "signed by the parties," oral evidence could not be received to show that certain unsigned specifications were intended.³⁰

²⁶ *Thomas v. Drennen*, 112 Ala. 670; 20 So. 848. (In this case the contract was written on one side of the paper; the lease on the other.)

²⁷ *Busch v. Hart*, 62 Ark. 330; 35 S. W. 534.

²⁸ *Wilstach v. Heyd*, 122 Ind. 574; 23 N. E. 963.

²⁹ *Coombs v. Wilkes* (1891), 3 Ch. 77; *Potter v. Peters*, 64 L. J. Ch. N. S. 357; *Strong v. Bent*, 31 N. S. 1; *Duff v. Hopkins*, 33 Fed. 599; *Alba v. Strong*, 94 Ala. 163; 10 So. 242; *Devine v. Warner*, 76 Conn. 229; 56 Atl. 562; *Turner v. Lorillard Co.*, 100 Ga. 645; 62 Am. St. Rep. 345; 28 S. E. 383; *Ross v. Allen*, 45 Kan. 231; 10 L. R. A.

835; 25 Pac. 570; *Kingsley v. Siebrecht*, 92 Me. 23; 69 Am. St. Rep. 486; 42 Atl. 249; *Third National Bank v. Stell*, 129 Mich. 434; 88 N. W. 1050; *Swallow v. Strong*, 83 Minn. 87; 85 N. W. 942; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; *Johnson v. Buck*, 35 N. J. L. 338; *Ward v. Hasbrouck*, 169 N. Y. 407; 62 N. E. 434; *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. C. 485; 11 S. E. 568; *Moore v. Powell*, 6 Tex. Civ. App. 43; 25 S. W. 472; *Darling v. Cumming*, 92 Va. 521; 23 S. E. 880.

³⁰ *Donnelly v. Adams*, 115 Cal. 129; 46 Pac. 916.

§689. Necessity and form of signature.

Under the statute of frauds a written contract or a note or memorandum thereof is of no validity unless it is signed by the party to be charged therewith or by some one authorized by him.¹ Hence a memorandum in a judgment entry showing an oral agreement of the parties in open court for the sale of land is insufficient.² So if the statute provides that a lease not signed has only the force of a lease at will, an unsigned lease, prepared by one party but not signed by him, is insufficient.³ The form of the signature is unimportant. While the signature consists in most cases of the name of the party written by himself, it may be a valid signature without any of these elements. It may consist of an abbreviation,⁴ if intended as a means of authenticating the instrument. It may be printed instead of written if intended as an authentication.⁵ Thus a name printed in a letter head under which a contract was written has been held to be a sufficient signature.⁶ So is a name printed on the cover of an order book in which the memorandum is written.⁷ Unless, however, the party whose name is printed upon the contract writes the contract upon such printed paper or authorizes it to be written, intending to adopt the printing as his signature to such contract, the signature is not sufficient under the statute.⁸ The name of the vendor stamped on the memorandum, no evidence being offered to show how it came there, will not be assumed to

¹ Robinson v. Driver, 132 Ala. 169; 31 So. 495; Ross v. Allen, 45 Kan. 231; 10 L. R. A. 835; 25 Pac. 570; Hazard v. Day, 14 All. (Mass.) 487; 92 Am. Dec. 790; McElroy v. Seery, 61 Md. 389; 48 Am. Rep. 110; Taft v. Dimond, 16 R. I. 584; 18 Atl. 183.

² Robinson v. Driver, 132 Ala. 169; 31 So. 495. *Contra*, that this is a contract of record to which the statute of frauds does not apply. See § 554.

³ Charlton v. Real Estate Co., 64 N. J. Eq. 631; 54 Atl. 444.

⁴ Such as initials. Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446.

⁵ Name printed and also written in body of instrument. Anderson v. Mfg. Co., 30 Wash. 147; 70 Pac. 217.

⁶ Drury v. Young, 58 Md. 546; 42 Am. Rep. 343. So with a name printed on a bill-head. Schneider v. Norris, 2 M. & S. 286.

⁷ Jones v. Joyner, 82 L. T. 768.

⁸ Hucklesby v. Hook (1900), W. N. 45.

be his signature.⁹ Under special circumstances a signature by mark has been held to be insufficient.¹⁰

§690. Place of signature.

The original statute required the contract note or memorandum to be "signed." Where the statute is so worded, the name of the party may appear at any part of the instrument if placed there with the intention of authenticating it.¹ Thus it may appear at the top,² or as the address of the letter constituting the contract, when written by the agent of the addressee,³ or in the body of the memorandum.⁴ A signature across the face of a written memorandum which covers one whole side of the paper and so leaves no room for a signature at the bottom has been held sufficient.⁵ The name of a party in the body of a memorandum in which there are no apt words to charge him is not a sufficient signature though the entire contract is in his handwriting.⁶ If the statute requires the memorandum to be "subscribed" a different rule obtains. By derivation "subscribe" implies "writing beneath" and accordingly the signature must be substantially at the end of the memorandum.⁷ If the agreement or memorandum is drawn in duplicate and each of the

⁹ Boardman v. Spooner, 13 All. (Mass.) 353; 90 Am. Dec. 196.

¹⁰ Hubert v. Moreau, 2 Car. & P. 528; Carlisle v. Campbell, 76 Ala. 247.

¹ Johnson v. Dodgson, 2 M. & W. 653; New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Merritt v. Clason, 12 Johns. (N. Y.) 102; 7 Am. Dec. 286; Tingley v. Boom Co., 5 Wash. 644; 32 Pac. 737; 33 Pac. 1055.

² Schneider v. Norris, 2 M. & S. 286; Drury v. Young, 58 Md. 546; 42 Am. Rep. 343; Anderson v. Mfg. Co., 30 Wash. 147; 70 Pac. 247.

³ Evans v. Hoare (1892), 1 Q. B. 593.

⁴ Swim v. Amos, 33 N. B. 49; New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Hawkins v. Chace, 19 Pick. (Mass.) 502; Coddington v. Goddard, 16 Gray (Mass.) 436; Merritt v. Clason, 12 Johns. (N. Y.) 102; 7 Am. Dec. 286; Clason v. Bailey, 14 Johns. (N. Y.) 484; Tingley v. Boom Co., 5 Wash. 644; 32 Pac. 737; 33 Pac. 1055.

⁵ California Canneries Co. v. Scatena, 117 Cal. 447; 49 Pac. 462.

⁶ Guthrie v. Anderson, 49 Kan. 416; 30 Pac. 459; affirmed on rehearing, 47 Kan. 383; 28 Pac. 164.

⁷ James v. Patten, 6 N. Y. 9; 55 Am. Dec. 376.

parties to the contract signs one copy and delivers it to the other, the contract has the same effect as if both had signed the same copy.⁸

§691. By which party memorandum must be signed.

The statute does not require the contract, note or memorandum to be signed by both parties but only by the party to be charged therewith. This is usually the defendant in an action to enforce the contract; though it may be the plaintiff if the defendant sets up the contract either as a defense or as a ground for affirmative relief. Accordingly a contract, note or memorandum is sufficient if signed by the party to be charged therewith though not signed by the party seeking to enforce it.¹ Thus a memorandum of a contract to convey land, signed by the vendor²

⁸ *Morris v. McKee*, 96 Ga. 611; 24 S. E. 142; *Bray v. Irrigation Co.*, 4 Ida. 685; 44 Pac. 432.

¹ *Bloom v. Hazzard*, 104 Cal. 310; 37 Pac. 1037; *Martin v. Ede*, 103 Cal. 157; 37 Pac. 199; *Cavanaugh v. Casselman*, 88 Cal. 543; 26 Pac. 515; *Hodges v. Kowing*, 58 Conn. 12; 7 L. R. A. 87; 18 Atl. 979; *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723; *Gradle v. Warner*, 140 Ill. 123; 29 N. E. 1118; *Perkins v. Hadsell*, 50 Ill. 216; *Raphael v. Hartman*, 87 Ill. App. 634; *Burke v. Mead*, 159 Ind. 252; 64 N. E. 880; *Lloyd v. O'Rear* (Ky.), 59 S. W. 483; *Broassard v. Verret*, 43 La. Ann. 929; 9 So. 905; *Hunter v. Giddings*, 97 Mass. 11; 93 Am. Dec. 54; *Old Colony R. R. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Bowers v. Whitney*, 88 Minn. 168; 92 N. W. 540; *Western Land Association v. Banks*, 80 Minn. 317; 83 N. W. 192; *Kessler v. Smith*, 42 Minn. 494; 44 N. W. 794; *Atkinson v. Whitney*, 67 Miss. 655; 7 So. 644; *Marqueze v. Caldwell*, 48 Miss. 23;

Mastin v. Grimes, 88 Mo. 478; *Black v. Crowther*, 74 Mo. App. 480; *Cunningham v. Williams*, 43 Mo. App. 629; *Ballou v. Sherwood*, 32 Neb. 666; 49 N. W. 790; 50 N. W. 1131; *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767; *Sabre v. Smith*, 62 N. H. 663; *Thayer v. Luce*, 22 O. S. 62; *Brodhead v. Reinbold*, 200 Pa. St. 618; 86 Am. St. Rep. 735; 50 Atl. 229; *Witman v. Reading*, 191 Pa. St. 134; 43 Atl. 140; *McPherson v. Fargo*, 10 S. D. 611; 65 Am. St. Rep. 723; 74 N. W. 1057; *Merchants' Coal Co. v. Billmeyer*, — W. Va. —; 46 S. E. 121.

² *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; *Black v. Maddox*, 104 Ga. 157; 30 S. E. 723; *Western Land Association v. Bank*, 80 Minn. 317; 83 N. W. 192; *Gardels v. Kloke*, 36 Neb. 493; 54 N. W. 834; *Sylvester v. Born*, 132 Pa. St. 467; 19 Atl. 337; *Monogah, etc., Co. v. Fleming*, 42 W. Va. 538; 26 S. E. 201.

alone, or to devise realty, signed by the promisor,³ or a lease, signed by the lessor only and accepted by the lessee,⁴ may be enforced by the promisee.

On the other hand, a memorandum signed by a lessee,⁵ or by a vendee,⁶ renders the contract enforceable against the party signing it at the instance of the adversary party though he did not sign it. So a contract for the sale of chattels within the statute, signed by the buyer alone, who is sought to be charged may be enforced by the seller.⁷ However, there must be evidence of acceptance by the party who does not sign.⁸ This is merely a general principle of contract law.⁹

There is a conflict of authority on this point, however, and some cases hold that unless both sign, neither is bound.¹⁰ This seems to be adding by judicial legislation to the plain requirements of the statute. It is a view most commonly expressed by such courts of equity as hold that in order to have specific performance, there must be mutuality of remedy as well as mutuality of obligation.¹¹ Even where the view last expressed obtains, it is held that if the party who does not sign, accepts and acts under the written memorandum, the party who signs is bound.¹² This view, of course, prevails where it is held that only the party to be charged need sign. There are, however, jurisdictions where it is held that an oral acceptance is insufficient unless the

³ *Howe v. Watson*, 179 Mass. 30; 60 N. E. 415.

⁴ *Carnegie Natural Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; 27 Atl. 951.

⁵ *Lagerfelt v. McKie*, 100 Ala. 430; 14 So. 281 (a lease of realty); *Singer Mfg. Co. v. Converse*, 23 Colo. 247; 47 Pac. 264 (a lease of a sewing machine).

⁶ *Hodges v. Kowing*, 58 Conn. 12; 7 L. R. A. 87; 18 Atl. 979.

⁷ *Kessler v. Smith*, 42 Minn. 494; 44 N. W. 794.

⁸ *Castro v. Gaffey*, 96 Cal. 421; 31 Pac. 363.

⁹ See § 41.

¹⁰ *Sykes v. Dixon*, 9 Ad. & El. 693; *Krohn v. Bantz*, 68 Ind. 277; *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. Rep. 708; 26 N. W. 139. (A case which observes that the conflict of authority on this point is "truly bewildering.")

¹¹ See § 1615 *et seq.*

¹² *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47; 11 L. R. A. 148; 8 So. 368; *Harriman v. Tyndale*, 184 Mass. 534; 69 N. E. 353; *Mull v. Smith*, — Mich. —; 94 N. W. 183.

party who accepts pays money or otherwise alters his position in performance of such contract.¹³

A written contract or memorandum thereof within the statute signed by one party only cannot be enforced against the adversary party.¹⁴ So a contract signed by one co-tenant cannot be enforced against the other,¹⁵ nor can a contract signed by a partnership in the firm name be enforced against one who subsequently becomes a member of such partnership and accepts such contract orally.¹⁶ It has been held that a contract for the sale of realty cannot be enforced against a vendee who has not signed, even if he has gone into possession under such contract.¹⁷

Some statutes require the memorandum to be signed by the party by whom the sale is made. Under such statutes, a contract of sale signed by the vendor only may be enforced either against him,¹⁸ or against the vendee.¹⁹ Some statutes specifically provide that both parties must sign. Under such a statute signatures of a written contract by one and oral acceptance by the other is insufficient.²⁰

§692. Authority of agent to sign.—Form of authority.

The statute allows the signature to be made "by the party to be charged therewith or some other person thereunto by him lawfully authorized." Under this wording, the contract, note or memorandum may be signed by an authorized agent.¹

¹³ *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796.

¹⁴ *Guthrie v. Anderson*, 47 Kan. 383; 28 Pac. 164; *Ross v. Allen*, 45 Kan. 231; 10 L. R. A. 835; 25 Pac. 570; *Brown v. Snider*, 126 Mich. 198; 85 N. W. 570; *Yeager v. Kelsey*, 46 Minn. 402; 49 N. W. 199; *Zanderson v. Sullivan*, 91 Tex. 499; 44 S. W. 484; affirming (Tex. Civ. App.), 42 S. W. 1027.

¹⁵ *Zanderson v. Sullivan*, 91 Tex. 499; 44 S. W. 484; affirming (Tex. Civ. App.), 42 S. W. 1027.

¹⁶ *Hughes v. Gross*, 166 Mass. 61; 55 Am. St. Rep. 375; 32 L. R. A. 620; 43 N. E. 1031.

¹⁷ *Love v. Atkinson*, 131 N. C. 544; 42 S. E. 966.

¹⁸ *Wall v. Ry.*, 86 Wis. 48; 56 N. W. 367.

¹⁹ *Ide v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17; 24 Pac. 695; *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767; 11 N. W. 732; *Hutchinson v. Ry.*, 37 Wis. 582.

²⁰ *Spence v. Apley* (Neb.), 94 N. W. 109.

¹ *New England, etc., Co. v. Wors-*

Whether the authority of the agent who signs the memorandum provided for by statute on behalf of his principal, must be in writing and signed by the principal in order to bind such principal, is a question which turns entirely on the wording of the particular statute. If the statute does not prescribe what form of authority is necessary, any form sufficient at common law will be sufficient under the statute. Accordingly if the statute provides that the memorandum is to be signed by the principal or by his agent thereunto "lawfully authorized," such authority need not be in writing,² as the statute when thus worded does not attempt to prescribe the form of the agent's authority; Common Law rules apply; and any form of parol authority is sufficient in the execution of a parol instrument. So in contracts for the sale of an interest in realty, oral authority of an agent is sufficient.³ Thus even where indorsing a note in blank out of the chain of title does not operate in law as a guaranty, it authorizes the holder to write a guaranty over such blank signature to conform to the oral contract.⁴ If the statute provides that such memorandum must be signed by the principal or by his agent "authorized in writing" such authority must, of course, be in writing in the form prescribed by the statute.⁵ So

ted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Heffron v. Armsby, 61 Mich. 505; 28 N. W. 672; Gerli v. Mfg. Co., 57 N. J. L. 432; 51 Am. St. Rep. 611; 30 L. R. A. 61; 31 Atl. 401.

² John Griffiths Cycle Corporation v. Humber (1899), 2 Q. B. 414; Rutenberg v. Main, 47 Cal. 213; McConnell v. Brillhart, 17 Ill. 354; 65 Am. Dec. 661; Columbia, etc., Co. v. Tinsley (Ky.); 60 S. W. 10; Talbot v. Bowen, 1 A. K. Mar. (Ky.) 436; 10 Am. Dec. 747; Peterson v. Russell, 62 Minn. 220; 54 Am. St. Rep. 634; 29 L. R. A. 612; 64 N. W. 555; Kennedy v. Ehlen, 31 W. Va. 540; 8 S. E. 398; Conaway v. Sweeney, 24 W. Va., 643; Ober v. Stephens, — W. Va., —; 46 S. E. 195.

³ Columbia, etc., Co. v. Tinsley (Ky.), 60 S. W. 10; Lindley v. Keim, 54 N. J. Eq. 418; *sub nom.*, O'Reilly v. Keim, 34 Atl. 1073; affirming (N. J. Eq.) 30 Atl. 1063; Kennedy v. Ehlen, 31 W. Va. 540; 8 S. E. 398.

⁴ Peterson v. Russell, 62 Minn. 220; 54 Am. St. Rep. 634; 29 L. R. A. 612; 64 N. W. 555.

⁵ Thompson v. Coal Co., 135 Ala. 630; 93 Am. St. Rep. 49; 34 So. 31; Castner v. Richardson, 18 Colo. 496; 33 Pac. 163; Albertson v. Ashton, 102 Ill. 50; Sigmund v. Newspaper Co., 82 Ill. App. 178; Samuels v. Greenspan, 9 Kan. App. 140; 58 Pac. 482; Dickson v. Luman, 93 Ky. 614; 20 S. W. 1038; Newlin v. Hoyt, — Minn. —; 98 N. W. 323;

in contracts for the sale of realty under such a statute, oral authority of the agent is not sufficient.⁶ Under some statutes, written authority of an agent is necessary only in certain classes of these contracts, as in contracts for the sale of some interest in realty,⁷ or the statute may require written authority of an agent acting for the vendor or lessor of realty, but not of an agent acting for a vendee,⁸ or lessee.⁹

Since a signature by an agent in the presence of his principal is in law the immediate signature of the principal himself and not that of the principal by his agent,¹⁰ an agent who without written authority signs a contract under the statute of frauds in the presence of his principal binds the principal.¹¹ If the agent executes a conveyance, and not merely a contract for a conveyance, in the presence of the principal and at his express request, the same rule applies, and oral authority is sufficient.¹²

Pierce v. Clarke, 71 Minn. 114; 73 N. W. 522 (overruling on another point *Hagelin v. Wacks*, 61 Minn. 214; 63 N. W. 624).

⁶ *Borderre v. Den*, 106 Cal. 594; 39 Pac. 946; *Meux v. Hogue*, 91 Cal. 442; 27 Pac. 744; *Castner v. Richardson*, 18 Colo. 496; 33 Pac. 163; *Kozel v. Dearlove*, 144 Ill. 23; 36 Am. St. Rep. 416; 32 N. E. 542; *Baldwin v. Schiappacasse*, 109 Mich. 170; 66 N. W. 1091; *O'Shea v. Rice*, 49 Neb. 893; 69 N. W. 308; *Brandrup v. Britten*, 11 N. D. 376; 92 N. W. 453; *Utah, etc., Co. v. Garbutt*, 6 Utah 342; 23 Pac. 758. In *Metosh v. Hodges*, 110 Mich. 319; 68 N. W. 158, in deciding a case which the court held to be controlled by Illinois law, it was held that such authority need not under the Illinois statute then in force, be in writing; following *Lake v. Campbell*, 18 Ill. 106. On rehearing the court held that by reason of a change in the Illinois statute such authority had to be in writing, but the former judgment was adhered to on another

point. See 110 Mich. 322; 70 N. W. 550, for opinion on rehearing.

⁷ *Dickson v. Luman*, 93 Ky. 614; 20 S. W. 1038; *Pierce v. Clarke*, 71 Minn. 114; 73 N. W. 522; *Cockrell v. McIntyre*, 161 Mo. 59; 61 S. W. 648.

⁸ *Rice-Dwyer Real Estate Co. v. Ruhlman*, 68 Mo. App. 503.

⁹ *Ehrmantraut v. Robinson*, 52 Minn. 333; 54 N. W. 188.

¹⁰ See § 574.

¹¹ *Ball v. Dunsterville*, 4 T. R. 313; *Morton v. Murray*, 176 Ill. 54; 43 L. R. A. 529; 51 N. E. 767; *Meyer v. King*, 29 La. Ann. 567; *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026. *Contra*, *Bramel v. Byron* (Ky.), 43 S. W. 695.

¹² *Videau v. Griffin*, 21 Cal. 389; *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101; *Gardner v. Gardner*, 5 Cush. (Mass.) 483; 52 Am. Rep. 740; *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026; *McMurtry v. Brown*, 6 Neb. 368; *Mutual Benefit*

The writing relied on as authority of the agent must show such authority on its face. So a note from A to B stating that A cannot meet B on account of illness, but that X will attend to the matter for A, is insufficient authority if it must be supplemented by evidence of prior oral negotiations for the exchange of land for mining stock to show what authority X had.¹³ Written authority to sell, however, shows authority to execute such memorandum as is necessary to make the sale binding.¹⁴ Written authority to sell need not fix the price at which the sale is to be made. Hence if the price is fixed in writing, a subsequent oral modification of such authority may be shown, fixing a lower price.¹⁵

§693. Nature of authority.

Since the statute provides for a signature by an agent "lawfully authorized," a signature by one not authorized to act for another cannot, at least in the absence of ratification, bind such other.¹ The party seeking to enforce the contract is bound to show that the person, other than the adversary party, who signs the memorandum, is the agent of such adversary party.² An agent may bind his principal by a written memorandum, such as a letter, written within the scope of his authority, recognizing an unsigned written contract made by his principal, without special authority from his principal to sign such memorandum, and without authority to make such contract originally.³

If both parties to the contract assent thereto the same person may act as agent for both, and in such cases the signature of

Life Ins. Co. v. Brown, 30 N. J. Eq. 193.

¹³ Cockrell v. McIntyre, 161 Mo. 59; 61 S. W. 648.

¹⁴ Jones v. Wattles, — Neb. —; 92 N. W. 765.

¹⁵ Rank v. Garvey, — Neb. —; 92 N. W. 1025.

¹ Wheeler, etc., Co. v. Barrett, 70 Ill. App. 222 (affirmed in Wheeler,

etc., Co. v. Barrett, 172 Ill. 610; 50 N. E. 325, but without discussion of this point).

² Clark County v. Howell, 21 Ind. App. 495; 52 N. E. 769.

³ John Griffiths Cycle Corporation v. Humber (1899), 2 Q. B. 414; following Jones v. Dock Co., 2 Q. B. Div. 314; explaining Smith v. Webster, 3 Ch. Div. 49.

such common agent to a note or memorandum of the contract binds both parties thereto.⁴ Thus oral authority given by a stockholder to the secretary of the corporation to put him down for a certain amount of new stock followed by the secretary's making such written subscription is a subscription in writing by the stockholder.⁵ However, a request by A to B's agent X to transmit a certain offer to B does not make X A's agent for the purpose of binding A by X's signature to such letter.⁶ Still less can the agent of one party represent the other without any request from him.⁷ The chief application of the rule that the same person may be the agent of both parties is found in auction sales. The auctioneer is the agent of the vendor by virtue of his appointment, and on receiving the bid he becomes the agent of the vendee for the purpose of closing the contract. It is on implied authority from the vendee that the auctioneer's power to represent him rests and not on any peculiarity of auction sales. Hence a memorandum made and signed not by the auctioneer but by the vendor's agent is not sufficient to bind the vendee.⁸ Accordingly the auctioneer's signature to a note or memorandum of the contract, made at the sale, is sufficient under the statute of frauds to bind both vendor and vendee.⁹ If he delays signing until after the sale, the validity of his memorandum depends on the existence of his authority.¹⁰ His

⁴ Gill v. Hewitt, 7 Bush (Ky.) 10; White v. Mfg. Co., 179 Mass. 427; 60 N. E. 791; Morton v. Dean, 13 Met. (Mass.) 385; Springer v. Kleinsorge, 83 Mo. 152; Proctor v. Finley, 119 N. C. 536; 26 S. E. 128; Reid v. Packing Association, 43 Or. 429; 73 Pac. 337; Perkiomen Brick Co. v. Dyer, 187 Pa. St. 470; 41 Atl. 326; Christie v. Simpson, 1 Rich. Law. (S. C.) 407.

⁵ Perkiomen Brick Co. v. Dyer, 187 Pa. St. 470; 41 Atl. 326.

⁶ Soward v. Moss, 59 Neb. 71; 80 N. W. 268; reversing on rehearing 58 Neb. 119; 78 N. W. 373; Wilson v. Mill Co., 150 N. Y. 314; 55 Am. St. Rep. 680; 44 N. E. 959.

⁷ Moore v. Powell, 6 Tex. Civ. App. 43; 25 S. W. 472.

⁸ Bamber v. Savage, 52 Wis. 110; 38 Am. Rep. 723; 8 N. W. 609.

⁹ Bird v. Boulter, 4 B. & Adol. 443; Burke v. Haley, 7 Ill. 614; McBrayer v. Cohen, 92 Ky. 479; 18 S. W. 123; Gill v. Hewitt, 7 Bush. (Ky.) 10; Morton v. Dean, 13 Met. (Mass.) 385; Gill v. Bicknell, 2 Cush. (Mass.) 358; Proctor v. Finley, 119 N. C. 536; 26 S. E. 128; Johnson v. Buck, 35 N. J. L. 338; 10 Am. Rep. 243; Pugh v. Chesseldine, 11 Ohio 109; 37 Am. Dec. 414; Meadows v. Meadows, 3 McCord (S. C.) 458; 15 Am. Dec. 645.

¹⁰ This is sometimes treated as an

authority as agent of the vendee terminates with the sale. A subsequent memorandum made by him cannot bind the vendee,¹¹ especially if made after the vendee has repudiated the contract.¹² The vendee may repudiate his bid at the sale if before the auctioneer has made a proper memorandum.¹³ Thus where a sheriff was acting as trustee in foreclosing a deed of trust and the vendee withdrew his bid two hours after the sale and before the sheriff had made a memorandum thereof, the vendee was not bound.¹⁴ His authority as agent of the vendor may exist for at least a reasonable time after the sale if not revoked. A memorandum made by him within a reasonable time after the sale may accordingly bind the vendor;¹⁵ but his power to bind the vendor after the sale ceases if the vendor has revoked his authority with the knowledge of the vendee.¹⁶

One party to the contract cannot act as agent for the adversary party,¹⁷ even if he acts as auctioneer. Hence a trustee who acts as his own auctioneer cannot be an agent for the vendee,¹⁸ as where a guardian sells his ward's property at auction.¹⁹

§694. Ratification of unauthorized agency.

Whether an oral ratification of an unauthorized signature is sufficient depends, in part, upon the statutory requirements for

exception to the general rule that a memorandum made after the contract is sufficient. It is not really an exception, however, but is instead an application of the principle that a signature by one who is then not a duly authorized agent is not of itself sufficient.

¹¹ *Bell v. Balls* (1897), 1 Ch. 663; *Horton v. McCarty*, 53 Me. 394; *Walker v. Herring*, 21 Gratt. (Va.) 678; 8 Am. Rep. 616.

¹² *Bell v. Balls* (1897), 1 Ch. 663.

¹³ *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248; *Gwathney v. Cason*, 74 N. C. 5; 21 Am. Rep. 484.

¹⁴ *Dunham v. Hartman*, 153 Mo. 625; 77 Am. St. Rep. 741; 55 S. W.

233. (The sheriff here was not acting officially.)

¹⁵ As where made on the following day. *White v. Mfg. Co.*, 179 Mass. 427; 60 N. E. 791.

¹⁶ *Schmidt v. Quinzel*, 55 N. J. Eq. 792; 38 Atl. 665.

¹⁷ *Shorman v. Brandt*, L. R. 6 Q. B. 720; *Dunham v. Hartman*, 153 Mo. 625; 77 Am. St. Rep. 741; 55 S. W. 233; *Smith v. Arnold*, 5 Mason (U. S.) 414; *Tull v. David*, 45 Mo. 444; 100 Am. Dec. 385.

¹⁸ *Dunham v. Hartman*, 153 Mo. 625; 77 Am. St. Rep. 741; 55 S. W. 233; *Tull v. David*, 45 Mo. 444; 100 Am. Dec. 385.

¹⁹ *Bent v. Cobb*, 9 Gray (Mass.) 397; 69 Am. Dec. 295.

the original authority of the agent. Putting aside questions of estoppel and performance, ratification requires the same degree of proof as original authority. Hence if the statute requires original authority to be proved by writing an oral ratification by the principal of an unauthorized contract for the sale of land made by his agent,¹ is within the statute; even if the agent had written authority with the terms of which he did not comply.² If original authority may be conferred orally, an oral ratification is sufficient either to enable the ratifying principal to hold the adversary party,³ or to enable the adversary party to hold the ratifying principal.⁴ If, however, the benefit of the contract entered into by the authorized agent is reserved not to the principal but to another, it has been held that an attempted oral ratification is in effect a promise to pay the debt of another, and hence is unenforceable under the statute.⁵

§695. Form of signature by agent.—Adding party by extrinsic evidence.

In written contracts except those which like negotiable instruments must be entirely in writing,¹ it is always possible to show that a written contract signed by X was signed by him as agent for A in order to hold A.² The statute of frauds has usually no specific provisions on this subject. The ordinary rules of the Common Law are therefore in force. Hence a contract note or memorandum under the statute of frauds, signed by X, may be enforced against A on showing that X signed as the authorized agent of A.³ A signature, "A, agent

¹ *Sigmund v. Newspaper Co.*, 82 Ill. App. 178; *Roth v. Goerger*, 118 Mo. 556; 24 S. W. 176; *Hankins v. Baker*, 46 N. Y. 666.

² *Kozel v. Dearlove*, 144 Ill. 23; 36 Am. St. Rep. 416; 32 N. E. 542.

³ *Soames v. Spencer*, 1 Dowl. & R. 32.

⁴ *Maclean v. Dunn*, 4 Bing. 722; *Hammond v. Hannin*, 21 Mich. 374; 4 Am. Rep. 490.

⁵ *Holmes v. McAllister*, 123 Mich. 493; 48 L. R. A. 396; 82 N. W. 220.

¹ See § 761.

² See § 606. X cannot use such evidence to show that he is not liable.

³ *Nevada Bank v. Bank*, 59 Fed. 338; *Tobin v. Larkin*, 183 Mass. 389; 67 N. E. 340; *White v. Mfg. Co.*, 179 Mass. 427; 60 N. E. 791;

for B," whatever the *prima facie* liability,⁴ may be shown to be intended to bind B.⁵ On the other hand, a signature of the principal's name by the agent, without any words to show that it is written by the agent, is sufficient.⁶

§696. Elements of memorandum in general.—Incomplete memorandum.

If the outward form of the memorandum is in compliance with law, its sufficiency then depends on its contents. By the provisions of the statute, the contract must be proved by writing. No provision is made for oral evidence as proof of terms omitted from the written memorandum. Accordingly the memorandum must, in general, set forth with sufficient certainty the essentials of the agreement. This usually includes the fact that there is a contract, the parties, their relation to the contract, the subject-matter, the terms and, sometimes, the consideration.¹

Phillips v. Cornelius (Miss.), 28 So. 871; Haubelt v. Mill Co., 77 Mo. App. 672; Wheeler v. Walden, 17 Neb. 122; 22 N. W. 346; Dykers v. Townsend, 24 N. Y. 57; J. M. Hayes Woolen Co. v. McKinnon, 114 N. C. 661; 19 S. E. 761; Hargrove v. Adcock, 111 N. C. 166; 16 S. E. 16; Brodhead v. Reinbold, 200 Pa. St. 618; 86 Am. St. Rep. 735; 50 Atl. 229; Hall v. White, 123 Pa. St. 95; 16 Atl. 521; Tynan v. Dullnig (Tex. Civ. App.), 25 S. W. 465, 818.

⁴ See § 1148.

⁵ Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446.

⁶ Evans v. Hare (1892), 1 Q. B. 593.

¹ Turner v. Prevost, 17 Can. S. C. 283; Grafton v. Cummings, 99 U. S. 100; Williams v. Morris, 95 U. S. 444; Littell v. Jones, 56 Ark. 139; 19 S. W. 497; O'Donnell v. Leeman, 43 Me. 158; 69 Am. Dec. 54; Elliot v. Barrett, 144 Mass. 256; 10 N. E. 820; Atwood v. Cobb, 16 Pick.

(Mass.) 227; 26 Am. Dec. 657; Gault v. Stormont, 51 Mich. 636; 17 N. W. 214; Clampet v. Bells, 39 Minn. 272; 39 N. W. 495; Sherburne v. Shaw, 1 N. H. 157; 8 Am. Dec. 47; Mentz v. Newwitter, 122 N. Y. 491; 19 Am. St. Rep. 514; 11 L. R. A. 97; 25 N. E. 1044; Drake v. Seaman, 97 N. Y. 230; Davidson v. Land Co., 126 N. C. 704; 36 S. E. 162; Hall v. Fisher, 126 N. C. 205; 35 S. E. 425; Corbitt v. Gaslight Co., 6 Or. 405; 25 Am. Rep. 541; Rineer v. Collins, 156 Pa. St. 342; 27 Atl. 28; Masterson v. Little, 75 Tex. 682; 13 S. W. 154. It must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. . . . Accordingly, it must show who are the contracting parties, intelligently identify the subject-matter involved, express the consideration, be signed by the party

If it contains these elements it is sufficient;² but if any of them are lacking and must be supplied by parol, the memorandum is insufficient,³ both at law,⁴ and in equity.⁵ While an incomplete memorandum in writing of a contract which need neither be in writing nor be proved by writing may be supplemented by oral evidence to show what the real contract is,⁶ no such supplemental evidence can be considered in case of a contract the terms of which must be proved by writing. So a written offer within the statute of frauds amended by telephone and accepted as amended is insufficient.⁷ It may be here observed that a memorandum of an alleged contract under the statute of frauds may be defective for either of two reasons: the alleged contract between the parties may be lacking in some essential element and this deficiency will, of course, appear on the memorandum;⁸ or the oral contract may be complete but its terms may not be carried into the memorandum with sufficient certainty to comply

to be charged and disclose the terms and conditions of the agreement." *Catterlin v. Bush*, 39 Or. 496, 501; 65 Pac. 1064, 1065.

² *Homan v. Stewart*, 103 Ala. 644; 16 So. 35; *Newton v. Lyon*, 62 Kan. 306; 62 Pac. 1000; affirmed on rehearing, 62 Kan. 651; 64 Pac. 592; *Alford v. Wilson*, 95 Ky. 506; 26 S. W. 539; *McDonald v. Fernald*, 68 N. H. 171; 38 Atl. 729; *Jones v. Davis*, 48 N. J. Eq. 493; 21 Atl. 1035; *Peck v. Goff*, 18 R. I. 94; 25 Atl. 690; *Abba v. Smyth*, 21 Utah 109; 59 Pac. 756.

³ *Peoria Grape Sugar Co. v. Babcock Co.*, 67 Fed. 892; *Jackson v. Telephone Exchange*, 108 Ga. 646; 34 S. E. 207; *North v. Mendel*, 73 Ga. 400; 54 Am. Rep. 879; *Wright v. Raftree*, 181 Ill. 464; 54 N. E. 998; *Watt v. Cranberry Co.*, 63 Ia. 730; 18 N. W. 898; *Proctor v. Plummer*, 112 Mich. 393; 70 N. W. 1028; *Renz v. Stoll*, 94 Mich. 377; 34 Am. St. Rep. 358; 54 N. W. 276; *Shipman v. Campbell*, 79 Mich. 82; 44

N. W. 171; *Messmore v. Cunningham*, 78 Mich. 623; 44 N. W. 145; *McElroy v. Buck*, 35 Mich. 434; *Palmer v. Rolling Mill Co.*, 32 Mich. 274; *Brown v. Munger*, 42 Minn. 482; 44 N. W. 519; *Ringer v. Holtzclaw*, 112 Mo. 519; 20 S. W. 800; *Schenck v. Improvement Co.*, 47 N. J. Eq. 44; 19 Atl. 881; *Mentz v. Newwitter*, 122 N. Y. 491; 19 Am. St. Rep. 514; 11 L. R. A. 97; 25 N. E. 1044.

⁴ *Atwood v. Cobb*, 16 Pick. (Mass.) 227; 26 Am. Dec. 657; *Grafton v. Cummings*, 99 U. S. 100; *Patmore v. Haggard*, 78 Ill. 607; *Reid v. Kenworthy*, 25 Kan. 701; *Riley v. Farnsworth*, 116 Mass. 223.

⁵ *Minturn v. Baylis*, 33 Cal. 129; *Fry v. Platt*, 32 Kan. 62; 3 Pac. 781; *Holmes v. Evans*, 48 Miss. 247; 12 Am. Rep. 372.

⁶ See §§ 605, 1197, 1198.

⁷ *Wiessner v. Ayer*, 176 Mass. 425; 57 N. E. 672.

⁸ See §§ 27, 28, 45-47.

with the statute. As oral evidence is inadmissible to supply defects in such memoranda, it is often impossible to determine in specific cases which sort of defect is under consideration. The details of these elements must be discussed hereafter.

§697. Memorandum must show existence of contract.

First, the memorandum must show that the parties intend thereby to enter into a contract or that they have already entered into a contract.¹

Among the illustrations of a written memorandum defective as not showing this on its face are the following: A memorandum showing that the signer had given the refusal of certain realty to another;² a written statement that the signer can "spare" a certain amount of corn;³ a promise to accept a written offer when corrected by describing the property correctly;⁴ the expression of an intention to settle property on another to take effect on the death of the party making the disposition;⁵ and an expression of a desire to adopt a given person, to destroy old wills and to make a new one;⁶ or a letter containing a proposition and a reply containing an invitation to "talk it over."⁷ So a letter which recognizes a liability for services and offers to convey a certain lot of land in payment thereof is not a sufficient memorandum of a contract under which such services were rendered and providing for payment therefor by the con-

¹ *Salomon v. McRae*, 9 Colo. App. 23; 47 Pac. 409; *Andrew v. Babcock*, 63 Conn. 109; 26 Atl. 715; *American Oak Leather Co. v. Porter*, 94 Ia. 117; 62 N. W. 658; *Leatherbee v. Bernier*, 182 Mass. 507; 65 N. E. 842; *Kling v. Bordner*, 65 O. S. 86; 61 N. E. 148; *Wright's Estate*, 155 Pa. St. 64; 25 Atl. 877; *Masterson v. Little*, 75 Tex. 682; 13 S. W. 154; *Munk v. Weidner*, 9 Tex. Civ. App. 491; 29 S. W. 409.

² *Williams v. Smith*, 161 Mass. 248; 37 N. E. 455.

³ *Redus v. Holcomb* (Miss.), 27 So. 524.

⁴ *Andrew v. Babcock*, 63 Conn. 109; 26 Atl. 715.

⁵ *White v. Bigelow*, 154 Mass. 593; 28 N. E. 904.

⁶ *Wright's Estate*, 155 Pa. St. 64; 25 Atl. 877. But compare *North Platte, etc., Co. v. Price*, 4 Wyom. 293; 33 Pac. 664, where words but slightly more definite were held to import a contract to convey certain land to a certain woman on her marriage with promisor.

⁷ *Mathes v. Bell*, 121 Ia. 722; 96 N. W. 1093.

veyance of such realty.⁸ A letter admitting legal liability assumed to exist independent of any contract is not evidence of a contract creating such liability.⁹

A written communication by a principal to his agent authorizing him to make a given contract is not a memorandum showing such contract.¹⁰ If, however, the written memorandum shows that a contract has been entered into and states the terms thereof, it may be the means of charging the signer with liability thereon even though it is written to repudiate the contract.¹¹

§698. Memorandum must show parties to contract.

Second, the memorandum must show who are the parties to the contract and their relation thereto; "not only who is the promisor, but who is the promisee as well."¹ Thus a memorandum which does not in some way indicate the vendor, as where only the auctioneer is indicated,² or the agent of the vendor,³ is insufficient. So a memorandum which does not show who the vendee is, is insufficient.⁴ So a deed by a trustee which

⁸ Koch v. Williams, 82 Wis. 186; 52 N. W. 257.

⁹ Russell v. Blair, 18 Wash. 339; 51 Pac. 477.

¹⁰ Kleinhans v. Jones, 68 Fed. 742; 15 C. C. A. 644; Carskaddon v. South Bend, 141 Ind. 596, 601; 39 N. E. 667; 41 N. E. 1; Hastings v. Weber, 142 Mass. 232; 56 Am. Rep. 671; 7 N. E. 846.

¹¹ Martin v. Haubner, 26 Can. S. C. 142.

¹ Oglesby Grocery Co. v. Mfg. Co., 112 Ga. 359; 37 S. E. 372. To the same effect are Grafton v. Cummings, 99 U. S. 100; American Oak Leather Co. v. Porter, 94 Ia. 117; 62 N. W. 658; Lincoln v. Preserving Co., 132 Mass. 129; Coddington v. Goddard, 16 Gray (Mass.) 436; McKeag v. Piednoir, 74 Mo. App. 593; Carrick v. Mincke, 60 Mo. App. 140; Brown v. Whipple, 58 N. H. 229; Mentz v. Newwitter, 122 N. Y. 491; 19 Am. St. Rep. 514; 11 L. R. A.

97; 25 N. E. 1044. Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446, holds that the memorandum need not identify the parties. This case has been criticised in Grafton v. Cummings, 99 U. S. 100, and disapproved in Mentz v. Newwitter, 122 N. Y. 491; 19 Am. St. Rep. 514; 11 L. R. A. 97; 25 N. E. 1044.

² McGovern v. Hern, 153 Mass. 308; 25 Am. St. Rep. 632; 10 L. R. A. 815; 26 N. E. 861; Mentz v. Newwitter, 122 N. Y. 491; 19 Am. St. Rep. 514; 11 L. R. A. 97; 25 N. E. 1044.

³ Coombs v. Wilkes (1891), 3 Ch. 77; Ross v. Allen, 45 Kan. 231; 10 L. R. A. 835; 25 Pac. 570. *Contra*, where only the agent of the vendor was indicated. Mantz v. Maguire, 52 Mo. App. 136. If the vendor is indicated, signature by the agent is, of course, sufficient.

⁴ Lewis v. Wood, 153 Mass. 321; 11 L. R. A. 143; 26 N. E. 862; Cat-

purports to discharge part of the land from the operation of the trust deed is not sufficient as a contract where it does not show that the trustee was acting for the creditors nor does it show any particular person as grantee.⁵

It is not, however, necessary that either party be named. If indicated in any manner with sufficient certainty, the memorandum is not on this account defective.⁶ Thus a description of vendors of realty as "Phillips & Bro.,"⁷ or a description of parties acting as vendors of personalty as agents of certain named principals,⁸ is sufficient. So a grant of a "further lease" shows that the lessee is to be the former tenant though he is not named.⁹ So an offer made to an agent, without naming his principal but accepted by the agent on behalf of his principal, naming him, sufficiently shows that such principal is a party to the contract.¹⁰

§699. Subject matter.—Realty.

Third, the memorandum must set forth the subject-matter with such certainty that it can be identified without resorting to oral evidence of the intention of the parties direct as to the subject-matter to supplement the terms of the memorandum.¹ This principle finds its most frequent application in contracts for the sale of some interest in land. While the memorandum need

terlin v. Bush, 39 Or. 498; 65 Pac. 1064; 59 Pac. 706; Harney v. Burhans, 91 Wis. 348; 64 N. W. 1031. So of a sheriff's sale on execution, where the statute of frauds applies. Tombs v. Basye, 65 Mo. App. 30.

⁵ Woodcock v. Merrimon, 122 N. C. 731; 30 S. E. 321.

⁶ McLeod v. Adams, 102 Ga. 533; 27 S. E. 680.

⁷ Phillips v. Cornelius (Miss.), 28 So. 871.

⁸ American, etc. Co. v. Steel Co., 101 Fed. 200. (The memorandum is sufficient to bind such principals.)

⁹ Carr v. Lynch (1900), 1 Ch. 613.

¹⁰ Filby v. Hounsell (1896), 2 Ch. 737.

¹ Alabama Mineral Land Co. v. Jackson, 121 Ala. 172; 77 Am. St. Rep. 46; 25 So. 709; Ridgway v. Ingram, 50 Ind. 145; 19 Am. Rep. 706; Fry v. Platt, 32 Kan. 62; 3 Pac. 781; Sherer v. Trowbridge, 135 Mass. 500; Burgon v. Cabanne, 42 Minn. 267; 44 N. W. 118; Lippincott v. Bridgewater, 55 N. J. Eq. 208; 36 Atl. 672; Kling v. Bordner, 65 O. S. 86; 61 N. E. 148; Ferguson v. Stover, 33 Pa. St. 411.

not give a technical description of the realty contracted for, it still must give sufficient facts to identify it.² If it is necessary to resort to oral evidence of the intention of the parties direct as to the realty bargained for, the memorandum is insufficient.³ So a contract to mortgage realty including a right of way which is not appurtenant to the realty and which is not described, is not sufficient.⁴ A memorandum showing that a specific tract was intended, but not describing it further, is insufficient.⁵ Thus a contract for "one of the lots set aside for sale,"⁶ for "that lot,"⁷ or for "four lots of timber, more or less,"⁸ are each insufficient. So a check showing that it is given as "part payment on coal lands" is insufficient where the vendor owned much more coal land than that sold.⁹ So a sale of "a strip of land in front of Golden Rule Store and Stent Market" has been held insufficient where such strip is unenclosed and can be identified only by oral evidence.¹⁰ So a description by acreage only as a memorandum in the form of a receipt for "thirty acres,"¹¹ or a contract for the "sixty acres,"¹² or for "115 acres,"¹³ or "one third interest in five acres located near said works,"¹⁴ are each insufficient. If the memorandum shows that the location of the realty bargained for was left open for future agreement it is insufficient.¹⁵ Indeed, in cases of this

² *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942; *Edens v. Miller*, 147 Ind. 208; 46 N. E. 526.

³ *Alba v. Strong*, 94 Ala. 163; 10 So. 242; *Edens v. Miller*, 147 Ind. 208; 46 N. E. 526; *Voorheis v. Eiting* (Ky.), 22 S. W. 80; *Weil v. Willard*, 55 Mo. App. 376.

⁴ *John F. Fowkes Mfg. Co. v. Metcalf*, 169 Mass. 595; 48 N. E. 848.

⁵ *Lippincott v. Bridgewater*, 55 N. J. Eq. 208; 36 Atl. 672; *Davis v. Ross* (Tenn. Ch. App.), 50 S. W. 650.

⁶ *Williams v. Stritz* (Miss.), 17 So. 227.

⁷ *Ray v. Card*, 21 R. I. 362; 43 Atl. 846.

⁸ *Douglass v. Bunn*, 110 Ga. 159; 35 S. E. 339.

⁹ *Thompson v. Coal Co.*, 135 Ala. 630; 93 Am. St. Rep. 49; 34 So. 31.

¹⁰ *Craig v. Zelian*, 137 Cal. 105; 69 Pac. 853.

¹¹ *Humbert v. Brisbane*, 25 S. C. 506.

¹² *Cooley v. Lobdell*, 153 N. Y. 596; 47 N. E. 783.

¹³ *Wortham v. Smith* (Ky.), 66 S. W. 390.

¹⁴ *Hamilton v. Harvey*, 121 Ill. 469; 2 Am. St. Rep. 118; 13 N. E. 210.

¹⁵ *Weil v. Willard*, 55 Mo. App. 376; *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. C. 485; 11 S. E. 568.

class there is no contract. The difficulty is deeper than the means of proof. Thus where a tract is to be selected by both parties out of a larger tract, as where the parties were to agree on a tract of forty by one hundred twenty feet out of a certain eighty-acre tract to front on a street¹⁶ the memorandum is insufficient. So a description showing a sale of lots out of a larger tract not yet subdivided is insufficient.¹⁷ However, a contract to sell ten acres in a consecutive tract out of a tract of forty acres, to have the same average value and quality as the entire tract, has been held sufficient.¹⁸ If the tract is to be selected out of a larger tract by one of the parties, a different question arises on which there is a divergence of authority; some courts holding the contract definite and the memorandum sufficient,¹⁹ others taking the view that the description in the memorandum is insufficient since it must be supplemented by oral evidence.²⁰ A memorandum which gives the length of the boundary lines without the means of locating them is insufficient.²¹ Examples of this are as follows: A contract to buy a certain number of feet front on a given avenue on the east side between two designated streets;²² a contract to lease a tract twenty feet square, eight rods south and fifteen east of the northwest corner of a certain tract;²³ or a contract to sell "six by ten rods deep to be taken either way" from a house on a tract of land twenty rods square fronting on two streets.²⁴ So

¹⁶ Scanlon v. Oliver, 42 Minn. 538; 44 N. W. 1031.

¹⁷ Chellis v. Grimes, — N. H. —; 56 Atl. 742.

¹⁸ Burgon v. Cabanne, 42 Minn. 267; 44 N. W. 118.

¹⁹ Lauder v. Peoria, etc., Society, 71 Ill. App. 475; Lingeman v. Shirk, 15 Ind. App. 432; 43 N. E. 33.

²⁰ Alabama Mineral Land Co. v. Jackson, 121 Ala. 172; 77 Am. St. Rep. 46; 25 So. 709. (Citing Amburger v. Marvin, 4 E. D. Smith 393; Wardell v. Williams, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796; Yates v. Martin, 2 Pinney (Wis.)

171; Hayes v. Burkham, 51 Ind. 130; Smith v. Bowler, 2 Disney (Ohio) 153; Pulse v. Hamer, 8 Or. 252; Ledford v. Ferrell, 34 N. C. 285; disapproving Lingeman v. Shirk, 15 Ind. App. 432; 43 N. E. 33.)

²¹ Scanlon v. Oliver, 42 Minn. 538; 44 N. W. 1031.

²² Fox v. Courtney, 111 Mo. 147; 20 S. W. 20.

²³ Diamond Plate-Glass Co. v. Tennell, 22 Ind. App. 132; 52 N. E. 168.

²⁴ Reed v. Lowe, 8 Utah 39; 29 Pac. 740.

a memorandum which gives the courses and distances but does not give a starting point for the lines is insufficient.²⁵ A memorandum which gives a part of one boundary, as by describing the land bounded as adjoining a specified tract is insufficient.²⁶ Whether the place at which the contract is dated can be assumed to be the place where the land is located, to supplement what would otherwise be a deficiency in description, is a question on which courts differ, some holding that this assumption can be made²⁷ and others that it cannot.²⁸

It is not, however, necessary to give a technical description of the realty bargained for.²⁹ A description of realty by its popular name, together with a sufficiently definite location,³⁰ as in a given county,³¹ or on a certain island,³² or within a given distance and in a certain direction from a specified city,³³ or in a certain range, township and section,³⁴ have each been held sufficiently definite. A description giving section, range and township, and describing the tract as the "Merchant Farm,"³⁵ or describing the land as "the Burns farm,"³⁶ have each been held sufficient. Merely giving its name without the state or county in which it is located, as calling it the "Baldwin Place" without otherwise identifying its owner,³⁷ is insufficient.

²⁵ Edens v. Miller, 147 Ind. 208; 46 N. E. 526.

²⁶ Jones v. Tye, 93 Ky. 390; 20 S. W. 388; Vickers v. Henry, 110 N. C. 371; 15 S. E. 115.

²⁷ Ross v. Purse, 17 Colo. 24; 28 Pac. 473; Langert v. Ross, 1 Wash. 250; 24 Pac. 443.

²⁸ Ross v. Allen, 45 Kan. 231; 10 L. R. A. 835; 25 Pac. 570. (The land was described by certain street numbers on Delaware Street of "the city proper." It was dated at "Leavenworth," and did not otherwise show where the land was.)

²⁹ Sheldon v. Carter, 90 Ala. 380; 8 So. 63; Baker v. Hall, 158 Mass 361; 33 N. E. 612.

³⁰ Hayes v. O'Brien, 149 Ill. 403; 23 L. R. A. 555; 37 N. E. 73; Illol-

lis v. Burgess, 37 Kan. 487; 15 Pac. 536; Springer v. Kleinsorge, 83 Mo. 152; House v. Jackson, 24 Or. 89; 32 Pac. 1027.

³¹ Cunyus v. Lumber Co., 20 Tex. Civ. App. 290; 48 S. W. 1106.

³² House v. Jackson, 24 Or. 89; 32 Pac. 1027.

³³ Sailor v. Gilfillan, 73 Mo. App. 152.

³⁴ Hayes v. O'Brien, 149 Ill. 403; 23 L. R. A. 555; 37 N. E. 73. (The part of a specified farm east of a right of way.)

³⁵ Hayes v. O'Brien, 149 Ill. 403; 23 L. R. A. 555; 37 N. E. 73.

³⁶ Mull v. Smith, — Mich. —; 94 N. W. 183.

³⁷ Wood v. Zeigler, 99 Tenn. 515; 42 S. W. 447.

A description of realty as located at or near a given place and owned by a given person is sufficient if no other realty within the locality described is owned by such person.³⁸ Thus a description of land as vendor's "place in Stratford, Conn., containing 15 acres more or less,"³⁹ or of "one one and a half story frame dwelling house with barn and out buildings and all land now being used in connection therewith, being about seven acres more or less situated in Sagus Center, Essex County,"⁴⁰ each is sufficient. This rule has been carried so far in some jurisdictions that "twenty-four acres of land at T——" has been held to import land owned by the promisor and hence sufficiently described.⁴¹

If the vendor owns more than one tract in the locality specified, a description of land as in that locality and of a specified area may be sufficiently definite.⁴² Without additional aid from a description of area and the like, mere description by the owner and location is not sufficient where such owner owns more than one piece of property in such location.⁴³ However, if the vendor contracts to convey an undivided third of all his realty, no further description is necessary.⁴⁴ A description of land by reference to the title whereby it was acquired,⁴⁵ as land received by vendor from his father,⁴⁶ or land bought from a

³⁸ Described by the city in which it is located. *Hodges v. Kowing*, 58 Conn. 12; 7 L. R. A. 87; 18 Atl. 979; *St. Paul Land Co. v. Dayton*, 42 Minn. 73; 43 N. W. 782. Described by the city and the street therein on which the land is located. *White v. Breen*, 106 Ala. 159; 32 L. R. A. 127; 19 So. 59; *Scanlon v. Geddes*, 112 Mass. 15. Described as a store lot on the corner of two given streets in a given city. *White v. Mooers*, 86 Me. 62; 69 Atl. 936.

³⁹ *Hodges v. Kowing*, 58 Conn. 12; 7 L. R. A. 87; 18 Atl. 979.

⁴⁰ *Sanders v. Boyer*, 152 Mass. 141; 9 L. R. A. 255; 25 N. E. 86.

⁴¹ *Plant v. Bourne* (1897), 2 Ch. 281; so *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671.

⁴² *Gray v. Smith*, 76 Fed. 525.

⁴³ *Doherty v. Hill*, 144 Mass. 465; 11 N. E. 581.

⁴⁴ *Moayon v. Moayon*, — Ky. —; 60 L. R. A. 415; 72 S. W. 33.

⁴⁵ *Ewing v. Stanley* (Ky.), 69 S. W. 724; *Atwood v. Cobb*, 16 Pick (Mass.) 227; 26 Am. Dec. 657.

⁴⁶ *Ryder v. Loomis*, 161 Mass. 161; 36 N. E. 836; *Parks v. Bank*, 97 Mo. 130; 10 Am. St. Rep. 295; 11 S. W. 41; affirming 31 Mo. App. 12.

given person,⁴⁷ is sufficient. So a description of land by its present ownership, as land in which the two contracting parties have a joint equitable estate,⁴⁸ is sufficient. A description of land by the use to which it is put is sufficient. Thus a sale of vendor's "land where he now lives,"⁴⁹ or of his "home place and storehouse,"⁵⁰ complies with the statute. A contract for the sale of realty, describing its boundaries so that they may be located,⁵¹ or giving section numbers,⁵² or lot numbers,⁵³ not with technical accuracy, yet so that the land can be located from the description in view of the surrounding circumstances, is sufficient. A description giving the city, street and street number is sufficient.⁵⁴ Thus a description of realty as "house and land No. 10 Howard Street," even if it erroneously adds "belonging to A" when it in fact belongs to A and two others, is sufficient.⁵⁵ If the number is omitted, being left blank, the description has been held to be sufficient.⁵⁶ If the street and street number are given, but not the city, the description is insufficient.⁵⁷ A description of land which gives one boundary, the direction of an adjoining side and the area of the tract conveyed, is sufficient.⁵⁸ Abbreviations do not make a description insufficient if they are such that one familiar with the land described would be able to identify the land by means of such description.⁵⁹ If, however, it is necessary to employ oral evi-

⁴⁷ *Newman v. Iron Co.*, 80 Fed. 228; 25 C. C. A. 382.

⁴⁸ *Black v. Crowther*, 74 Mo. App. 480. For somewhat similar facts see *Easton v. Thatcher*, 7 Utah 99; 25 Pac. 728.

⁴⁹ *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. C. 485; 11 S. E. 568.

⁵⁰ *Henderson v. Perkins*, 94 Ky. 207; 21 S. W. 1035.

⁵¹ *Kyle v. Rhodes*, 71 Miss. 487; 15 So. 40; *Sherman v. Simpson*, 121 N. C. 129; 28 S. E. 186.

⁵² *Ryan v. United States*, 136 U. S. 68; *Mann v. Higgins*, 83 Cal. 66; 23 Pac. 206; *Wilson v. Emig*, 44 Kan. 125; 24 Pac. 80; *Combs v.*

Scott, 76 Wis. 662; 45 N. W. 532.

⁵³ *St. Paul Land Co. v. Dayton*, 42 Minn. 73; 43 N. W. 782.

⁵⁴ *Claphan v. Barber*, — N. J. Eq. —; 56 Atl. 370.

⁵⁵ *Tobin v. Larkin*, 183 Mass. 389; 67 N. E. 340.

⁵⁶ *Bulkley v. Devine*, 127 Ill. 406; 3 L. R. A. 330; 20 N. E. 16. (Possession having been taken under the lease.)

⁵⁷ *Ross v. Allen*, 45 Kan. 231; 10 L. R. A. 835; 25 Pac. 570.

⁵⁸ *Felty v. Calhoon*, 139 Pa. St. 378; 21 Atl. 19.

⁵⁹ *Melone v. Ruffino*, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93.

dence of the intention direct to show the realty contracted for, the description is insufficient. Thus a description of realty as "the southeast of twenty-five, nine, Kingman, Kansas," is insufficient.⁶⁰

§700. Other types of subject-matter.

While questions as to the sufficiency of the description of the subject-matter are raised most frequently in contracts for the sale of realty, they are not confined to that class. The same test applies to other kinds of subject-matter in contracts within the statute of frauds as applies to contracts for the sale of an interest in realty. Technical accuracy of description is not necessary; but as the entire contract must be proved by writing, the description must be such as to specify the subject-matter so that one familiar with such subject-matter can identify it, without further evidence of the intention of the parties direct. Thus in contracts to answer for the debt of another the debt may be described as incurred for the "house and barn completed for Mr. B,"¹ or as the bill that A "owes your concern,"² or by reference to the "amount of debt and damage contained in a writ," giving the names of plaintiff, defendant and officer making the service, together with the date of the service.³ So a contract to sell goods in a territory not sufficiently defined⁴ cannot be supplemented by oral evidence if not to be performed within a year from the date of the making thereof. If the memorandum refers to two or more kinds of chattels to be sold and does not show how much of each is bar-

⁶⁰ *Hartshorn v. Smart*, 67 Kan. 543; 73 Pac. 73.

¹ *Star Brewery v. Farnsworth*, 172 Ill. 247; 50 N. E. 228; affirming 70 Ill. App. 150.

² *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500. (The letter being addressed to the creditor.)

³ *Savage v. Robinson*, 93 Me. 262; 44 Atl. 926.

⁴ *Rahm v. Klerner*, 99 Va. 10; 37 S. E. 292. (It not appearing whether the contract was to sell goods in all the Southern States or only in seven out of the eleven.) In *Kaufman v. Mfg. Co.*, 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612, a contract to sell goods in a certain city "and the territory tributary thereto" was held sufficiently definite.

gained for, it is insufficient.⁵ On the other hand, if the vendor has the option of delivering which ever kind of chattel he pleases the memorandum is sufficient.⁶ A contract for the sale of "the same cattle picked out by said Woods on Jan. 27, 1893," sufficiently describes them.⁷ Abbreviations shown to have a definite meaning in the trade or business do not make the memorandum defective. Thus a memorandum: "Will deliver S. R. & Co. best refined iron 50 tons within 90 days at 5 ct. p. lb. 4 of cash. Plates to be 10 to 16 inches wide and 9 ft. to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. N. F. J. B. R." was held sufficient.⁸ So a telegram, "Bought 13 at 11 $\frac{5}{8}$," and a telegram in reply, "We confirm purchase Wagner 11 $\frac{5}{8}$ like sample," is sufficient; the extrinsic evidence showing that the contract was for the sale of hops made by the agent Wagner.⁹ If the contract provides for the delivery of a certain number of "bales" of cotton, and the evidence shows that this term is ambiguous and denotes more than one weight, and that the parties had a specified agreement as to what weight was meant, the memorandum is insufficient.¹⁰ If the consideration expressed is a promise to dig a well on certain specified lots, it is sufficiently definite without locating it more exactly or defining its character further.¹¹ Terms of a contract fixed by law, such as the time of begin to teach, where the opening of the term is fixed by the rules of the district,¹² need not be expressed in the memorandum.

§701. Consideration.

Fourth, whether the consideration must be set forth in the memorandum is a question on one branch of which there is a

⁵ Ellis v. R. R., 7 Colo. App. 350; 43 Pac. 457.

⁶ American, etc., Mfg. Co. v. Steel Co., 101 Fed. 200; Burgess-Sulphite Fibre Co. v. Broomfield, 180 Mass. 283; 62 N. E. 367.

⁷ Woods v. Hart, 50 Neb. 497; 70 N. W. 53.

⁸ Sanborn v. Flagler, 9 All. (Mass.) 474.

⁹ Brewer v. Horst and Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418.

¹⁰ Stewart v. Cook, 118 Ga. 541; 45 S. E. 398.

¹¹ Ross v. Purse, 17 Colo. 24; 28 Pac. 473.

¹² Burkhead v. School District, 107 Ia. 29; 77 N. W. 491.

hopeless conflict of authority. There are really two separate questions here involved which must be treated separately. The first question concerns the consideration alone and arises when the consideration for the promise is not an executory promise, but has been performed at or before the making of the promise for which it is a consideration. Whether in such cases the consideration must appear is the question upon which the conflict is hopeless, some courts holding that it must appear on the theory that the statute requires the substance of the entire contract of which the memorandum is offered in evidence, to appear therein, and that the consideration is an essential element of such contract,¹ and other courts holding that it need not appear on the theory that it is only the executory promise which must be proved by a writing.² In the cases here cited the statute under discussion required the "agreement" or some note or memorandum thereof to be in writing. Where the statute uses "agreement or promise" instead of "agreement" simply, the courts have held that the consideration need not appear,³ and in

¹ *Wain v. Warlters*, 5 East 10; *Saunders v. Wakefield*, 4 B. & Ad. 595; *James v. Williams*, 5 B. & Ad. 1109; *Bainbridge v. Wade*, 16 Q. B. 89; *Foster v. Napier*, 74 Ala. 393; *Hazeltine v. Larco*, 7 Cal. 32; *Epich v. Clifford*, 6 Colo. 493; *Weldin v. Porter*, 4 Houst. (Del.) 236; *Fry v. Platt*, 32 Kan. 62; 3 Pac. 781; *Culbertson v. Smith*, 52 Md. 628; 36 Am. Rep. 384; *Messmore v. Cunningham*, 78 Mich. 623; 44 N. W. 145; *Parry v. Spikes*, 49 Wis. 384; 35 Am. Rep. 782; 5 N. W. 794. The doctrine of *Wain v. Warlters*, 5 East 10, was doubted in *Phillips v. Bateman*, 16 East 356, and denied in *ex parte Gardom*, 15 Ves. 286, but was finally established in the other English cases cited.

² *Ringgold v. Newkirk*, 3 Ark. 96; *Toomy v. Dunphy*, 86 Cal. 639; 25 Pac. 130; *Sage v. Wilcox*, 6 Conn. 81; *Davis v. Tift*, 70 Ga. 52; *Ames*

v. Moir, 130 Ill. 582; 22 N. E. 535; affirming, 27 Ill. App. 88; *Memory v. Niepert*, 33 Ill. App. 131; *Strubbe v. Lewis* (Ky.), 76 S. W. 150; *Ewing v. Stanley* (Ky.), 69 S. W. 724; *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; *Packard v. Richardson*, 17 Mass. 122; 9 Am. Dec. 123; *Little v. Nabb*, 10 Mo. 3; *Rucker v. Harrington*, 52 Mo. App. 481; *McWilliams v. Lawless*, 15 Neb. 131; 17 N. W. 349; *Brown v. Fowler*, 70 N. H. 634; 47 Atl. 412; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; *Thornburg v. Masten*, 88 N. C. 293; *Reed v. Evans*, 17 Ohio 128; *Gregory v. Gleed*, 33 Vt. 405.

³ *Ratcliff v. Trout*, 6 J. J. Mar. (Ky.) 605; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Fulton v. Robinson*, 55 Tex. 401; *Colgin v. Henley*, 6 Leigh (Va.) 85.

some cases have based their decisions on this difference in wording between their statute and the English statute. It is dangerous, however, to base distinctions in construction upon the assumption that the words "agreement," "promise" and "contract" are used with technical accuracy and with distinct meanings in so loosely drawn a statute. In many states this question is settled by statute; but unfortunately some statutes provide that in some or all of the contracts included in the statute of frauds the consideration must appear,⁴ while other statutes provide that it need not appear,⁵ and so the conflict remains more hopeless than ever.

§702. Price and Terms.

The second question concerns the consideration when it consists of executory promises. In such cases the consideration is not only important because it makes the executory promise of the adversary party enforceable, but it is itself one of the promises which with that of the adversary party complete the contract. Omitting to state a consideration which is an executory promise is therefore omitting one of the terms of the contract. Accordingly the weight of authority, even in states where an executed consideration need not be expressed in the memorandum, requires the memorandum to disclose the consideration when it consists of executory promises.¹ The distinction be-

⁴ *Speer v. Crowder* (Ala.), 32 So. 678; *Lindsay v. McRae*, 116 Ala. 542; 22 So. 868; *White v. White*, 107 Ala. 417; 18 So. 3; *Baltimore Breweries Co. v. Callahan*, 82 Md. 106; 33 Atl. 460; *Siemens v. Siemens*, 65 Minn. 104; 60 Am. St. Rep. 430; 67 N. W. 802; *Cooley v. Lobdell*, 153 N. Y. 596; 47 N. E. 783; *Kuener v. Smith*, 108 Wis. 549; 84 N. W. 850; *Van Doren v. Roepke*, 107 Wis. 535; 83 N. W. 754; *Twohy Mercantile Co. v. Drug Co.*, 94 Wis. 319; 68 N. W. 963.

⁵ *Williams v. Robinson*, 73 Me.

186; 40 Am. Rep. 352; *White v. Mfg. Co.*, 179 Mass. 427; 60 N. E. 791; *Hayes v. Jackson*, 159 Mass. 451; 34 N. E. 683; *McWilliams v. Lawless*, 15 Neb. 131; 17 N. W. 349.

¹ *Taylor v. Smith* (1893), 2 Q. B. 65; *Arnold v. Garth*, 106 Fed. 13; *Reid v. Plate-Glass Co.*, 85 Fed. 193; 29 C. C. A. 110; *Peoria Grape Sugar Co. v. Babcock Co.*, 67 Fed. 892; *Phillips v. Adams*, 70 Ala. 373; *Turner v. Lorillard Co.*, 100 Ga. 645; 62 Am. St. Rep. 345; 28 S. E. 383 (citing, *Wain v. Warlters*, 5

tween the necessity of stating the consideration and the necessity of stating the price is recognized in those jurisdictions in which the price must be stated if an executory promise, but if executed, it need not be stated.²

Thus a memorandum of a sale of realty in the form of a receipt, which shows the price for one-third of which the receipt is given, and which provides that a title bond will be given on the execution of notes for the balance, is defective if it does not show how many notes are to be given, when they are due and what rate of interest they are to bear.³

The price may be sufficiently described by reference to other instruments, however. Thus a memorandum of a contract for the sale of realty at a given price with a clause providing for the payment of a certain part of the purchase price "by the assignment of a certain mortgage now held by X for that amount" describes the mortgage with sufficient certainty.⁴ A memorandum which shows that certain terms of credit and of the payment of the purchase price have been agreed upon, but which does not show what such terms are, is defective.⁵ A memoran-

East 10; *Elmore v. Kingscote*, 5 Barn. & C. 583; *Acebal v. Levy*, 10 Bing. 376; *Ex-parte Gardom*, 15 Ves. Jr. 286; *Goodman v. Griffiths*, 1 Hurl. & N. 574; *Ashcroft v. Butterworth*, 136 Mass. 511; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *James v. Muir*, 33 Mich. 223; *Hanson v. Marsh*, 40 Minn. 1; 40 N. W. 841; *Stone v. Browning*, 68 N. Y. 598; *Ide v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698; *Norris v. Blair*, 39 Ind. 90; *Fry v. Platt*, 32 Kan. 62; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *Rector Provision Co. v. Sauer*, 69 Miss. 235; 13 So. 623; *Newberry v. Wall*, 65 N. Y. 484. This rule obtains even where on revision the clause in the statute requiring the consideration to appear is intentionally omitted. *Drake v. Seaman*, 97 N. Y. 230. In *Kelly v. Thuey*, 143

Mo. 422; 45 S. W. 300; reversing in banc, 37 S. W. 516, the court pointed out that the "heresy" that oral evidence was admissible to show the price, which had once been entertained by the Missouri court in *O'Neil v. Crain*, 67 Mo. 250, and *Ellis v. Bray*, 79 Mo. 227, had been corrected in *Ringer v. Holtzslaw*, 112 Mo. 519; 20 S. W. 800, and *Boyd v. Paul*, 125 Mo. 9; 28 S. W. 171.

² *Sayward v. Gardner*, 5 Wash. 247; 31 Pac. 761; 33 Pac. 289.

³ *Nelson v. Improvement Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So. 695.

⁴ *Loveridge v. Shurtz*, 111 Mich. 618; 70 N. W. 132.

⁵ *Snow v. Nelson*, 113 Fed. 353; *Nelson v. Improvement Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So.

dum so indefinite that it might show a contract to sell realty or a contract of agency is insufficient.⁶

§703. What is statement of consideration.

In jurisdictions where the consideration must appear the question of what amounts to a statement of the consideration has often been presented for decision. If the consideration is expressly stated, this rule is, of course, complied with, even if the consideration as expressed is a nominal one, such as one dollar.¹ If a sealed contract is enforceable without a consideration, the presence of a seal upon a written contract dispenses with any statement of the consideration since there need be none, and if the contract is enforceable without a consideration, the memorandum need show only the actual terms of the contract.² If the note or memorandum of the agreement shows on its face that the promise was made "for value received" no further statement of the consideration is necessary.³ Thus if a contract to answer for the debt of another purports to be for "value received," the consideration is sufficiently expressed.⁴ The same rule applies to contracts for the sale of realty.⁵ It is not necessary, however, either that the consideration be stated expressly or that the contract should be sealed. An unsealed contract or memorandum may be sufficient if the consideration reasonably

695; *Lester v. Heidt*, 86 Ga. 226; 10 L. R. A. 108; 12 S. E. 214; *Brun-
dige v. Blair*, 43 Kan. 364; 23 Pac.
482; *Parker's Heirs v. Bodley*, 4
Bibb. (Ky.) 102; *Schenck v. Im-
provement Co.*, 47 N. J. Eq. 44; 19
Atl. 881; *Edichal Bullion Co. v.
Gold Mining Co.*, 87 Va. 641; 13 S.
E. 100; *Buck v. Pickwell*, 27 Vt.
157.

⁶ *Catterlin v. Bush*, 39 Or. 496;
65 Pac. 1064.

¹ *Bolling v. Munchus*, 65 Ala. 558.

² *United States v. Linn*, 15 Pet.
(U. S.) 290; *Edelen v. Gough*, 5 Gill.
(Md.) 103; *Johnston v. Wadsworth*,
24 Or. 494; 34 Pac. 13; *Kuener v.*

Smith, 108 Wis. 549; 84 N. W. 850.
This rule is sometimes distorted into
the form that the seal imports a con-
sideration.

See §§ 561-563.

³ *Flowers v. Steiner*, 108 Ala. 440;
19 So. 321; *McMahan v. Jacoway*,
105 Ala. 585; 17 So. 39; *Whitney v.
Stearns*, 16 Me. 394; *Dahlman v.
Hammel*, 45 Wis. 466; *Day v. El-
more*, 4 Wis. 190.

⁴ *Martin v. Powder Co.*, 2 Colo.
596; *Osborne v. Baker*, 34 Minn.
307; 57 Am. Rep. 55; 25 N. W. 606;
Miller v. Cook, 23 N. Y. 495; *Dahl-
man v. Hammel*, 45 Wis. 466.

⁵ *Cheney v. Cook*, 7 Wis. 413.

and fairly appears from the entire instrument, without being expressly stated.⁶ As might be expected from so abstract a proposition, the courts which agree upon this rule do not agree upon its application. The following are examples of memoranda of a contract to answer for the debt of another, in which it was held that the consideration could be inferred reasonably from the writing itself: A letter written by A promising to pay B the amount due on certain lumber sold by B to C if B would deliver such lumber to C to enable C to perform his contracts;⁷ a letter by A promising that if B will release certain securities of A's employee C, A will guarantee performance by C of his promise to pay a certain sum annually on his debt to B, with a letter from C referring to A's letter and promising to pay such sum annually;⁸ a writing as follows: "I guarantee the payment of the contents of the within note to X, the one-half within six months and the other half within twelve months;"⁹ a promise to be responsible "for all such goods as B shall buy of X within one year from date" contemporaneously indorsed on a written contract of sale between X and B;¹⁰ a written instrument addressed by A to B agreeing to extend A's guaranty of C's credit for a certain time to cover sales by B to C for such time;¹¹ an instrument referring to future sales to be made by B to C in which A agrees to guarantee C's "account;"¹² a written promise

⁶ *Otis v. Hazeltine*, 27 Cal. 81; *Weldin v. Porter*, 4 Houst. (Del.) 236; *Baltimore Breweries Co. v. Callahan*, 82 Md. 106; 33 Atl. 460; *Ordeman v. Lawson*, 49 Md. 135; *Straight v. Wight*, 60 Minn. 515; 63 N. W. 105; *Church v. Brown*, 21 N. Y. 315; *Reid v. Packing Association*, 43 Or. 429; 73 Pac. 337; *Van Doren v. Roepke*, 107 Wis. 535; 83 N. W. 754. So in contracts to answer for the debt of another. *Straight v. Wight*, 60 Minn. 515; 63 N. W. 105; *Highland v. Dresser*, 35 Minn. 345; 29 N. W. 55; *Church v. Brown*, 21 N. Y. 315; *Waldheim*

v. Miller, 97 Wis. 300; 72 N. W. 869.

⁷ *Choate v. Hoogstraal* (Wis.), 105 Fed. 713.

⁸ *Barney v. Forbes*, 118 N. Y. 580; 23 N. E. 890; distinguishing *Evansville National Bank v. Kauffman*, 93 N. Y. 273; 45 Am. Rep. 204; as a case in which no consideration appeared.

⁹ *Neelson v. Sanborne*, 2 N. H. 413; 9 Am. Dec. 108.

¹⁰ *Church v. Brown*, 21 N. Y. 315.

¹¹ *Coxe Bros. v. Milbrath*, 110 Wis. 499; 86 N. W. 174.

¹² *Waldheim v. Miller*, 97 Wis. 300; 72 N. W. 869.

as follows: "I will be responsible for the purchase of goods from X for B or by his order until I give them notice to the contrary";¹³ a letter introducing a new customer to a wholesale dealer, which states "I hereby guarantee the collection of any amount which you credit him with not exceeding two thousand dollars."¹⁴ A contract of guaranty made contemporaneously with the original contract and referring to it, need not express a separate consideration, since the consideration of the original contract supports the contract of guaranty.¹⁵ So as an example of this rule applying to contracts not to be performed within the year: A contract signed by both parties whereby A recites that he has employed B for a certain time at a certain salary, though there is no express promise by B to serve for such time,¹⁶ so in contracts of sale, a memorandum that A agrees to sell the merchandise in certain store buildings situated on certain lots to B in consideration of B's purchase of such lots is sufficient.¹⁷ On the other hand, the following are examples of memoranda of a contract to answer for the debt of another, insufficient because the consideration is not expressed with sufficient clearness; an agreement by A, the holder of a chattel mortgage given by C to pay C's debt to B if B would forbear suit,¹⁸ and an agreement by A to pay so much of C's note to B as is unpaid on a certain day, though the agreement is dated the same day as the note and recites that the note is given in satisfaction of a mortgage executed by C to B.¹⁹ A contract of guaranty executed after the principal obligation is incurred must express the consideration if this rule is in force.²⁰ Thus a mere indorsement of a note has been held an insufficient contract of guaranty.²¹

¹³ *Williams v. Ketchum*, 19 Wis. 231.

¹⁴ *Eastman v. Bennett*, 6 Wis. 232; approved in *Young v. Brown*, 53 Wis. 333; 10 N. W. 391.

¹⁵ *Davis v. Tift*, 70 Ga. 52; *Nichols, etc., Co. v. Dedrick*, 61 Minn. 513; 63 N. W. 1110; *Erie, etc., Bank v. Coit*, 104 N. Y. 532; 11 N. E. 54.

¹⁶ *Baltimore Breweries Co. v. Cal-*

lahan, 82 Md. 106; 33 Atl. 460.

¹⁷ *Van Doren v. Roepke*, 107 Wis. 535; 83 N. W. 754.

¹⁸ *Twohy Mercantile Co. v. Drug Co.*, 94 Wis. 319; 68 N. W. 963.

¹⁹ *Lindsay v. McRae*, 116 Ala. 542; 22 So. 868.

²⁰ *Brewster v. Silence*, 8 N. Y. 207; *Hall v. Farmer*, 2 N. Y. 553.

²¹ *Schafer v. Bank*, 59 Pa. St. 144; 98 Am. Dec. 323; *Parry v. Spikes*, 49

Among contracts in consideration of marriage a promise by A to pay B "on the wedding day when she shall become my wife the sum of one thousand dollars" has been held insufficient.²² Among contracts for the conveyance of realty a promise by A to B, his wife, who has left him, that if she will come back he will do as he has agreed and will give her a deed of sixty acres, has been held insufficient.²³

§704. **Memorandum showing all terms sufficient.**

If the memorandum shows all the terms of the transaction, it is clearly sufficient if the contract is one which is definite enough to be enforced if it were not for the statute of frauds, since this statute is not intended either to add to or to take from the pre-existing elements of a valid contract.¹ Thus, if the price is agreed upon with sufficient certainty by reference to some mode of ascertaining it in the future, the memorandum need not show anything further.² Hence if the parties agree that the lessor may sell the premises on giving sixty days' notice to lessee, and on giving the lessee the privilege of buying the premises if he will pay as much as any other person, a memorandum to that effect shows the price with sufficient certainty.³ So a memorandum showing a contract to pay what the vendor paid for the property,⁴ or what he spent on it,⁵ or to settle the price by arbitration,⁶ is sufficient. So if the parties do not agree upon any price, so that the vender is entitled to recover a reasonable price, the memorandum need show nothing more than the terms of

Wis. 384; 35 Am. Rep. 782; 5 N. W. 794; Taylor v. Pratt, 3 Wis. 674.

²² Siemers v. Siemers, 65 Minn. 104; 60 Am. St. Rep. 430; 67 N. W. 802.

²³ Cooley v. Lobdell, 153 N. Y. 596; 47 N. E. 783.

¹ *In re Robinson's Estate*, 142 Cal. 152; 75 Pac. 777.

² Marske v. Willard, 169 Ill. 276; 48 N. E. 290; affirming, 68 Ill. App. 83; Norton v. Gale, 95 Ill. 533; 35

Am. Rep. 173; Brown v. Bellows, 4 Pick. (Mass.) 179.

³ Marske v. Willard, 169 Ill. 276; 48 N. E. 290; affirming, 68 Ill. App. 83.

⁴ Atwood v. Cobb, 16 Pick. (Mass.) 227.

⁵ Vindquest v. Perky, 16 Neb. 284; 20 N. W. 301.

⁶ Camp v. Moreman, 84 Ky. 635; 2 S. W. 179.

their agreement.⁷ So if the contract is sufficiently definite, a memorandum is sufficient if it shows the terms of such contract but is silent as to terms not agreed upon by the parties.⁸ Thus a memorandum omitting terms of performance, such as place and time of payment, which have not been agreed upon by the parties, is sufficient if the contract is valid.⁹ So, while the terms of the contract must appear in the memorandum, if certain terms are left to the discretion of one party and so appear on the memorandum, the memorandum is sufficient if the oral contract is so definite that it would be enforced but for the statute. Thus a memorandum showing that the remainder of the purchase price of certain realty sold is to run to suit the purchaser's convenience,¹⁰ or one showing that a contract of employment for a year is to begin at some time in the future to be fixed by one party within a limit of two weeks agreed upon by both,¹¹ or that a lease is to run for five years from the completion of the building,¹² or one showing that certain kinds of personalty are to be sold and delivered as long as the purchaser continues to take them,¹³ have each been held sufficient. So a contract for the sale of realty not specifying the kind of deed that shall be executed,¹⁴ or a contract for a lease providing that it should be "in the usual form in use" in the city where the leased realty was

⁷ Valpy v. Gibson, 4 C. B. 837; Ashcroft v. Morrin, 4 Man. & Gr. 450.

⁸ Kaufman v. Mfg. Co., 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612; Miller v. Ry., 58 Kan. 189; 48 Pac. 853; Smith v. Shell, 82 Mo. 215; 52 Am. Rep. 365; Langart v. Ross, 1 Wash. 250; 24 Pac. 443.

⁹ Wilson v. Samuels, 100 Cal. 514; 35 Pac. 148; Miller v. R. R., 58 Kan. 189; 48 Pac. 853; Smith v. Shell, 82 Mo. 215; 52 Am. Rep. 365; Sayre v. Mohny, 35 Or. 141; 56 Pac. 526; Langart v. Ross, 1 Wash. 250; 24 Pac. 443.

¹⁰ Langart v. Ross, 1 Wash. 250; 24 Pac. 443. (Such remainder of

the purchase price being the amount of a mortgage on the premises which the purchaser was to pay when due.)

¹¹ Troy Fertilizing Co. v. Logan, 96 Ala. 619; 12 So. 712.

¹² Hammond v. Barton, 93 Wis. 183; 67 N. W. 412. So Colclough v. Carpeles, 89 Wis. 239; 61 N. W. 836.

¹³ Kaufman v. Mfg. Co., 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612. (In this case the contract gave the purchaser the exclusive right to sell a given brand of cigar in certain territory as long as he continued to order it.)

¹⁴ Miller v. R. R., 58 Kan. 189; 48 Pac. 853.

located,¹⁵ are each sufficient. A memorandum of a sale of realty which fixes the place of payment at a certain city has been held sufficiently definite, and oral evidence has been received to show at what place in such city payment should be made.¹⁶ So the omission of terms which may be supplied from the rest of the memorandum does not make it invalid.¹⁷ Thus leaving blank the amount specified does not avoid such memorandum if it furnishes the means of ascertaining such amount, as the amount remaining due from the property-owner to the contractor.¹⁸

IX. METHODS OF SATISFYING THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS.

§705. Methods of satisfying the seventeenth section.

An important point of difference between the fourth section and the seventeenth section of the statute of frauds is this. The fourth section provides without alternative provision, that the contract or some note or memorandum thereof must be in writing. The seventeenth section provides four courses: (1) a written contract or memorandum; (2) acceptance and actual receipt of the property sold; (3) payment of part or all of the purchase price; (4) payment of earnest. Any one of these four courses complies literally with the statute and makes the contract enforceable. Payment of the purchase price, payment of earnest, and acceptance and receipt, are none of them merely acts of part performance which justify equity in enforcing the contract in the absence of a written memorandum and in disregard of the statute.¹ They or any of them constitute compliance with the statute as truly as the written memorandum. Full performance by one² or both³ of the parties, is a compliance

¹⁵ Scholtz v. Ins. Co., 100 Fed. 573; 40 C. C. A. 556.

¹⁶ Sayre v. Mohny, 35 Or. 141; 56 Pac. 526.

¹⁷ Wilson v. Samuels, 100 Cal. 514; 35 Pac. 148; McLeod v. Adams, 102 Ga. 533; 27 S. E. 680.

¹⁸ Wilson v. Samuels, 100 Cal. 514; 35 Pac. 148.

¹ See § 717 *et seq.*

² Fermont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370; 91 N. W. 376.

³ Lathrop v. Humble, — Wis. —; 97 N. W. 905.

with the statute. Hence it is error to charge that there can be no sale of personalty without a memorandum in writing and refusal so to charge is not error.⁴ If on the other hand a written memorandum has been made as provided for by statute, no acts of performance are necessary.⁵

Furthermore, the seventeenth section specifically provides the methods of complying with its requirements. Accordingly other acts intended as performance of the contract are insufficient as compliance with the statute. Preparations by the vendee for receiving the goods,⁶ or for having them transported by vendor, as furnishing flour sacks in which vendor is to ship the flour sold,⁷ or trimming the sides of a hay rick, sold with others for delivery by vendor at another place,⁸ do not prevent the statute from applying. Still less does conduct by the vendor, such as buying goods with which to perform the contract of sale⁹ prevent the statute from applying. This rule is modified in England by the present statute which provides that acceptance exists within the meaning of the contract where the buyer does any act which recognizes a pre-existing contract of sale whether he accepts the goods in performance of the contract or not. Thus the statute does not apply where the vendee examines the goods, takes a sample and rejects them on the ground that they are not equal to a sample previously given to him with which the goods were to correspond.¹⁰

The statute requires acts of the prescribed classes which clearly show the intention of the parties to make the contract which they seek to enforce. Mere words, no matter how clear, cannot satisfy the statute.¹¹ The nature of the written memo-

⁴ Williams v. Andrew, 185 Ill. 98; 56 N. E. 1041; affirming, 84 Ill. App. 289.

⁵ Warner v. Warner, 30 Ind. App. 578; 66 N. E. 760; Wade v. Curtis, 96 Me. 309; 52 Atl. 762.

⁶ Harris v. Rounsevel, 61 N. H. 250.

⁷ Galbraith v. Holmes, 15 Ind. App. 34; 43 N. E. 575.

⁸ Corbett v. Wolford, 84 Md. 426; 35 Atl. 1088.

⁹ Bernhardt v. Walls, 29 Mo. App. 206.

¹⁰ Abbott v. Wolsey (1895), 2 Q. B. 97.

¹¹ It is said to be definitely settled that "words are not enough, and that the statute can be satisfied only by something done subsequent

randum has been discussed elsewhere.¹² The remaining acts specified by this section of the statute will be considered in detail.

§706. Part payment.

By the terms of the statute payment of part of the purchase money is sufficient.¹ Payment implies that the vendor takes the thing given in payment with that understanding. Thus a tender of the purchase money,² or of earnest,³ if unaccepted is not a compliance with the statute. Payment of part of the purchase price to the agent who is authorized to make the sale is sufficient.⁴ So if several contracts of sale have been made a general payment on account is sufficient to comply with the statute.⁵ Payment need not be in money. Anything of value accepted and received in payment amounts to payment within the meaning of this section. Payment, within the statute, may be by check,⁶ or note,⁷ as well as by cash. The transfer of a logging contract is payment of the purchase money within the statute.⁸ An oral promise, however, while it is a valuable consideration for a promise in return, is not payment within the meaning of the statute.⁹ Whether an agreement to purchase certain goods and to credit the price thereof upon a debt owed by the vendor to the vendee necessarily involves a part payment for such goods is a question on which there is some divergence of authority. The weight of authority holds that a mere oral agreement to credit the purchase price on the antecedent debt, without anything

to the sale unequivocally indicating the mutual intentions of the parties." *Alderton v. Buchoz*, 3 Mich. 322, 329; cited in *Gorman v. Brosard*, 120 Mich. 611, 618; 79 N. W. 903.

¹² See §§ 696-704.

¹ *Cooper v. Gas Co.*, 127 Fed. 482; *C. R. Shaw Lumber Co. v. Manville*, 4 Ida. 369; 39 Pac. 559.

² *Edgerton v. Hodge*, 41 Vt. 676.

³ *Hershey Lumber Co. v. Lumber Co.*, 66 Minn. 449; 69 N. W. 215.

⁴ *Jones v. Wattles*, — Neb. —; 92 N. W. 765.

⁵ *Berwin v. Bolles*, 183 Mass. 340; 67 N. E. 323.

⁶ *McLure v. Sherman*, 70 Fed. 190.

⁷ *Baldwin v. Threlkeld*, 8 Ind. App. 312; 34 N. E. 851; rehearing denied, 35 N. E. 841. *Contra*, *Krohn v. Bantz*, 68 Ind. 277.

⁸ *Burton v. Gage*, 85 Minn. 355; 88 N. W. 997.

⁹ *Edgerton v. Hodge*, 41 Vt. 676.

further is not part payment within the meaning of the statute.¹⁰ It has been said that a written receipt must be given or an actual credit on the old debt made.¹¹ Credit given on the notes of the vendor which were held by the vendee is part payment within the meaning of the statute.¹² In some cases, even a written receipt has been treated as a memorandum subject to the rules which control its form and essential elements, and not as part payment.¹³ Hence if the receipt does not show all the property bargained for, oral evidence is inadmissible to show that additional property was included in the contract.¹⁴ Other courts hold that, assuming such a contract to be within the statute, the satisfaction of the antecedent debt is such part payment as to comply with this section of the statute of frauds.¹⁵

§707. Earnest.

Earnest was originally a sum of money paid by the vendee to bind the vendor to his offer; "a distinct payment for the seller's forbearance to sell or deliver a thing to any one else."¹ As it bound the vendor and not the vendee it corresponded to offers at Modern Law, made under contract, supported by valuable con-

¹⁰ Norton v. Davison (1899), 1 Q. B. 401; Gorman v. Brossard, 120 Mich. 611; 79 N. W. 903; Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536; Brabin v. Hyde, 32 N. Y. 519. "Where no written evidence of the contract is made and payment is relied on as the compliance with the statute, mere words are not sufficient. Some act in part performance or part execution of the contract such as the surrender or cancellation of the evidence of the debt, or a receipt or discharge of the indebtedness is necessary to make the contract valid." Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536, 540; quoted in Milos v. Covacevich, 40 Or. 239, 242; 66 Pac. 914.

¹¹ Galbraith v. Holmes, 15 Ind.

App. 34; 43 N. E. 575; Brabin v. Hyde, 32 N. Y. 519.

¹² Dieckman v. Young, 87 Mo. App. 530.

¹³ Milos v. Covacevich, 40 Or. 239; 66 Pac. 914.

¹⁴ Milos v. Covacevich, 40 Or. 239; 66 Pac. 914. (This case, however, was decided under a statute providing that payment must be made at the time of the sale, and the receipt was given two days afterwards.)

¹⁵ Johnson v. Buchanan, 29 N. S. 27. To this effect see the dictum in Walker v. Nussey, 16 Mees. & W. 302. See also Plow Co. v. Hanthorn, 71 Wis. 529; 37 N. W. 825.

¹ Pollock and Maitland's History of English Law (2nd Edition), Vol. II., p. 206 (original paging).

sideration, not to revoke, which are often called options. As the theory gradually prevailed and finally took statutory form,² that earnest bound both vendor and vendee, earnest came to be considered a thing of value, transferred from vendee to vendor to bind the bargain, not a part of the purchase price nor to be deducted from it. In its present obsolescent form, earnest is often confused with purchase money and is treated as a payment in advance of part of the purchase price.³ Earnest must be paid to the vendor. A deposit by vendee with a third person as forfeit in case of non-performance is not part payment or earnest within the statute,⁴ nor is it a payment of earnest where the vendee touched the vendor's hand with money, vendee retaining possession of it.⁵

§708. Acceptance and receipt.—Necessity of both.

By the terms of this section of the statute, acceptance and actual receipt of part or all of the personalty sold is sufficient to make the contract enforceable, without a written memorandum or a payment of part of the purchase price or earnest.¹ Accordingly the statute does not apply where there has been either full performance,² or receipt and acceptance of part of the person-

² Pollock and Maitland's History of English Law (2nd Edition), Vol. II., p. 209.

³ *Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306.

⁴ *Noakes v. Morey*, 30 Ind. 103; *Jennings v. Dunham*, 60 Mo. App. 635.

⁵ *Blenkinsop v. Clayton*, 7 Taunt. 597.

¹ *Dinkler v. Baer*, 92 Ga. 432; 17 S. E. 953; *Coffin v. Bradbury*, 3 Ida. 770; 95 Am. St. Rep. 37; 35 Pac. 715; *Leggett, etc., Co. v. Collier*, 89 Ia. 144; 56 N. W. 417; *Leonard v. Medford*, 85 Md. 666; 37 L. R. A. 449; 37 Atl. 365; *French v. Bank*, 179 Mass. 404; 60 N. E. 793; *New England, etc., Co. v. Worsted*

Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; *Sullivan v. Sullivan*, 70 Mich. 583; 38 N. W. 472; *Beyerstedt v. Mill Co.*, 49 Minn. 1; 51 N. W. 619; *Long v. Martin*, 71 Mo. App. 569; *Wyler v. Rothschild*, 53 Neb. 566; 74 N. W. 41; *Riley v. Bancroft*, 51 Neb. 864; 71 N. W. 745; *Roman v. Bressler*, 32 Neb. 240; 49 N. W. 368; *Duzan v. Meserve*, 24 Or. 523; 34 Pac. 548; *Tingey v. Land Co.*, 9 Wash. 34; 36 Pac. 1098; *Kimble v. Ford*, 7 Wash. 603; 35 Pac. 395; *Gerndt v. Conrad*, 117 Wis. 15; 93 N. W. 804; *Alexander v. Oneida Co.*, 76 Wis. 56; 45 N. W. 21.

² *Hinkle v. Fisher*, 104 Ind. 84; 3 N. E. 624; *Edwards v. Brown*, 98

alty sold.³ In dealing with decisions as distinguished from *dicta*, it is difficult to deduce an accurate definition of receipt apart from acceptance, or acceptance apart from receipt, since if either is lacking the presence of the other is not enough to uphold the contract. Acceptance and actual receipt must co-exist. The statute uses the word "and," not "or," and one without the other is insufficient.⁴ Accordingly mere delivery of

Me. 165; 56 Atl. 654; Gray v. Peterson, 64 Neb. 671; 90 N. W. 559; Brown v. Loan & Trust Co., 117 N. Y. 266; 22 N. E. 952; Walker v. Bamberger, 17 Utah 239; 54 Pac. 108.

³ Scott v. Ry., 12 M. & W. 33; Coffin v. Bradbury, 3 Ida. 770; 95 Am. St. Rep. 37; 35 Pac. 715; Weeks v. Crie, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107; New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Mississippi Cotton Oil Co. v. Smith, — Miss. —; 33 So. 443; Badger Telephone Co. v. Telephone Co., — Wis. —; 97 N. W. 907.

⁴ Devine v. Warner, 75 Conn. 375; 96 Am. St. Rep. 211; 53 Atl. 782; Corbett v. Wolford, 84 Md. 426; 35 Atl. 1088; Knight v. Mann, 118 Mass. 143; Powder River Livestock Co. v. Lamb, 38 Neb. 339; 56 N. W. 1019; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Curtis v. Lumber Co., 114 N. C. 530; 19 S. E. 374; Dinnie v. Johnson, 8 N. D. 153; 77 N. W. 612; Galvin v. MacKenzie, 21 Or. 184; 27 Pac. 1039. "The question as to what is an acceptance and actual receipt of goods within the purview of the statute is one on which the decisions are at variance. These propositions may be considered as settled by the great weight of authority in England, as well as in the courts of this country, and the doctrines embraced in

them accord with the reasons which gave rise to this important statute. First, the statute is not complied with unless two things concur — the buyer must accept and actually receive part of the goods and the contract will not be good unless he does both. Second, there may be an actual receipt without acceptance and an acceptance without a receipt — an acceptance to be inferred from the assent of the buyer, meant by him to be final, that the goods are to be taken by him as his property under the contract. Third, it is immaterial whether the buyer's refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous or assigning no reasons at all, it is clear that he does not accept the goods. The question is not whether he ought to accept, but whether he has accepted them. Fourth, the question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts. . . . Another proposition that is vouched for upon principle and by the weight of authority is that possession of itself is not evidence of an acceptance, and that a compliance with the statute would require an acceptance by the vendee as owner." *Mechanical Boiler Cleaner Co. v. Kellner*, 62 N. J. L. 544, 558; 43 Atl. 599. For similar views see *Devine v. Warner*, 76

the goods sold, transferring possession, but not under such circumstances as to show that the vendee has accepted them as full or part performance of the contract of sale is not compliance with the statute.⁵ Thus if A sells hay standing in ricks to B, to be transported by A to a station to be selected by B, at which point B was to take charge of the hay and pay for it, acts of B's servants under his direction in taking some of the hay from one of the ricks and trimming down one of the sides, do not constitute receipt and acceptance as a matter of law, so that the vendor can recover where the hay was burned a few minutes after this work on it had begun.⁶ Receipt and acceptance need not occur at the same time. Receipt may precede acceptance,⁷ or acceptance may precede receipt.⁸ The definition of the one is not infrequently so framed as to imply the presence of the other. "Acceptance is the receipt of the thing with an intention to retain it, indicated by some act or words sufficient for that purpose."⁹ It is therefore safer to state in what cases they co-exist than to attempt to state in what cases they exist separately. As far as their meanings can be treated separately, these terms are discussed in the following sections. Whether receipt and acceptance exist is a question of fact.¹⁰

§709. Receipt.

Receipt within the meaning of the statute is the acquisition by the vendee, and the corresponding surrender by the vendor, of the right of possession of the property sold.¹ The act of the

Conn. 229; 56 Atl. 562. In Utah the original statute of frauds provided for acceptance *or* receipt; but this was held to be impliedly repealed by a later statute of evidence requiring acceptance *and* receipt. Hudson Furniture Co. v. Carpet Co., 10 Utah 31; 36 Pac. 132.

⁵ Gilman v. Hill, 36 N. H. 311; Caulkins v. Hellman, 47 N. Y. 449; 7 Am. Rep. 461; Dinnie v. Johnson, 8 N. D. 153; 77 N. W. 612.

⁶ Corbett v. Wolford, 84 Md. 426; 35 Atl. 1088.

⁷ Schmidt v. Thomas, 75 Wis. 529; 44 N. W. 771.

⁸ Cusack v. Robinson, 1 B. & S. 299.

⁹ Schmidt v. Thomas, 75 Wis. 529; 44 N. W. 771.

¹⁰ Garfield v. Paris, 96 U. S. 557; Corbett v. Wolford, 84 Md. 426; 35 Atl. 1088.

¹ (In the following quotation "*re-*

vendee in taking possession with the vendor's consent, of the thing sold is a sufficient receipt where though incomplete, it extends as far as circumstances permit.² So, as has already been stated, taking possession of part only of the personalty sold is sufficient.³ If the statute prohibits making a contract on Sunday, some courts treat receipt and acceptance as so far an essential element of the contract that a receipt and acceptance on Sunday does not make the contract valid.⁴ Property received on Sunday may be accepted on a week-day. Thus where A bought an organ, book and stool by oral contract and the organ was delivered on Sunday, and subsequently the book and stool were delivered on a week-day, the vendee recognizing the organ as his, receipt and acceptance exist.⁵ Greater difficulties are presented where there has been no actual transfer of possession from the vendor to the vendee. Constructive or symbolic delivery with the assent of the vendee may be a sufficient receipt.⁶ Thus the transfer of a bill of lading,⁷ or a delivery ticket,⁸ or the indorsement and transfer of a stock certificate,⁹ have all been held sufficient receipt and acceptance, if by their terms such instruments were made assignable. Even the indorsement of an undelivered stock certificate, retained by the vendor as security for a note of the vendee has been held to be sufficient receipt and acceptance.¹⁰ Constructive or symbolic receipt and acceptance of articles too

ceipt" is termed "delivery.")

"There must be a delivery of the goods with intent to vest the right of possession in the vendee and there must be an actual acceptance by the latter with intent to take as owner." *Belt v. Marriott*, 9 Gill (Md.) 331; quoted in *Corbett v. Wolford*, 84 Md. 426, 429; 35 Atl. 1088. It is incorrect to use "delivery" as synonymous with "receipt." *Goodwine v. Cadwallader*, 158 Ind. 202; 61 N. E. 939.

² *Remick v. Sandford*, 120 Mass. 309; *Cunningham v. Ashbrook*, 20 Mo. 553; *Somers v. McLaughlin*, 57 Wis. 358; 15 N. W. 442.

³ See § 708.

⁴ *Ash v. Aldrich*, 67 N. H. 581; 39 Atl. 442; *Schmidt v. Thomas*, 75 Wis. 529; 44 N. W. 771.

⁵ *Schmidt v. Thomas*, 75 Wis. 529; 44 N. W. 771.

⁶ *Gibson v. Stevens*, 8 How. (U. S.) 384; *Michigan, etc., R. R. v. Phillips*, 60 Ill. 190.

⁷ *Wadhams & Co. v. Balfour*, 32 Or. 313; 51 Pac. 642.

⁸ *Webster v. Granger*, 78 Ill. 230.

⁹ *Meehan v. Sharp*, 151 Mass. 564; 24 N. E. 907.

¹⁰ *St. Paul, etc., Co. v. Howell*, 59 Minn. 295; 61 N. W. 141.

ponderous to be taken into actual custody have been held sufficient.¹¹ Some courts have refused to allow words alone to constitute a symbolic delivery of articles, however ponderous.¹² Since the vendee must acquire the right to the possession of the goods sold, conduct of the vendor showing a retention of a lien for the price, on the goods sold, prevents the transaction from amounting to receipt and acceptance.¹³ So if the goods are left in the possession of the vendor pending an inventory to determine their price, there is no receipt and acceptance, even though the vendor at the request of the vendee, makes announcement to others of the transfer, and sends them orders to be filled for the vendee in place of the vendor.¹⁴

§710. Acceptance.

Acceptance within the meaning of the statute consists of words or acts of the buyer sufficient to show his intention to assume exclusive dominion over the property purchased, thereby acquiring title thereto.¹ It involves the intention on the part of the vendee to take the goods sold as the owner thereof.² So where vendee, under a contract to buy vendor's accumulation of sawdust, received several loads of it and used it,³ or where a

¹¹ Chaplin v. Rogers, 1 East 192. Such as growing trees when treated as personalty. Leonard v. Medford, 85 Md. 666; 37 L. R. A. 449; 37 Atl. 365.

¹² Such as curb-stones. Gorman v. Brossard, 120 Mich. 611; 79 N. W. 903.

¹³ Devine v. Warner, 75 Conn. 375; 96 Am. St. Rep. 211; 53 Atl. 782.

¹⁴ Brunswick Grocery Co. v. Lamar, 116 Ga. 1; 42 S. E. 366.

¹ Remick v. Sandford, 120 Mass. 309; Gilman v. Hill, 36 N. H. 311; Mechanical Boiler Cleaner Co. v. Kellner, 62 N. J. L. 544; 43 Atl. 599; Stone v. Browning, 68 N. Y. 598; s. c., 51 N. Y. 211; Redington v. Roberts, 25 Vt. 686; Schmidt v.

Thomas, 75 Wis. 529; 44 N. W. 771. Acceptance consists of "acts of such character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price." Mechanical Boiler Cleaner Co. v. Kellner, 62 N. J. L. 544, 559; 43 Atl. 599; Hinchman v. Lincoln, 124 U. S. 38. Acceptance consists of acts sufficient "to pass title." Kerhhof v. Paper Co., 68 Wis. 674, 676; 32 N. W. 766.

² Curtis v. Lumber Co., 114 N. C. 530; 19 S. E. 374; Galvin v. MacKenzie, 21 Or. 184; 27 Pac. 1039.

³ Beyerstedt v. Mill Co., 49 Minn. 1; 51 N. W. 619.

vendee of a dress made to order tried it on, declared that it fitted and asked the maker to change part of the trimming which had been selected originally,⁴ the statute was complied with. Accordingly acceptance may be inferred from acts of the vendee which are rightful if he owns the goods, but wrongful if he does not.⁵ So where vendee of standing timber entered and cut down the trees, the contract being regarded as a contract for the sale of personalty,⁶ acceptance may be inferred. Mere change of possession is not sufficient. While it may amount to receipt, there must be something further to constitute an acceptance.⁷ Thus delivery to the vendee for the purpose of testing the chattel,⁸ or to enable him to determine whether it corresponds to the sample,⁹ or delivery of a small quantity of the property sold to be used by vendee as a sample in effecting a resale,¹⁰ none of them amount to an acceptance, since no intention to take as owner appears. Acceptance by an agent of vendee is in the contemplation of the law acceptance by the vendee.¹¹ Without express authority, however, a carrier empowered to receive the goods does not thereby accept them.¹² The acts of the agent relied on as acceptance must be unequivocal. Thus the act of the vendee's agent in marking the property sold, with the vendee's initials is not a receipt and acceptance within the statute.¹³

⁴ *Galvin v. MacKenzie*, 21 Or. 184; 27 Pac. 1039.

⁵ "If the vendee does any act to the goods of wrong if he is not the owner of the goods, and of right if he is the owner of the goods, the doing of that act is evidence that he has accepted them." *Parker v. Wallis*, 5 E. & B. 21, 27; quoted in *Leonard v. Medford*, 85 Md. 666, 673; 37 L. R. A. 449; 37 Atl. 365.

⁶ *Leonard v. Medford*, 85 Md. 666; 37 L. R. A. 449; 37 Atl. 365; *Wilson v. Fuller*, 58 Minn. 149; 59 N. W. 988.

⁷ *Sprankel v. Trulove*, 22 Ind.

App. 577; 54 N. E. 461; *Remick v. Sandford*, 120 Mass. 309; *Dinnie v. Johnson*, 8 N. D. 153; 77 N. W. 612.

⁸ *Mechanical Boiler-Cleaner Co. v. Kellner*, 62 N. J. L. 544; 43 Atl. 599; *Stone v. Browning*, 68 N. Y. 598; s. c., 51 N. Y. 211.

⁹ *Bacon v. Eccles*, 43 Wis. 227.

¹⁰ *Dierson v. Petersmeyer*, 109 Ia. 233; 80 N. W. 389. See also *Moore v. Love*, 57 Miss. 765.

¹¹ *Schroder v. Hardware Co.*, 88 Ga. 578; 15 S. E. 327; *Meyer v. Thompson*, 16 Or. 194; 18 Pac. 16.

¹² See § 711.

¹³ *Hart v. Anderson*, 24 N. S. 157.

§711. Acts of vendor insufficient as receipt and acceptance.

Acceptance and receipt must be acceptance and receipt by the purchaser. Acts of the seller alone, though in performance of the contract, cannot serve as compliance with the statute of frauds.¹ If the vendor delivers to a common carrier whom he selects, the goods sold by oral contract, such delivery does not amount to a receipt and acceptance within the meaning of the statute.² If the vendee takes the goods from the carrier, and pays the freight, receipt and acceptance exist.³ Even if the vendee has selected the carrier, the weight of authority is that mere delivery by the vendor to the carrier is not receipt and acceptance by the vendee, since the carrier is authorized only to transport the goods, and not to bind vendee by accepting them.⁴ So acts in performance of the contract by the vendor not amounting to delivery, such as piling the property by the side of the road under the terms of the contract,⁵ or altering and painting wagon

¹ "No act of the seller alone, in however strict conformity to the terms of the contract, will satisfy the statute. There must be acts of the buyer, of accepting and actually receiving the goods sold, beyond the mere fact of entering into the contract to bind the latter." *Shepherd v. Pressey*, 32 N. H. 49, 55; quoted in *Dierson v. Petersmeyer*, 109 Ia. 233, 235; 80 N. W. 389. (Citing *Maxwell v. Brown*, 39 Me. 98; 63 Am. Dec. 605; *Boardman v. Spooner*, 13 All. (Mass.) 353; 90 Am. Dec. 196; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55.

² *Denme-d v. Glass*, 30 Ga. 637; *Hausman v. Nye*, 62 Ind. 485; 30 Am. Rep. 199; *Keiwert v. Meyer*, 62 Ind. 587; 30 Am. Rep. 206; *Ft. Worth Packing Co. v. Meat Co.*, 86 Md. 635; 39 Atl. 746; *Gatiss v. Cyr*, — Mich. —; 96 N. W. 26; *Kuppenheimer v. Wertheimer*, 107 Mich. 77; 61 Am. St. Rep. 317; 64 N. W. 952;

Rindskopf v. De Ruyter, 39 Mich. 1; 33 Am. Rep. 340; *Simmons Hardware Co. v. Mullen*, 33 Minn. 195; 22 N. W. 294; *Rogers v. Philips*, 40 N. Y. 519; *Hudson Furniture Co. v. Carpet Co.*, 10 Utah 31; 36 Pac. 132; *Agnew v. Dumas*, 64 Vt. 147; 23 Atl. 634; *Williams-Hayward Shoe Co. v. Brooks*, 9 Wyom. 424; 64 Pac. 342.

³ *Leggett v. Collier*, 89 Ia. 144; 56 N. W. 417.

⁴ *Taylor v. Smith* (1893), 2 Q. B. 65; *Billin v. Henkel*, 9 Colo. 394; 13 Pac. 420; *Jones v. Bank*, 29 Md. 287; 96 Am. Dec. 533; *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545; *Smith v. Brennan*, 52 Mich. 349; 4 Am. St. Rep. 867; 28 N. W. 892; *Waite v. McKelvy*, 71 Minn. 167; 73 N. W. 727; *Allard v. Grea-sert*, 61 N. Y. 1. *Contra*, *Strong v. Dodds*, 47 Vt. 348; *Spencer v. Hale*, 30 Vt. 314; 73 Am. Dec. 309.

⁵ *Finney v. Apgar*, 31 N. J. L.

trucks in accordance with the order,⁶ do not satisfy the requirements of the statute.⁷ A tender by the vendor or his agent on condition of receiving immediate payment is not receipt and acceptance.⁸ Thus sending stock to a bank with a draft attached for delivery to vendee on payment of the draft is not receipt and acceptance.⁹ A transfer of possession in contemplation of immediate payment does not constitute receipt and acceptance where possession was re-delivered by the prospective vendee because he had not the means of paying therefor.¹⁰ If the vendor retains possession as bailee of the vendor, this has been held sufficient.¹¹ If the vendee had possession before the sale, and retains possession afterwards, sufficient receipt and acceptance exist.¹² If the property is in the possession of a third person as bailee of the vendor, and such third person agrees to hold them thenceforth for the vendee, sufficient receipt and acceptance exist.¹³ If the third person does not agree to hold the property as bailee of the vendee, but retains it in his original capacity as agent of the vendor, his retention is not receipt and acceptance.¹⁴ We have already seen¹⁵ that the transfer of a

266. But see, apparently *contra*, Daniel v. Hannah, 106 Ga. 91; 31 S. E. 734.

⁶ Parvelki v. Hargreaves, 47 N. J. L. 334.

⁷ Hanson v. Roter, 64 Wis. 622; 25 N. W. 530.

⁸ Spear v. Bach, 82 Wis. 192; 52 N. W. 97.

⁹ Spear v. Bach, 82 Wis. 192; 52 N. W. 97.

¹⁰ Spear v. Bach, 82 Wis. 192; 52 N. W. 97.

¹¹ Green v. Merriman, 28 Vt. 801. (In this case A sold B certain sheep which were then in a yard of A's. A and B then drove them to another yard of A's, where by agreement they were to be left two days, B to pay for keeping them. This was held a sufficient receipt and acceptance.)

¹² It is "all the delivery that could be made." Snider v. Thrall, 56 Wis. 674, 676; 14 N. W. 814.

¹³ King v. Jarman, 35 Ark. 190; 37 Am. Rep. 11; Amson v. Dreher, 35 Wis. 615. *Contra*, Gunn v. Knoop, 73 Ga. 510; Sparrow v. Pate, 67 Ga. 352. These cases, however, are controlled by § 1593 of the Georgia code providing that title does not pass until the price is paid where delivery and payment are by the terms of the contract concurrent; hence the loss of the cotton in the hands of the warehouseman fell upon the vendor.

¹⁴ Farina v. Home, 16 M. & W. 119; Bentall v. Burn, 3 B. & C. 423; Boardman v. Spooner, 13 All. (Mass.) 353; 90 Am. Dec. 196; Bassett v. Camp, 54 Vt. 232.

¹⁵ See § 709.

warehouse receipt or bill of lading given to vendor "or order" or with other words of assignability amounts to constructive delivery. Such a form of order may be considered as a consent of the warehouse man or carrier, given in advance, to hold the goods for the assignee of the order.¹⁶

§712. Time at which receipt and acceptance, and part payment, must be made.

Receipt and acceptance need not accompany the sale. If they occur subsequently in pursuance of the sale, the statute is complied with.¹

In the absence of specific statutory provision part payment may be made after the contract of sale is made.² In some jurisdictions, however, the statute provides that part payment must be made "at the time" that the contract of sale is made.³ Under such statute, if payment is made subsequent to the contract, "there must be a distinct renewal of, or assent to the terms of the original agreement, so as to make the payment apply on a present and not in a past agreement of sale,"⁴ in order to have the subsequent payment operate as a compliance with the statute.⁵ Thus where A agreed to transfer his stock in a corporation and to resign his position therein in consideration of certain goods, A's resignation presented some time thereafter was not part payment within the meaning of the statute unless there was

¹⁶ See as showing the necessity of words of assignability, *Hallgarten v. Oldham*, 135 Mass. 1; 46 Am. Rep. 433.

¹ *Marsh v. Hyde*, 3 Gray (Mass.) 331; *Ward v. Ward*, 75 Minn. 269; 77 N. W. 965; *Ortloff v. Klitzke*, 43 Minn. 154; 44 N. W. 1085; *Austin v. Boyd*, 23 Mo. App. 317; *Towne v. Davis*, 66 N. H. 396; 22 Atl. 450; *Jackson v. Tupper*, 101 N. Y. 515; *Schmidt v. Thomas*, 75 Wis. 529; 44 N. W. 771.

² *Thompson v. Alger*, 12 Met.

(Mass.) 428; *Dallavo v. Richardson*, — Mich. —; 96 N. W. 20.

³ *Raymond v. Colton*, 104 Fed. 219; 43 C. C. A. 501; *Milos v. Cova-cevich*, 40 Or. 239; 66 Pac. 914.

⁴ *Crosby Hardwood Co. v. Tester*, 90 Wis. 412, 413; 63 N. W. 1057; citing *Kirkhof v. Paper Co.*, 68 Wis. 674; 32 N. W. 766; *Paine v. Fulton*, 34 Wis. 83; *Bates v. Chesebro*, 32 Wis. 594; s. c., 36 Wis. 636.

⁵ *Hunter v. Wetsell*, 84 N. Y. 549; 38 Am. Rep. 544; s. c., 57 N. Y. 375; 15 Am. Rep. 508.

such reaffirmance or restatement of the contract as to render the payment one made at the time.⁶

Under the theory that an unenforceable offer is revocable until so accepted as to be enforced, receipt and acceptance,⁷ or part payment⁸ by the vendee after the offer is revoked by the vendor is insufficient.

X. EFFECT OF COMPLETE PERFORMANCE OF CONTRACTS WITHIN THE FOURTH SECTION OF FRAUDS.

§713. Complete performance on both sides.

The section of the statute under discussion provides that "no action shall be brought whereby to charge" parties to the classes of contracts therein specified. From this wording it is plain that the legislature was referring only to contracts which were in part at least executory and to enforce which a right of action was necessary. Accordingly if the contract is completely performed on both sides it is not within this section of the statute either in letter or in spirit.¹ Thus an oral contract for the sale,² or lease³ of realty; or an oral contract for an easement,

⁶ Raymond v. Colton, 104 Fed. 219; 43 C. C. A. 501. (Merely presenting his resignation and stating that it was in fulfillment of the agreement was not sufficient.)

⁷ Smith v. Hudson, 6 B. & S. 431; 118 Eng. C. L. 429.

⁸ Edgerton v. Hodge, 41 Vt. 676.

¹ Bibb v. Allen, 149 U. S. 481; Walsh v. Calcough, 56 Fed. 778; 6 C. C. A. 114; Merrell v. Witherby, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; Bates v. Babcock, 95 Cal. 479; 29 Am. St. Rep. 133; 16 L. R. A. 745; 30 Pac. 605; Coffin v. Bradbury, 3 Ida. 770; 95 Am. St. Rep. 37; 35 Pac. 715; Anderson School Township v. Milroy Lodge, 130 Ind. 108; 30 Am. St. Rep. 206; 29 N. E. 411; Nicholson v. Schmucker, 81 Md. 459; 32 Atl.

182; Wetherbee v. Potter, 99 Mass. 354; Stone v. Dennison, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; McCue v. Smith, 9 Minn. 252; 86 Am. Dec. 100; Brown v. Trust Co., 117 N. Y. 266; 22 N. E. 952; Remington v. Palmer, 62 N. Y. 31; Gregg v. Willis, 71 Vt. 313; 45 Atl. 229; Howe v. Chesley, 56 Vt. 731; Pireaux v. Simon, 79 Wis. 392; 48 N. W. 674; Larsen v. Johnson, 78 Wis. 300; 23 Am. St. Rep. 404; 47 N. W. 615.

² Grippen v. Benham, 5 Wash. 589; 32 Pac. 555; Larsen v. Johnson, 78 Wis. 300; 23 Am. St. Rep. 404; 47 N. W. 615. Such as a release of dower and homestead rights. Gerber v. Upton, 123 Mich. 605; 82 N. W. 363.

³ Stautz v. Protzman, 84 Ill. App.

such as the right to construct a ditch over the land of another,⁴ or an agreement to convey a right of way to a railway,⁵ or a contract to partition realty,⁶ cannot after full performance on both sides be avoided because within the statute. Thus where A agreed orally to convey certain realty to B in consideration of B's supporting A for life, such contract though verbal cannot be avoided where A has made such conveyance and B has furnished such support.⁷ So an oral contract to pay the debt of another cannot be avoided after performance.⁸ So a subsequent oral modification of a written contract of a class included within the statute cannot be avoided when fully performed on both sides.⁹ After performance one party cannot ignore the contract and sue to recover a reasonable compensation for what he has parted with thereunder.¹⁰

§714. Complete performance on one side, leaving no act within the statute to be done.

If the contract requires A to do an act which is one of those named in this section of the statute of frauds, and requires B to do an act which is not one of those named in this section, complete performance by one party may have a very different effect upon the contract from performance by the other. If A, the party who is required by the terms of the contract to perform an act which is one of those included within this section of the stat-

434; *Harris v. Harper*, 48 Kan. 418; 29 Pac. 697. So with the surrender of a lease. *Tobener v. Miller*, 68 Mo. App. 569.

⁴ *Flickinger v. Shaw*, 87 Cal. 126; 22 Am. St. Rep. 234; 11 L. R. A. 134; 25 Pac. 268; *McLure v. Koen*, 25 Colo. 284; 53 Pac. 1058; *Baldock v. Atwood*, 21 Or. 73; 26 Pac. 1058.

⁵ *Maupin v. Ry.*, 171 Mo. 187; 71 S. W. 334. For a similar case see *Michigan Central Ry. v. Ry.*, — Mich. —; 93 N. W. 882.

⁶ *Bacon v. Fay*, 63 N. J. Eq. 411; 51 Atl. 797.

⁷ *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404; 47 N. W. 615.

⁸ *Kling v. Tunstall*, 124 Ala. 268; 27 So. 420; *Webster v. Le Compte*, 74 Md. 249; 22 Atl. 232; *Milner v. Harris*, 1 Neb. Un. 584; 95 N. W. 682.

⁹ *Doherty v. Doe*, 18 Colo. 456; 33 Pac. 165.

¹⁰ *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159; *Stanatt v. Mullen*, 148 Mass. 570; 2 L. R. A. 697.

ute, has fully performed the terms of the contract on his part to be performed, leaving B liable for an act which is not one of those named in this section, A's performance prevents the statute from applying to such contracts, since B's promise may be proved by oral evidence and A's performance need be shown only as consideration for B's promise, no attempt to enforce A's promise being necessary.¹ A may sue B at law on the contract itself, without either suing for a reasonable compensation independent of the contract, or being compelled to resort to equity.² Thus if A has agreed orally to convey realty to B in consideration of some recompense in value not within the statute and A has performed the terms of the contract on his part to be performed by executing and delivering a deed for such realty to B, A can enforce the contract against B.³ If A agrees to convey realty to B and performs the contract, a further oral contract between A and B with reference to the payment of the purchase price is not affected by this clause of the statute.⁴ Thus an oral

¹ *McConnell v. Brayner*, 63 Mo. 461; *Marks v. Davis*, 72 Mo. App. 557; *Flower v. Barnekoff*, 20 Or. 132; 11 L. R. A. 149; 25 Pac. 370; *Warwick, etc., Co. v. Allen (R. I.)*, 35 Atl. 579.

² *Marks v. Davis*, 72 Mo. App. 557.

³ *Wood v. Perkins*, 57 Fed. 258; *Merrell v. Witherby*, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; *Dargin v. Hewlitt*, 115 Ala. 510; 22 So. 128; *Butler v. Lee*, 11 Ala. 885; 46 Am. Dec. 230; *Devalinger v. Maxwell*, — Del. —; 54 Atl. 684; *Stringer v. Stringer*, 93 Ga. 320; 20 S. E. 242; *Ballard v. Campbell*, 161 Ind. 16; 67 N. E. 505 [reversing (*Ind. App.*) 64 N. E. 931]; *Lingeman v. Shirk*, 15 Ind. App. 432; 43 N. E. 33; *Bird v. Jacobus*, 113 Ia. 194; 84 N. W. 1062; *McKinley v. McKinley (Ky.)*, 66 S. W. 831; *O'Grady v. O'Grady*, 162 Mass. 290; 38 N. E.

196; *Parker v. Tainter*, 123 Mass. 185; *Gardner v. Gardner*, 106 Mich. 18; 63 N. W. 988; *Hagelin v. Wacks*, 61 Minn. 214; 63 N. W. 624; *Smock v. Smock*, 37 Mo. App. 56; *Skow v. Locks (Neb.)*, 91 N. W. 204; *Griffith v. Thompson*, 50 Neb. 424; 69 N. W. 946; *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026; *Smith v. Arthur*, 110 N. C. 400; 15 S. E. 197; *Maguire v. Heraty*, 163 Pa. St. 381; 43 Am. St. Rep. 800; 30 Atl. 151; *Wilkins v. Totty (Tenn. Ch. App.)*, 64 S. W. 338; *Showalter v. Macdonnell*, 83 Tex. 158; 18 S. W. 491; *Johnson v. Clarkson (Tex. Civ. App.)*, 29 S. W. 178; *Davis v. Farr*, 26 Vt. 596.

⁴ *Turpie v. Lowe*, 114 Ind. 37; 15 N. E. 834; *Cummings v. Arnold*, 3 Met. (Mass.) 486; 37 Am. Dec. 155; *Brown v. Brown*, 47 Mo. 130; 4 Am. Rep. 320; *Negley v. Jeffors*, 28 O. S. 90; *Whiffen v. Hollister*, 12

agreement by vendee to pay a debt of vendor's⁵ as a lien for the purchase money due from vendor to his grantor,⁶ or a mortgage given by vendor to secure his debt,⁷ as part of the purchase price of such realty, is not within this clause of the statute.⁸ So an oral contract by vendee to discharge certain assessments claimed to be liens on the realty conveyed is not within this clause.⁹ So a contract forfeiting an advance deposit of the purchase price if the written contract for the purchase of realty as extended by the oral contract in question is not complied with, is not within the statute.¹⁰ A contract by vendor to refund a part of the purchase price on tendering a deed of a lot less in area than that contracted for¹¹ is not within the statute. While an oral contract whereby A agrees with B that A shall buy land from X and resell it to B is within the statute, yet if A causes the deed to be made out to B and otherwise performs his part of the contract, B must compensate him in accordance with the contract on his part to be performed.¹² So where X offered two tracts for sale, refusing to sell them separately, and A, who wished one of them, agreed to pay B \$100 if B would buy the other tract at \$900, which X asked for it, so that A could buy

S. D. 68; 80 N. W. 156; Johnson v. Clarkson (Tex. Civ. App.), 30 S. W. 71; 29 S. W. 178.

⁵ McLaren v. Hutchinson, 22 Cal. 187; 83 Am. Dec. 59. So with a promise to pay a debt of vendor's husband. Brown v. Brown, 47 Mo. 130; 4 Am. Rep. 320.

⁶ Pickett v. Jackson (Tex. Civ. App.), 42 S. W. 568.

⁷ Lowe v. Hamilton, 132 Ind. 406; 31 N. E. 1117; Neiswanger v. McClellan, 45 Kan. 599; 26 Pac. 18; Bennett v. Knowles, 111 Mich. 226; 69 N. W. 491; Negley v. Jeffers, 28 O. S. 90. So where such mortgage is to secure vendor's debt to his grantor for the purchase price of the realty sold to vendee. Bedford Belt Ry. v. Winstandley, 16 Ind. App. 143; 44 N. E. 556.

⁸ Nor is it within the clause concerning contracts to answer for the debt of another. See § 623.

⁹ Heald v. Ross (N. J. Eq.), 47 Atl. 575.

¹⁰ Hurlburt v. Fitzpatrick, 176 Mass. 287; 57 N. E. 464.

¹¹ Haviland v. Sammis, 62 Conn. 44; 36 Am. St. Rep. 330; 25 Atl. 394.

¹² Baker v. Wainwright, 36 Md. 336; 11 Am. Rep. 495. (A purchased at sheriff's sale in accordance with B's instructions, and had the deed made out to B. B refused to pay the purchase price; and the property was resold in accordance with the terms of the sale and the loss charged to A. A was allowed to recover this loss from B.).

his tract at the same time, A's promise was not within the statute.¹³ So if A by an oral contract agrees to sell realty to B and C, and subsequently at B's request, A conveys to C alone, B is liable in an action on the contract for the purchase money.¹⁴ So an oral sale of articles which are treated by the law as a part of the realty, such as rock,¹⁵ growing timber,¹⁶ or hay,¹⁷ is not affected by the statute where the vendor has performed by permitting vendee to sever the articles sold from the realty and to appropriate them. Thus an oral contract for the assignment of a lease,¹⁸ or for an easement, such as a party-wall,¹⁹ or a right of way,²⁰ are not within this clause of the statute when completely performed by the party who is to convey the interest in realty. If A orally promises to pay B's debt to C, performance by A withdraws the contract from the operation of the statute.²¹ Whether a contract which by its terms is not to be performed within a year from the date of the making thereof is taken out of the operation of the statute by full performance on the side of the party whose part was not to be complete within the year, is a question upon which the decisions are in conflict. Some courts hold that in such cases the statute does not apply,²² others, that it

¹³ *Ambrose v. Ambrose*, 94 Ga. 655; 19 S. E. 980; citing *Little v. McCarter*, 89 N. C. 233.

¹⁴ *Randall v. Turner*, 17 O. S. 262.

¹⁵ *Rich v. Donovan*, 81 Mo. App. 184.

¹⁶ *Oconto Co. v. Lundquist*, 119 Mich. 264; 77 N. W. 950; *Wilson v. Fuller*, 58 Minn. 149; 59 N. W. 988.

¹⁷ *Mowrey v. Davis*, 12 Ind. App. 681; 40 N. E. 1108.

¹⁸ *Cleveland, etc., Ry. v. Wood*, 189 Ill. 352; 59 N. E. 619.

¹⁹ *Rindge v. Baker*, 57 N. Y. 209; 15 Am. Rep. 475; *Hall v. Geyer*, 14 Ohio C. C. 229; 7 Ohio C. D. 436; *Horr v. Hollis*, 20 Wash. 424; 55 Pac. 565; *Pireaux v. Simon*, 79 Wis. 392; 48 N. W. 674. In *Walker v. Shackelford*, 49 Ark. 503; 4 Am. St.

Rep. 61; 5 S. W. 887; it seems to be regarded as an open question (though in that case, immaterial) whether the contract itself could be enforced or whether the party who had erected the wall could recover on a *quantum meruit* and use the oral contract to show the amount of damages.

²⁰ *Scott v. Ry.*, 94 Fed. 340; 36 C. C. A. 282; *Texas, etc., Ry. v. Scott*, 77 Fed. 726; 37 L. R. A. 94; 23 C. C. A. 424.

²¹ *Hasterlick v. Applebaum*, 64 Ill. App. 433.

²² *Ives v. Gilbert*, 1 Root (Conn.) 89; 1 Am. Dec. 35; *Louman v. Sheets*, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351; *Taylor v. Turnpike Co. (Ky.)*, 34 S. W. 226; *Winters v. Cherry*, 78 Mo. 344.

does.²³ In many states it is held that this clause of the statute does not apply to contracts to be performed on one side within the year and on the other not within the year.²⁴

§715. What constitutes performance.

The question of the applicability of the statute depends therefore in many cases on whether the contract has been performed or not. Delivery of a deed by the vendor to his own agent subject to his orders, is, of course, not performance.¹ Delivery in escrow is held not to be full performance by the vendor, and the statute of frauds applies.² Whether a tender of a deed for the realty by the vendor, which tender is refused by the vendee, amounts to full performance in this sense is a question upon which the authorities are in conflict.³ Where such tender is held to constitute full performance a vendee cannot avoid liability for the purchase price if the vendor is ready and willing to deliver his deed in accordance with his oral contract.⁴ Whether

²³ Towsley v. Moore, 30 O. S. 184; 27 Am. Rep. 434. In these cases the remedy is on *quantum meruit*. See §§ 749-751.

²⁴ See § 669.

¹ Sowards v. Moss, 59 Neb. 71; 80 N. W. 268; reversing 58 Neb. 119; 78 N. W. 373.

² Swain v. Burnette, 89 Cal. 564; 26 Pac. 1093; Kopp v. Reiter, 146 Ill. 437; 37 Am. St. Rep. 156; 22 L. R. A. 273; 34 N. E. 942; Shultz v. Pinson, 63 Kan. 38; 64 Pac. 963; Ducett v. Wolf, 81 Mich. 311; 45 N. W. 829; Cagger v. Lansing, 43 N. Y. 550; Cooper v. Thomason, 30 Or. 161; 45 Pac. 296; Campbell v. Thomas, 42 Wis. 437; 24 Am. Rep. 427. Under delivery in escrow three questions are involved: (1) is such delivery full performance; (2) if not, can an undelivered deed be a memorandum sufficient to comply with the statute, and (3)

if an undelivered deed can comply with the requirements of the statute, does the deed in the specific case contain enough to be a sufficient memorandum. See § 696 *et seq.*

³ That it is full performance, Scott v. Glenn, 98 Cal. 168; 32 Pac. 983; Stephens v. Harding, 48 Neb. 659; 67 N. W. 746; Hodges v. Green, 28 Vt. 358. That it is not full performance. Graham v. Theis, 47 Ga. 479; Sands v. Thompson, 43 Ind. 18; Kroll v. Match Co., 113 Mich. 196; 71 N. W. 630; Moore v. Powell, 6 Tex. Civ. App. 43; 25 S. W. 472.

⁴ Washington Glass Co. v. Mosbaugh, 19 Ind. App. 105; 49 N. E. 178; Rowland v. Garman, 1 J. J. Mar. (Ky.) 76; 19 Am. Dec. 54; Barnes v. Wise, 3 T. B. Mon. (Ky.) 167; McGowen v. West, 7 Mo. 569; 38 Am. Dec. 468; Green v. R. R.,

tender of a deed can amount to full performance or not, there can be no performance without at least a tender. Thus where a deed was executed by the grantor and left with the notary, no tender ever being made, it was held that an oral contract for the sale of realty was not taken out of the statute by these acts.⁵

§716. Complete performance on one side leaving act within the statute to be done.

If, on the other hand, B, who by the terms of the contract is to do an act which is not within the statute, performs the contract fully on his part, while A, who by the terms of the contract was to perform an act which is one of those named in the statute, has not performed on his part, the contract is within the statute. Thus if A has agreed to convey realty to B for a valuable consideration and B has performed as by paying the purchase money,¹ or by rendering the services agreed upon,² and A has not conveyed the realty agreed upon, the contract is within the statute.

77 N. C. 95; *Crutchfield v. Donathon*, 49 Tex. 691; 30 Am. Rep. 112. "He is at the wrong end of the contract to do this." *Taylor v. Russell*, 119 N. C. 30; 25 S. E. 710.
⁵ *Shultz v. Pinson*, 63 Kan. 38; 64 Pac. 963. (The buildings on the realty sold were wrecked by a tornado and the vendee repudiated the contract.)

¹ *Duff v. Hopkins*, 33 Fed. 599; *Manning v. Pippen*, 95 Ala. 537; 11 So. 56; *Forrester v. Flores*, 64 Cal. 24; 28 Pac. 107; *Percifield v. Black*, 132 Ind. 384; 31 N. E. 955; *Godard v. Donaha*, 42 Kan. 754; 22 Pac. 708; *Nay v. Mोगrain*, 24 Kan. 80; *Truski v. Streseveski*, 60 Mich. 34; 26 N. W. 823; *Peckham v. Balch*, 49 Mich. 179; 13 N. W. 506; *Townsend v. Fenton*, 30 Minn. 528; 16 N. W. 421; *Simmons v. Headlee*, 94 Mo. 482; 7 S. W. 20; *Baker v. Wiswell*, 17 Neb. 52; 22 N. W. 111;

Nibert v. Baghurst, 47 N. J. Eq. 201; 20 Atl. 252; *Cooley v. Lobdell*, 153 N. Y. 596; 47 N. E. 783; *Armstrong v. Kattenhorn*, 11 Ohio 265; *Pollard v. Kinner*, 6 Ohio 528; *Sites v. Keller*, 6 Ohio 483; *Boozer v. Teague*, 27 S. C. 348; 3 S. E. 551; *Humbert v. Brisbane*, 25 S. C. 506; *Wright v. Bearrow*, 13 Tex. Civ. App. 146; 35 S. W. 190; *Munk v. Weidner*, 9 Tex. Civ. App. 491; 29 S. W. 409; *Maxfield v. West*, 6 Utah 327, 379; 23 Pac. 754; 24 Pac. 98; *Miller v. Lorentz*, 39 W. Va. 160; 19 S. E. 391; *Gallagher v. Gallagher*, 31 W. Va. 9; 5 S. E. 297; *Jourdain v. Fox*, 90 Wis. 99; 62 N. W. 936. This rule is modified by special statute in some states as in Iowa. See § 731.

² *Townsend v. Venderwerken*, 9 Mackey (D. C.) 197; *Crabill v. Marsh*, 38 O. S. 321.

This view is generally taken both in law and equity.³ So where A agrees to mortgage certain realty to B to secure a loan and B makes the loan, A's promise to make the mortgage cannot be enforced if oral.⁴ Many of the cases which belong under this topic are treated for convenience under part performance.⁵ If A agrees to perform an act which by the terms of the contract cannot be performed within the year, and B in consideration thereof agrees to perform another act, performance by B still leaves the contract within the statute.⁶ Thus if A agrees not to sue on a note for two years in consideration of payment by B of part of the interest in advance payment by B, does not take the case out of the statute.⁷

XI. EFFECT OF PART PERFORMANCE OF CONTRACTS WITHIN THE FOURTH SECTION OF THE STATUTE.

§717. Part performance.

In equity it is settled that certain acts in performance of an oral contract which without such acts would be within the statute of frauds, will withdraw such contract from the operation of the statute and leave even the executory part thereof enforceable, though oral.¹ In some jurisdictions, however, the doctrine of

³ *Townsend v. Fenton*, 32 Minn. 482; 21 N. W. 726; *Brown v. Drew*, 67 N. H. 569; 42 Atl. 177.

⁴ *Brown v. Drew*, 67 N. H. 569; 42 Atl. 177.

⁵ See § 717 *et seq.*

⁶ *Reinheimer v. Carter*, 31 O. S. 579.

⁷ *Reinheimer v. Carter*, 31 O. S. 579.

¹ *Riggles v. Ermev*, 154 U. S. 244; *St. Louis, etc., Ry. v. Graham*, 55 Ark. 294; 18 S. W. 56; *Calanchini v. Branstetter*, 84 Cal. 249; 24 Pac. 149; *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379; 29 Atl. 15; *Chapman v. Allen*, Kirby (Conn.) 399; 1 Am. Dec. 24; *Collins v.*

Moore, 115 Ga. 327; 41 S. E. 609; *Deeds v. Stephens*, — Ida. —; 69 Pac. 534; *Swazey v. Moore*, 22 Ill. 63; 74 Am. Dec. 134; *Bogle v. Jarvis*, 58 Kan. 76; 48 Pac. 558; *Pike v. Pike*, 121 Mich. 170; 80 Am. St. Rep. 488; 80 N. W. 5; *Delavan v. Wright*, 110 Mich. 143; 67 N. W. 1110; *Borden v. Curtis*, 48 N. J. Eq. 120; 21 Atl. 472; 46 N. J. Eq. 468; 19 Atl. 127; *Johnson v. Hubbell*, 10 N. J. Eq. (2 Stockt. Ch.) 332; 66 Am. Dec. 773; *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; *Butler v. Thompson*, 45 W. Va. 660; 72 Am. St. Rep. 838; 31 S. E. 960; *McWhinne v. Martin*, 77 Wis. 182; 46 N. W. 118.

part performance is not recognized.² This doctrine is known as the doctrine of part performance. The name, while possibly as convenient as any is inexact and liable to mislead. It is by no means every act of part performance which amounts to a technical part performance. Furthermore, the name "part performance" is not infrequently applied to acts which constitute full performance on one side.³ The very existence of this doctrine, while settled by precedent beyond controversy, would probably be challenged if the question were now open. It is often characterized as a judicial repeal of the statute. While the courts recognize it as applicable in cases where it is established by precedent, they are unwilling in most jurisdictions to extend it further. Part performance, when operative, withdraws the entire contract from the statute of frauds and makes it enforceable. It must therefore be distinguished from the doctrine, recognized in some jurisdictions that if a contract has been partly performed on one side, the rights of the parties as to what has been performed are fixed by the contract, though such acts may not amount to a technical part performance to withdraw the contract from the operation of the statute.⁴ The doctrine of part performance is only a special application of a wider doctrine of equity, namely, that its power of granting relief against fraud is not limited by the statute of frauds. Thus while an oral contract in consideration of marriage is ordinarily unenforceable, both at law and in equity, yet if at the time of making such contract the promisor does not intend performance this is such fraud as calls for the interposition of a court of equity without interference from the statute of frauds.⁵ Some authorities have gone so far as to give relief for breach of such

² *Washington v. Soria*, 73 Miss. 665; 55 Am. St. Rep. 555; 19 So. 485; *Box v. Stanford*, 13 Sm. & M. (Miss.) 93; 51 Am. Dec. 142.

³ See § 714 *et seq.*

⁴ *City of Greenville v. Waterworks Co.*, 125 Ala. 625; 27 So. 764; *Lagerfelt v. McKie*, 100 Ala. 430; 14 So. 281; *Murphy v. DeHaan*,

116 Ia. 61; 89 N. W. 100; *Graves County Water Co. v. Ligon*, 112 Ky. 775; 66 S. W. 725; *Sanger v. French*, 157 N. Y. 213; 51 N. E. 979.

⁵ *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; *Green v. Green*, 34 Kan. 740; 55 Am. Rep. 256; 10 Pac. 156.

contract, where the marriage would not have been entered into but for such promise, even if it is not shown that intention not to perform existed when the contract was made, on the theory that such breach works a constructive fraud.⁶ Part performance, as such, does not, however, have any place in contracts in consideration of marriage.

§718. Is part performance a doctrine of equity alone?

The doctrine of part performance, so-called, is in most jurisdictions treated as a purely equitable doctrine. Accordingly in such jurisdictions part performance of an oral contract which is within the statute does not withdraw it from the operation of the statute at law, and no action at law can be brought thereon.¹ Thus an oral contract for the assignment of a lease by which the assignee agrees to pay to the lessor the rent stipulated in the lease does not, by part performance, cease to be within the statute as far as concerns the right of lessor to sue the assignee at law upon the covenants of the lease.² So a vendor cannot on part performance of an oral contract to convey an interest in

⁶ Moore v. Allen, 26 Colo. 197; 77 Am. St. Rep. 255; 57 Pac. 698; Catalini v. Catalini, 124 Ind. 54; 19 Am. St. Rep. 73; 24 N. E. 375; Petty v. Petty, 4 B. Mon. (Ky.) 215; 39 Am. Dec. 501.

¹ Eaton v. Whitaker, 18 Conn. 222; 44 Am. Dec. 586; Chicago Attachment Co. v. Machine Co., 142 Ill. 171; 15 L. R. A. 754; 28 N. E. 959; reversed on rehearing 25 N. E. 669; affirmed 31 N. E. 438; Sigmund v. Newspaper Co., 82 Ill. App. 178; Butler v. Sheehan, 61 Ill. App. 561; Hunt v. Coe, 15 Ia. 197; 81 Am. Dec. 465; Hamilton v. Thirston, 93 Md. 213; 48 Atl. 709; Thompson v. Gould, 20 Pick. (Mass.) 134; Kidder v. Hunt, 1 Pick. (Mass.) 328; 11 Am. Dec. 183; Schultz v. Huffman, 127 Mich. 276; 86 N. W. 823; Hallett v. Gordon, 122 Mich.

567; 81 N. W. 556; (modified on rehearing in 122 Mich. 573; 82 N. W. 827; because under the statute assumpsit would lie for the fraudulent representations by defendant in this case to induce plaintiff to buy realty from defendant's principal); Nally v. Reading, 107 Mo. 350; 17 S. W. 978; Tiefenbrun v. Tiefenbrun, 65 Mo. App. 253; Smith v. Phillips, 69 N. H. 470; 43 Atl. 183; McElroy v. Ludlum, 32 N. J. Eq. 828; Kling v. Bordner, 65 O. S. 86; 61 N. E. 148; Buck v. Pickwell, 27 Vt. 157; Hibbard v. Whitney, 13 Vt. 21.

² Chicago Attachment Co. v. Machine Co., 142 Ill. 171; 15 L. R. A. 754; 28 N. E. 959; reversing on rehearing, 25 N. E. 669; affirmed 31 N. E. 438; Nally v. Reading, 107 Mo. 350; 17 S. W. 978.

realty,³ such as an easement,⁴ maintain an action at law for breach of the contract. So in an oral contract to partition realty, taking possession of their respective shares, does not confer the legal title upon the parties.⁵ This view is not entertained in all jurisdictions. In some, part performance withdraws a contract from the operation of the statute even at law.⁶ Thus in Nebraska taking possession of realty under an oral contract and making valuable improvements thereon even though coupled with a default in payment of the purchase price are such acts of part performance as to defeat an action of ejectment by the vendor against a vendee in possession.⁷

§719. What acts constitute part performance.

Since part performance is a doctrine of equity only, questions of part performance usually arise in suits for specific performance, and as in each case the ultimate question is whether specific performance should be given or not, the two doctrines are often involved, and re-act each upon the other. The doctrine of part performance rests upon a combination of two distinct grounds: first, that where one party has performed the contract on his part so far that he cannot be restored to his

³ *Kidder v. Hunt*, 1 Pick. (Mass.) 328; 11 Am. Dec. 183; *Smith v. Phillips*, 69 N. H. 470; 43 Atl. 183.

⁴ *Schultz v. Huffman*, 127 Mich. 276; 86 N. W. 823.

⁵ *Berry v. Seawell*, 65 Fed. 742; 13 C. C. A. 101; *Gates v. Salmon*, 46 Cal. 362; *McCall v. Reybold*, 1 Har. (Del.) 146; *Duncan v. Duncan*, 93 Ky. 37; 40 Am. St. Rep. 159; 18 S. W. 1022; *White v. O'Bannon*, 86 Ky. 93; 5 S. W. 346; *Chenery v. Dole*, 39 Me. 162; *Duncan v. Sylvester*, 16 Me. 388; *Mfg. Co. v. Heall*, 5 Me. 384; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Porter v. Perkins*, 5 Mass. 233; 4 Am. Dec. 52; *Ballou v. Hace*, 47 N. H. 347; 93 Am. Dec. 438; *Wood*

v. Griffin, 46 N. H. 231; *Dow v. Jewell*, 18 N. H. 310; 45 Am. Dec. 371; *Medlen v. Steele*, 75 N. C. 154; unless possession lasts for the period of limitations; *Johnson v. Goodwin*, 27 Vt. 288; *Pope v. Henry*, 24 Vt. 560; *Booth v. Adams*, 11 Vt. 156; 34 Am. Dec. 680; *contra*, that possession under a contract for partition passes the legal title; *McKnight v. Bell*, 135 Pa. St. 358; 19 Atl. 1036; *Rountree v. Lane*, 32 S. C. 160; 10 S. E. 941; *Kennemore v. Kennemore*, 26 S. C. 251; 1 S. E. 881.

⁶ *Dewey v. Payne*, 19 Neb. 540; 26 N. W. 248.

⁷ *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026.

former condition even by compensation in money, refusal by the other party to perform operates as a fraud against which equity will relieve.¹ Part performance involves actual possession or some act whereby the vendee has received an injury for which a court of law cannot give a complete remedy.² The general and abstract form of stating the rule as to what may constitute part performance is that the acts relied on must be "such part performance as cannot be compensated in damages."³ As a corollary to this proposition, if money damages will fairly compensate the party seeking relief, technical part performance does not exist.⁴ Accordingly it is sometimes said that the acts of the party to be charged do not of themselves amount to part performance, since even if he is prejudiced thereby it gives no rights to the adversary party.⁵ According to some authorities, the party to be charged with the oral contract must have been benefited by the acts done in performance of the contract in order to have the doctrine of part performance apply.⁶ Thus a contract by lessor to pay the son of lessee for his work and

¹ *Riggles v. Erney*, 154 U. S. 244; *Von Trotha v. Bamberger*, 15 Colo. 1; 24 Pac. 883; *Ricker v. Kelly*, 1 Greenl. (Me.) 117; 10 Am. Dec. 38; *Borden v. Curtis*, 48 N. J. Eq. 120; 21 Atl. 472; 46 N. J. Eq. 468; 19 Atl. 127; *Robbins v. McKnight*, 1 Halst. Ch. (N. J.) 642; 45 Am. Dec. 406. "If the parol agreement be clearly and satisfactorily proved and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part has done acts in part performance of such agreement to the knowledge of the defendant — acts which have so altered the relations of the parties as to prevent their restoration to their former condition — it would be a virtual fraud to allow the defendant to interpose the statute as a defense and thus secure to himself the benefit of what has been done in part performance." *Riggles*

v. Erney, 154 U. S. 244, 254; quoted in *Hancock v. Melloy*, 187 Pa. St. 371, 379; 41 Atl. 313.

² *Smith v. Finch*, 8 Wis. 245; *Harney v. Burhans*, 91 Wis. 348; 64 N. W. 1031.

³ *Moore v. Small*, 19 Pa. St. 461, 467; quoted in *Hancock v. Melloy*, 187 Pa. St. 371, 379; 41 Atl. 313.

⁴ *Williams v. Morris*, 95 U. S. 457; *Bennett v. Dyer*, 89 Me. 17; 35 Atl. 1004; *Brown v. Hoag*, 35 Minn. 373; 29 N. W. 135; *Lord's Appeal*, 105 Pa. St. 451; *Mayer's Appeal*, 105 Pa. St. 432.

⁵ *Bennett v. Dyer*, 89 Me. 17; 44 L. R. A. 482; 35 Atl. 1004; *Abbott v. Baldwin*, 61 N. H. 583; *Morris v. Gaines*, 82 Tex. 255; 17 S. W. 538.

⁶ *Dunphy v. Ryan*, 116 U. S. 491; *Shumate v. Farlow*, 125 Ind. 359; 9 L. R. A. 657; 25 N. E. 432; *Bristol v. Sutton*, 119 Mich. 693; 78 N.

labor to be performed on the farm for his father until he becomes of age, is not taken out of the statute where the lessee may have been benefited by increased crops, even if the son's labor improved the farm. Second, a further reason for holding that part performance withdraws the contract from the operation of the statute is that the performance of such acts as are classed in equity as part performance shows without relying upon the oral contract alone, that there is some kind of agreement between the parties, and the terms of such contract may then be shown by oral evidence.⁷ Accordingly the acts relied on as part performance must be referable exclusively to the oral contract.⁸ Thus part performance of a valid written contract does not validate an oral modification thereof.⁹ So possession under a prior valid lease or deed is not part performance of a subsequent oral contract.¹⁰ This general statement of the grounds upon which the doctrine of part performance rests is important as showing the considerations which have controlled courts in deciding the specific questions to be discussed hereafter; but from its abstract form, it is of little value in determining *a priori* the results which the courts reach in specific cases. Not infrequently different courts reach opposite results while professing to apply the same general principles underlying part performance. Accordingly the following questions will be discussed specifically: first, what acts amount to part performance in contracts for the sale of realty or some interest therein; second, to what extent if any does the doctrine of part performance apply to contracts other than those for the sale of realty. The acts usually invoked as acts of part performance to take the contract out of the statute are change of pos-

W. 885; same case, 115 Mich. 365; 73 N. W. 424; *Lydick v. Holland*, 83 Mo. 703.

⁷ *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379; 29 Atl. 15; *Rogers v. Wolfe*, 104 Mo. 1; 14 S. W. 805; *Shahan v. Swan*, 48 O. S. 25; 29 Am. St. Rep. 517; 26 N. E. 222; *Reynolds v. Neces-*

sary, 88 Va. 125; 13 S. E. 348.

⁸ *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379; 29 Atl. 15; *Truman v. Truman*, 79 Ia. 506; 44 N. W. 721; *Nibert v. Baghurst* (N. J. Eq.), 25 Atl. 474.

⁹ *Buttz v. Colton*, 6 Dak. 306; 43 N. W. 717.

¹⁰ See § 727.

session of the realty sold, erection of improvements and payment of part or all of the purchase price. It will be necessary to discuss the effect of these separately and in combination, together with such other acts as are invoked to show a change of condition in reliance on the contract which cannot be compensated in damages.

§720. Part performance as applying to contracts for the sale of realty.

The doctrine of part performance clearly applies to contracts for the sale of realty or some interest therein.¹ Thus if the parties to an oral contract of partition have taken possession in severalty of their respective allotments, such contract is not within the statute.² An oral assignment of dower if following by possession is not within the statute.³ Such a contract does not create an interest in realty. It "only admeasured and established the limits of the estate the law conferred upon" the widow.⁴ Taking possession of realty exchanged,⁵ or taking possession and making valuable improvements thereon⁶ takes an

¹ *Riggles v. Erney*, 154 U. S. 244; *St. Louis, etc., Ry. v. Graham*, 55 Ark. 294; 18 S. W. 56; *Bogle v. Jarvis*, 58 Kan. 76; 48 Pac. 558; *Delavan v. Wright*, 110 Mich. 143; 67 N. W. 1110; *Butler v. Thompson*, 45 W. Va. 660; 72 Am. St. Rep. 838; 31 S. E. 960; *McWhinne v. Martin*, 77 Wis. 182; 46 N. W. 118.

² *Tuffree v. Polhemus*, 108 Cal. 670; 41 Pac. 806; *Long v. Dollardhide*, 24 Cal. 218; *Higginson v. Schaneback* (Ky.), 66 S. W. 1040; *Natchez v. Vanderveide*, 31 Miss. 706; 66 Am. Dec. 581; *Wildev v. Bonney*, 31 Miss. 644; *Borden v. Curtis*, 48 N. J. Eq. 120; 21 Atl. 472; 46 N. J. Eq. 468; 19 Atl. 127; *Piatt v. Hubbell*, 5 Ohio 243; *McKnight v. Bell*, 135 Pa. St. 358; 19 Atl. 1036; *Mellon v. Reed*, 114 Pa. St. 647; 8 Atl. 227; *Rider v. Maul*,

46 Pa. St. 376; same case, 70 Pa. St. 15; *Mass v. Bromberg*, 28 Tex. Civ. App. 145; 66 S. W. 468; *Whitemore v. Cope*, 11 Utah 344; 40 Pac. 256.

³ *Pearce v. Pearce*, 184 Ill. 289; 56 N. E. 311; affirming 83 Ill. App. 77; *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263; *Shattuck v. Gregg*, 23 Pick. (Mass.) 88.

⁴ *Pearce v. Pearce*, 184 Ill. 289, 293; 56 N. E. 311; affirming 83 Ill. App. 77.

⁵ *Kimbrough v. Nelms*, 104 Ala. 554; 16 So. 619; *Webb v. Ballard*, 97 Ala. 584; 12 So. 106; *Bennett v. Knowles*, 111 Mich. 226; 69 N. W. 491; *Brown v. Bailey*, 159 Pa. St. 121; 28 Atl. 245.

⁶ *Hunkins v. Hunkins*, 65 N. H. 95; 18 Atl. 655.

oral contract of exchange out of the statute. So an oral rescission of a contract of exchange which has been itself partly performed by exchange of possession though deeds for the realty have not been delivered, is not within the statute where such oral rescission is partly performed by a restitution of original possession to one party.⁷ So if an oral release is accompanied by acts which are inconsistent with the continuance of the estate released and which are acted on by the adversary party, the release is binding though oral.⁸ Thus if A agrees in writing to sell realty to B, and B surrenders such option orally and induces A to make a new written contract with X for the sale of such realty, A's surrender is enforceable.⁹ On the other hand, an oral surrender of a written contract of sale and a re-delivery of the original contract is within the statute.¹⁰ The validity of such oral releases is due to principles of estoppel, to which the statute of frauds does not apply.

§721. Change of possession, payment of consideration and erection of valuable improvements.

If in reliance on the oral contract the vendee has taken possession of the realty sold,¹ has paid part or all of the consideration agreed upon and has made valuable improvements upon such realty, the contract is not within the statute in equity.²

⁷ *Boggs v. Bodkin*, 32 W. Va. 566; 5 L. R. A. 245; 9 S. E. 891.

⁸ *Fenner v. Blake* (1900), 1 Q. B. 426; *Wheeler v. Walden*, 17 Neb. 122; 22 N. W. 346; *Bedford v. Terhune*, 30 N. Y. 462; 86 Am. Dec. 394; *Telford v. Frost*, 76 Wis. 172; 44 N. W. 835; *Goldsmith v. Darling*, 92 Wis. 363; 66 N. W. 397; *Hutchins v. Da Costa*, 88 Wis. 371; 60 N. W. 427; *O'Donnell v. Brand*, 85 Wis. 97; 55 N. W. 154.

⁹ *Telford v. Frost*, 76 Wis. 172; 44 N. W. 835.

¹⁰ *Stewart v. McLaughlin*, 126 Mich. 1; 85 N. W. 266; 87 N. W. 218; modified on the question of

damages, 126 Mich. 6; *Maxon v. Gates*, 112 Wis. 196; 88 N. W. 54.

¹ What constitutes such possession is subsequently discussed. See §§ 726, 727.

² *Townsend v. Vanderwerker*, 160 U. S. 171; *Pembroke v. Logan*, — Ark. —; 74 S. W. 297; *Epps v. Story*, 109 Ga. 302; 34 S. E. 662; *McClure v. Otrich*, 118 Ill. 320; 8 N. E. 784; *Swales v. Jackson*, 126 Ind. 282; 26 N. E. 62; *Marsh v. Davis*, 33 Kan. 326; 6 Pac. 612; *Goodwin v. Smith*, 89 Me. 506; 36 Atl. 997; *Johnson v. Hurley*, 115 Mo. 513; 22 S. W. 492; *Schloetterer v. Wagner* (N. J. Eq.), 21

§722. Payment of purchase price as an essential element of part performance.

That payment of part or all of the purchase price is not an essential feature of part performance is evident from the rule which applies to oral promises to make gifts of realty. If, in reliance upon such oral promise, the donee takes possession of the realty and erects valuable improvements thereon, specific performance will be decreed, though the original promise was not a valid contract because of want of consideration and if a valuable consideration had existed, the statute of frauds would have applied to the original promise.¹

§723. Change of possession and payment of consideration.

If the vendee in reliance upon an oral contract for the sale of realty enters into possession under the contract of sale and pays part or all of the purchase price, these acts constitute such part performance as take the case out of the statute.¹ Thus

Atl. 863; Peay v. Seigler, 48 S. C. 496; 59 Am. St. Rep. 731; 26 S. E. 885; Humbert v. Brisbane, 25 S. C. 506; Gulf, etc., Ry. v. Settegast, 79 Tex. 256; 15 S. W. 228; Houston, etc., Ry. v. Wright, 15 Tex. Civ. App. 151; 38 S. W. 836; Peck v. Stanfield, 12 Wash. 101; 40 Pac. 635; McWhinnie v. Martin, 77 Wis. 182; 46 N. W. 118.

¹ Mackall v. Mackall, 135 U. S. 167; Manning v. Franklin, 81 Cal. 205; 22 Pac. 550; Todd v. Leach, 100 Ga. 227; 28 S. E. 43; Gaines v. Kendall, 176 Ill. 228; 52 N. E. 141; Dunn v. Berkshire, 175 Ill. 243; 51 N. E. 770; Starkey v. Starkey, 136 Ind. 349; 36 N. E. 287; Gilmore v. Asbury, 64 Kan. 383; 67 Pac. 864; Seavey v. Drake, 62 N. H. 393; Brown v. Prescott, 61 N. H. 643; Davis v. Portwood, 20 Tex. Civ. App. 548; 50 S. W. 615; Baker v. De Freese, 2 Tex. Civ. App. 524;

21 S. W. 963; Harrison v. Harrison, 36 W. Va. 556; 15 S. E. 87.

¹ Hodson v. Heuland (1896), 2 Ch. 428; Smallwood v. Sheppards (1895), 2 Q. B. 627; Townsend v. Vanderwerker, 160 U. S. 171; Merrill v. Witherby, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; Day v. Cohn, 65 Cal. 508; 4 Pac. 511; Eaton v. Whitaker, 18 Conn. 222; 44 Am. Dec. 586; Hatfield v. Miller, 123 Ind. 463; 24 N. E. 330; Gould v. Banking Co., 136 Ill. 60; 26 N. E. 497; reversing 36 Ill. App. 390; Caldwell v. Drummond, — Ia. —; 96 N. W. 1122; Winkleman v. Winkleman, 79 Ia. 319; 44 N. W. 556; Green v. Jones, 76 Me. 563; Dugan v. Gittings, 3 Gill. (Md.) 138; 43 Am. Dec. 306; Sigler v. Sigler, 108 Mich. 591; 66 N. W. 489; Walker v. Owen, 79 Mo. 563; Kelley v. Stanberry, 13 Ohio 408; Baker v. Hussey, 63 S. C. 551;

taking possession of realty and using a right of way under a deed conveying the realty only is part performance of an oral contract to convey the right of way.² In some jurisdictions change of possession and payment of the consideration are not sufficient as part performance if no valuable improvements are erected.³

§724. Change of possession and alteration in circumstances.

If the vendee takes possession of realty under an oral contract for its sale and alters his position in reliance on such contract, the contract is not within the statute.¹ Illustrations of the change of condition here referred are as follows: Giving a note and mortgage,² payment by vendee to a third person of a debt of vendor assumed by him as part of the purchase price of the realty sold,³ removal by vendee of fixtures and machinery at great expense from the realty sold,⁴ abandonment by vendee of his former employment, change of residence and support of the vendor,⁵ or the purchase of a mill site and the construction of a dam by promisee in reliance on an oral promise to allow him to flow the land of another.⁶

41 S. E. 758; *Rapley v. Klugh*, 40 S. C. 134; 18 S. E. 680; *Watts v. Witt*, 39 S. C. 356; 17 S. E. 822; *Griffith v. Abbott*, 56 Vt. 356; *Browder v. Phinney*, 30 Wash. 71; 70 Pac. 264.

² *Russell v. Napier*, 80 Ga. 77; 4 S. E. 857.

³ *Bradley v. Owsley*, 74 Tex. 69; 11 S. W. 1052; *Ann Berta Lodge v. Leveton*, 42 Tex. 18; *Robinson v. Davenport*, 40 Tex. 342; *Hickman v. Withers*, 83 Tex. 575; 19 S. W. 138; *Merchants' National Bank v. Eustis*, 8 Tex. Civ. App. 350; 28 S. W. 227.

⁴ *Andrew v. Babcock*, 63 Conn. 109; 26 Atl. 715; *Hatfield v. Miller*, 123 Ind. 463; 24 N. E. 330; *Rosen-*

berger v. Jones, 118 Mo. 559; 24 S. W. 203; *White v. Ingram*, 110 Mo. 474; 19 S. W. 827; *Olmstead v. Abbott*, 61 Vt. 281; 18 Atl. 315.

⁵ *Hatfield v. Miller*, 123 Ind. 463; 24 N. E. 330.

⁶ *Rosenberger v. Jones*, 118 Mo. 559; 24 S. W. 203.

⁷ *Andrew v. Babcock*, 63 Conn. 109; 26 Atl. 715.

⁸ *Hinkle v. Hinkle*, 55 Ark. 583; 18 S. W. 1049; see *Pike v. Pike*, 121 Mich. 170; 80 Am. St. Rep. 488; 80 N. W. 5; for similar facts.

⁹ *Olmstead v. Abbott*, 61 Vt. 281; 18 Atl. 315. For a similar state of facts see *Wilson v. Chalfant*, 15 Ohio 248; 45 Am. Dec. 574; *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638.

§725. Change of possession and erection of valuable improvements.

If the vendee, in reliance on the oral contract, has taken possession of the realty sold and has erected valuable improvements thereon the contract is not within the statute in equity.¹ Thus if a railroad company, in reliance upon an oral promise for a right of way, has taken possession of the right of way and laid a track thereon,² or the location of a side track has been altered under contract between the owners of the dominant and servient tenements,³ or a telegraph company builds its line along the right of way of a railroad in reliance on an oral contract with the railroad,⁴ or a toll-road enters on land under oral contract with the owner thereof and constructs its roads thereon,⁵ or if A agrees to give a tract of ground for school purposes in consideration that B and others will erect a school-house thereon, and they erect such school-house in reliance on such promise,⁶ or if A under an oral contract with B for an easement to flood B's lands constructs and uses a mill-dam on B's lands,⁷ such part performance withdraws the contract from the operation of

¹ Hoak v. Trust Co., 95 Fed. 41; 36 C. C. A. 645; reversing 89 Fed. 410; 32 C. C. A. 238; Latimer v. Hamill, — Ariz. —; 52 Pac. 364; Mooney v. Rowland, 64 Ark. 19; 40 S. W. 259; Moulton v. Harris, 94 Cal. 420; 29 Pac. 706; Calanchini v. Branstetter, 84 Cal. 249; 24 Pac. 149; Hall v. Ry., 143 Ill. 163; 32 N. E. 598; Horner v. McConnell, 158 Ind. 280; 63 N. E. 472; Weaver v. Shipley, 127 Ind. 526; 27 N. E. 146; Gilmore v. Asbury, 64 Kan. 383; 67 Pac. 864; Miner v. O'Harrow, 60 Mich. 91; 26 N. W. 843; Mournin v. Trainor, 63 Minn. 230; 65 N. W. 444; Hayes v. R. R., 108 Mo. 544; 18 S. W. 1115; Hunkins v. Hunkins, 65 N. H. 95; 18 Atl. 655; Luton v. Badham, 127 N. C. 96; 80 Am. St. Rep. 783; 53 L. R. A. 337; 37 S. E. 143; Cauble v. Worsham, 96 Tex.

86; 97 Am. St. Rep. 871; 70 S. W. 737; La Master v. Dickson, 91 Tex. 593; 45 S. W. 1; affirming 17 Tex. Civ. App. 473; 43 S. W. 911; Wanh-scaffé v. Pontoja (Tex. Civ. App.), 63 S. W. 663; Graves v. Smith, 7 Wash. 14; 34 Pac. 213; Mudgett v. Clay, 5 Wash. 103; 31 Pac. 424.

² Denver, etc., R. R. v. Ristine, 77 Fed. 58; 23 C. C. A. 13; Capps v. Ry., 21 Tex. Civ. App. 84; 50 S. W. 643.

³ Kent Furniture Mfg. Co. v. Long, 111 Mich. 383; 69 N. W. 657.

⁴ Western Union Telegraph Co. v. R. R., 86 Ill. 246; 29 Am. Rep. 28.

⁵ Uncanoonuck Road Co. v. Orr, 67 N. H. 541; 41 Atl. 665.

⁶ Martin v. McCord, 5 Watts. (Pa.) 493; 30 Am. Dec. 342.

⁷ Heiskell v. Cobb, 11 Heisk. (Tenn.) 638; and see Wilson v.

the statute. On the same principle where A agrees orally to sell to B a half interest in A's land, and A divides the rent with B, and B pays half the cost of certain improvements, these acts amount to part performance.⁸ In some jurisdictions the courts seem to hold that change of possession and the erection of valuable improvements do not constitute part performance so as to form a basis for specific performance⁹ though the party who erects such improvements may have compensation therefor¹⁰ whether he makes demand for such compensation in an action of ejectment brought by his vendor against him¹¹ or surrenders possession to vendor on demand therefor and sues in equity for compensation.¹²

§726. Change of possession.

Thus far the acts commonly relied on as part performance have been treated as to their effect in combination. A discussion of their effect separately still remains. If the vendee in reliance upon an oral contract for the sale of realty takes possession thereof, such mere change of possession is of itself sufficient to take the contract out of the statute.¹ Thus a ven-

Chalfant, 15 Ohio 248; 45 Am. Dec. 574; *Olmstead v. Abbott*, 61 Vt. 281; 18 Atl. 315.

⁸ *Shearer v. Gibson*, 123 Mich. 467; 82 N. W. 206.

⁹ *Thomas v. Kyles*, 54 N. C. 302. So under the California Statute where the contract is made by an agent without authority in writing. *Hall v. Wallace*, 88 Cal. 434; 26 Pac. 360.

¹⁰ *North v. Bunn*, 122 N. C. 766; 29 S. E. 776.

¹¹ *Pass v. Brooks*, 125 N. C. 129; 34 S. E. 228; *Albee v. Griffin*, 22 N. C. 9.

¹² *Luton v. Badham*, 127 N. C. 96; 80 Am. St. Rep. 783; 53 L. R. A. 337; 37 S. E. 143.

¹ *Bullion, etc., Bank v. Otto*, 59 Fed. 256; *Kimbrough v. Nelms*, 104

Ala. 554; 16 So. 619; *Trammell v. Craddock*, 100 Ala. 266; 13 Ala. 911; *Houston v. Hilton*, 67 Ala. 374; *Lacy v. Gard*, 60 Ill. App. 72; *Puterbaugh v. Puterbaugh*, 131 Ind. 288; 15 L. R. A. 341; 30 N. E. 519; *Ague v. Seitsinger*, 85 Ia. 305; 52 N. W. 228; *Anderson v. Canter*, 10 Kan. App. 167; 63 Pac. 285; *O'Grady v. O'Grady*, 162 Mass. 290; 38 N. E. 196; *Pike v. Pike*, 121 Mich. 170; 80 N. W. 5; *Bennett v. Knowles*, 111 Mich. 226; 69 N. W. 491; *Toan v. Pline*, 60 Mich. 385; 27 N. W. 557; *Weed v. Terry*, 2 Dougl. (Mich.) 344; 45 Am. Dec. 257; *Archer v. Helm*, 69 Miss. 730; 11 So. 3; *Bless v. Jenkins*, 129 Mo. 647; 31 S. W. 938; *Carney v. Carney*, 95 Mo. 353; 8 S. W. 729; *Smith v. Pierce*, 65 Vt. 200; 25 Atl. 1092;

dee² or lessee³ in possession under the contract cannot resist payment under the contract. This may, however, be looked upon in this sense as full performance on the part of the vendor: though it is not strictly speaking full performance, as the legal title has not passed. So a note given in consideration of an oral contract to devise realty is enforceable if the heirs of the devisee are in possession of the realty contracted for.⁴ Change of possession has, however, been held insufficient if the contract is to be enforced against the vendee.⁵ Some jurisdictions hold that change of possession is not of itself sufficient to keep the statute of frauds from applying, if such change of possession does no injury to the vendee and confers no benefit on the vendor.⁶

§727. Elements of change of possession.

Possession, in order to constitute part performance, must be taken under and by virtue of the contract and must be referable solely to such contract.¹ If the vendee is in possession when the contract is made and merely retains his former possession, such possession does not constitute part performance.² Thus

Brundage v. Loan Association, 11 Wash. 277; 39 Pac. 666; *Reinhart v. Gregg*, 8 Wash. 191; 35 Pac. 1075; *Miller v. Lorentz*, 39 W. Va. 160; 19 S. E. 391; *Boggs v. Bodkin*, 32 W. Va. 566; 5 L. R. A. 245; 9 S. E. 891.

² *Houston v. Hilton*, 67 Ala. 374; *Schierman v. Beckett*, 88 Ind. 52.

³ *Kriz v. Peege*, 119 Wis. 105; 95 N. W. 108.

⁴ *Ballard v. Camplin*, 161 Ind. 16; 67 N. E. 505.

⁵ *Bennett v. Dyer*, 89 Me. 17; 35 Atl. 1004.

⁶ *Eshleman v. Vineyard Co.*, 102 Cal. 199; 36 Pac. 579.

¹ *Bromley v. Aday*, 70 Ark. 351; 68 S. W. 32; *Von Trotha v. Bamberger*, 15 Colo. 1; 24 Pac. 883; *Allan v. Bemis*, 120 Ia. 172; 94 N. W. 560; *Lowery v. Lowery*, 117

Ia. 704; 89 N. W. 1118; *Hartshorn v. Smart*, 67 Kan. 543; 73 Pac. 73; *Perkins v. Perkins*, 181 Mass. 401; 63 N. E. 926; *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769; 11 L. R. A. 323; 14 S. W. 209; *Gladwell v. Holcomb*, 60 O. S. 427; 71 Am. St. Rep. 724; 54 N. E. 473; *Boozar v. Teague*, 27 S. C. 348; 3 S. E. 551; *Gallagher v. Gallagher*, 31 W. Va. 9; 5 S. E. 297; *Cutler v. Babcock*, 81 Wis. 195; 29 Am. St. Rep. 882; 51 N. W. 420; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 51 N. W. 420.

² *Lake Erie, etc., Ry. v. Ry.*, 86 Fed. 840; *Shovers v. Warrick*, 152 Ill. 355; 38 N. E. 792; *Swales v. Jackson*, 126 Ind. 282; 26 N. E. 62; *Wilmer v. Farris*, 40 Ia. 309; *Billingslea v. Ward*, 33 Md. 48; *Messmore v. Cunningham*, 78 Mich. 623;

possession of land by one who takes possession as lessee is not such part performance of a subsequent oral contract between himself and his lessor as vests an interest in land for the new term in the lessee;³ nor is it part performance of a contract to convey such land;⁴ nor is possession retained by a judgment debtor of realty sold on execution part performance of a contract between himself and a purchaser at the execution sale.⁵ So possession of realty by one to whom the owner had promised to devise it is not part performance of such contract where possession was not taken under such contract.⁶ An assignment of a lessee's interest in the unexpired term and his assignee's taking possession under such assignment do not constitute part performance of an oral contract between the lessee, his assignee and his lessor, by which the lessor in consideration of the assignment agrees to renew the lease.⁷ A's withdrawal of an application for a patent for a given mining claim and abandonment of a contest of B's application for a patent for the same claim is not a change of possession within the meaning of this rule.⁸

To constitute part performance the possession taken must be such as shows the existence of some contract for conveyance. Residence in a dwelling by one who might have been so resid-

44 N. W. 145; *Bigler v. Baker*, 40 Neb. 325; 24 L. R. A. 255; 58 N. W. 1026; *Gladwell v. Holcomb*, 60 O. S. 427; 71 Am. St. Rep. 724; 54 N. E. 473; *Lefferson v. Dallas*, 20 O. S. 68; *Crawford v. Wick*, 18 O. S. 190; 98 Am. Dec. 103; *Armstrong v. Kattenhorn*, 11 Ohio 265; *Jones v. Peterman*, 3 S. & R. (Pa.) 543; 8 Am. Dec. 672; *Ellison v. Torpin*, 44 W. Va. 414; 30 S. E. 183.

³ *Shoyers v. Warrick*, 152 Ill. 355; 38 N. E. 792; *Swales v. Jackson*, 126 Ind. 282; 26 N. E. 62; *Hutton v. Doysee*, 116 Ia. 13; 89 N. W. 79; *Messmore v. Cunningham*, 78 Mich. 623; 44 N. W. 145; *Bigler v. Baker*, 40 Neb. 325; 24

L. R. A. 255; 58 N. W. 1026; *Armstrong v. Kattenhorn*, 11 Ohio 265.

⁴ *Hutton v. Doysee*, 116 Ia. 13; 89 N. W. 79.

⁵ *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769; 11 L. R. A. 323; 14 S. W. 209 (overruling on this point, *Simmons v. Headlee*, 94 Mo. 482; 7 S. W. 20; *Emmel v. Headlee* (Mo.), 7 S. W. 22). See *Lewis v. North*, 62 Neb. 552; 87 N. W. 312.

⁶ *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

⁷ *Koch v. Building Association*, 137 Ill. 197; 27 N. E. 530; affirming, 35 Ill. App. 465.

⁸ *Ducie v. Ford*, 138 U. S. 587.

ing by the permission of the owner, such as his wife,⁹ or his mistress,¹⁰ or guest,¹¹ is not part performance. Possession under circumstances which suggest a lease is not part performance of a contract of sale. Thus, A's possession of realty for the sole purpose of raising crops thereon and his payment to B, the owner, of the usual cropper's rent — one-third of the crop — is not part performance of an oral contract by B to sell such realty to A.¹² So using a vacant lot to store bricks temporarily is not such possession as constitutes part performance,¹³ nor is putting some fence posts and lumber on the land.¹⁴

To constitute part performance the possession must be exclusive of the vendor's. Possession in common with the vendor is not sufficient to take the case out of the statute,¹⁵ as where plaintiff had used a right of way jointly with defendant under an oral contract.¹⁶ Possession must be taken with the knowledge of the vendor in order to constitute part performance.¹⁷

If a tenant in possession enters into an oral contract with his lessor for a renewal of the lease upon different terms, as on an increased rent,¹⁸ or a diminished rent,¹⁹ retention of possession

⁹ *Cooley v. Lobdell*, 153 N. Y. 596; 47 N. E. 783. So where she remains in possession after he has left the state. *Erringdale v. Riggs*, 148 Ill. 403; 36 N. E. 93.

¹⁰ *Van Epps v. Redfield*, 69 Conn. 104; 36 Atl. 1011.

¹¹ *Davis v. Moore*, 9 Rich. Law (S. C.) 215.

¹² *Bresnahan v. Bresnahan*, 71 Minn. 1; 73 N. W. 515.

¹³ *Hunt v. Lipp*, 30 Neb. 469; 46 N. W. 632.

¹⁴ *Foster v. Maginnis*, 89 Cal. 264; 26 Pac. 828.

¹⁵ *Lake Erie, etc., Co. v. Ry.*, 86 Fed. 840; *Gorham v. Dodge*, 122 Ill. 528; 14 N. E. 44; *Johns v. Johns*, 67 Ind. 440; *Larison v. Polhemus*, 36 N. J. Eq. 506; *Newcomb v. Cox*, 27 Tex. Civ. App. 583; 66 S. W. 338; *Munk v. Weidner*, 9 Tex. Civ. App. 491; 29 S. W. 409.

¹⁶ *Long v. Mayberry*, 96 Tenn. 378; 36 S. W. 1040.

¹⁷ *Foster v. Maginnis*, 89 Cal. 264; 26 Pac. 828; *Barnett v. Glass Co.*, 12 Ind. App. 631; 40 N. E. 1102; *Carrolls v. Cox*, 15 Ia. 455; *Pawlak v. Granowski*, 54 Minn. 130; 55 N. W. 831; *Cockrell v. McIntyre*, 161 Mo. 59; 61 S. W. 648; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; *Groucher v. Martin*, 9 Watts (Pa.) 106.

¹⁸ *Miller v. Sharp* (1899), 1 Ch. 622; *Moore v. Harter*, 67 O. S. 250; 65 N. E. 883.

¹⁹ *Doherty v. Doe*, 18 Colo. 456; 33 Pac. 165. (In this case the lessee refused to perform unless the rent was reduced, and the landlord agreed orally on a reduction of rent. This oral agreement was held to be a waiver of the lease, and the retention of possession by the ten-

and payment of the rent due under the new contract are held to take the lease out of the statute; at any rate as concerns the time during which the tenant retained possession. The courts are not, however, unanimous on this question. Thus where the tenant held over after the expiration of his lease under an oral contract with his landlord for a reduction in rent, and paid such reduced rent, it was held that the contract was within the statute and that the landlord could recover the difference between the original rent, and the rent actually paid under the oral contract.²⁰

§728. Erection of valuable improvements.

If the vendee is in possession when the contract for the sale of the realty is made the subsequent construction by him of valuable improvements in reliance on such contract may amount to part performance.¹ Such improvements, however, must be made with the consent of the vendor.² They must be of substantial benefit to the property. Repairs,³ improvements in the ordinary course of husbandry,⁴ or the setting out of flowers and shrubbery,⁵ are not valuable improvements in this sense. The improvements must be constructed at the expense of the vendee. If made by a third person,⁶ or by vendee at the expense

ant, and acceptance by the lessor of the reduced rent were held to take the case out of the statute.)

²⁰ *Goldsborough v. Gable*, 140 Ill. 269; 15 L. R. A. 294; 29 N. E. 722; reversing, 36 Ill. App. 363. (It was further held that there was no consideration for the promise to reduce the rent.)

¹ *Manly v. Howlett*, 55 Cal. 94; *Morrison v. Herrick*, 130 Ill. 631; 22 N. E. 537; affirming, 27 Ill. App. 339; *Drum v. Stevens*, 94 Ind. 181; *Bard v. Elston*, 31 Kan. 274; 1 Pac. 565; *Dawson v. McFadden*, 22 Neb. 131; 34 N. W. 338; *Pugh v. Spicknall*, 43 Or. 489; 73 Pac. 1020.

² *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252.

³ *Holland v. Atkinson*, 112 Ga. 346; 37 S. E. 380; *Gallagher v. Gallagher*, 31 W. Va. 9; 5 S. E. 297.

⁴ *Emmel v. Hayes*, 102 Mo. 186; 22 Am. St. Rep. 769; 11 L. R. A. 323; 14 S. W. 209.

⁵ *Cooley v. Lobdell*, 153 N. Y. 596; 47 N. E. 783.

⁶ *Abbott v. Baldwin*, 61 N. H. 583. Here the improvements were made by one to whom vendee had conveyed the land, and who reconveyed it to vendee after making such improvements.

of the vendor,⁷ they do not constitute part performance. The vendee must be prejudiced by the making of such improvements. Thus, if a tenant in common buys his co-tenant's share by oral contract and improves the tract, such improvements do not amount to part performance where it is possible to partition the tract so as to set them off to the party making them.⁸ According to some authorities improvements for the value of which the vendee has been fully compensated, as by the use of the land,⁹ do not amount to part performance. Other authorities hold that valuable improvements amount to part performance even though the party making them may be fully compensated by the rents and profits of the realty.¹⁰ Payment of rent by the party in possession who makes the valuable improvements in question may rebut any presumption that would otherwise arise that such improvements were made in performance of a contract of sale.¹¹

§729. Contracts locating boundaries.

If the boundary between two adjoining owners of realty is in dispute, an oral agreement between them locating such boundary line is not within this clause of the statute,¹ according to

⁷ *Geer v. Goudy*, 174 Ill. 514; 51 N. E. 623.

⁸ *Tunison v. Bradford*, 49 N. J. Eq. 210; 22 Atl. 1073.

⁹ *Gallagher v. Gallagher*, 31 W. Va. 9; 5 S. E. 297.

¹⁰ *La Master v. Dickson*, 91 Tex. 593; 45 S. W. 1; affirming, 17 Tex. Civ. App. 473; 43 S. W. 911.

¹¹ *Allan v. Bemis*, 120 Ia. 172; 94 N. W. 560.

¹ *Jenkins v. Trager*, 40 Fed. 726; *Sherman v. King*, — Ark. —; 72 S. W. 571; *Dierssen v. Nelson*, 138 Cal. 394; 71 Pac. 456; *Cavanaugh v. Jackson*, 91 Cal. 580; 27 Pac. 931; *Farr v. Woolfolk*, 118 Ga. 277; 45 S. E. 230; *Grigsby v. Combs* (Ky.), 21 S. W. 37; *Smith*

v. Dudley, 1 Litt. (Ky.) 66; 13 Am. Dec. 222; *May v. Baskin*, 12 Smedes & M. (Miss.) 428; *Diggs v. Kurtz*, 132 Mo. 250; 53 Am. St. Rep. 488; 33 S. W. 815; *Turner v. Baker*, 64 Mo. 218; 27 Am. Rep. 226; *Hitchcock v. Libby*, 70 N. H. 399; 47 Atl. 269; *Terry v. Chandler*, 16 N. Y. 354; 69 Am. Dec. 707; *Vosburgh v. Teator*, 32 N. Y. 561; *Hills v. Ludwig*, 46 O. S. 373; 24 N. E. 596 (obiters in *Bobo v. Richmond*, 25 O. S. 115, and in *McAfferly v. Conover*, 7 O. S. 99; 70 Am. Dec. 57, are to the same effect); *Walker v. Devlin*, 2 O. S. 593; *Lennox v. Hendricks*, 11 Or. 33; 4 Pac. 515; *Nichol v. Lytle*, 4 Yerg. (Tenn.) 456; 26 Am. Dec. 240;

the weight of authority, at least where possession is taken thereunder.²

In some jurisdictions mere occupation under an oral contract locating a disputed boundary is held insufficient.³ Even in such jurisdictions occupation and making valuable improvements,⁴ or occupation for the period of limitations by virtue of the contract⁵ is sufficient.

If, on the other hand, such boundary is not in dispute, a contract between two adjoining land-owners changing the location of the line is a contract for the transfer of the realty between the true line and the line as established, and is within the statute.⁶

§730. Acts of part performance not involving possession of realty.

It is often said by the courts that there can be no part performance of an oral contract for the sale of realty which will prevent the statute of frauds from applying unless possession of the realty sold is taken under the contract.¹ While this is undoubtedly true in these cases, since no other acts were shown

Gilchrist v. McGee, 9 Yerg. (Tenn.) 455; *Leconte v. Toudouze*, 82 Tex. 208; 27 Am. St. Rep. 870; 17 S. W. 1047; *Harris v. Crenshaw*, 3 Rand. (Va.) 14.

² *Anderson v. Canter*, 10 Kan. App. 167; 63 Pac. 285; *Archer v. Helm*, 69 Miss. 730; 11 So. 3.

³ *Strickley v. Hill*, 22 Utah 257; 83 Am. St. Rep. 786; 62 Pac. 893. (But in this case the evidence left it in doubt whether any contract had in fact been made. If it had, it was by one co-owner who could not bind the others.)

⁴ *Dupont v. Starring*, 42 Mich. 492; 4 N. W. 190; *Joyce v. Williams*, 26 Mich. 332; *Smith v. Hamilton*, 20 Mich. 433; 4 Am. Rep. 398.

⁵ *Schoonmaker v. Doolittle*, 118 Ill. 605; 8 N. E. 839; *Bobo v. Rich-*

mond, 25 O. S. 115; *Davis v. Russell*, 142 Pa. St. 426; 21 Atl. 870; *Larson v. Onesite*, 21 Utah 38; 59 Pac. 234; *McMaster v. Morse*, 18 Utah 21; 55 Pac. 70.

⁶ *Nathan v. Dierssen*, 134 Cal. 282; 66 Pac. 485; *Smith v. Dudley*, 1 Litt. (Ky.) 66; 13 Am. Dec. 222; *Vosburgh v. Teator*, 32 N. Y. 561; *Mynatt v. Smart* (Tenn. Ch. App.), 48 S. W. 270; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 157; 21 L. R. A. 776; 54 N. W. 496.

¹ *Geer v. Goudy*, 174 Ill. 514; 51 N. E. 623; *Dickens v. McKinley*, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; *Grant v. Ramsey*, 7 O. S. 157; *Moore v. Beasley*, 3 Ohio 294; *Waggoner v. Speck*, 3 Ohio 292; *Derr v. Ackerman*, 182 Pa. St. 591; 38 Atl. 475.

which could amount to part performance, and while in the greater number of cases, change of possession is the only act of part performance shown, it is not safe to lay down so sweeping a proposition as law. On the one hand, acts which are collateral to the contract for the sale of realty,² such as obtaining tenants,³ or paying taxes on the realty and listing it for sale with real-estate agents,⁴ do not constitute part performance.

On the other hand there are many cases in which the doctrine of part performance has been applied though possession of realty was not taken under the contract. In some jurisdictions, at least, if the act done by one party to the contract as part performance thereof is of such a kind that he cannot be restored to his original position even by compensation in money, such act is treated as part performance, taking the case out of the statute, and the other party may be compelled in equity to perform the oral contract on his part specifically, even although the act which he has undertaken to do is within the statute.⁵ Thus, where in consideration of A's promise to convey realty, B agrees to and does withdraw exceptions to the account of an administratrix and allow the account to be confirmed,⁶ or dismisses a divorce suit and resumes marital relations with promisor,⁷ A's promise is held not to be within the statute. Thus, where A, the vendor of certain realty, agreed with B, the purchaser thereof, to release his lien in two-thirds of the realty on consideration of B's reconveying the other third of the realty and paying a certain sum of money, and in reliance on this contract C lends B such amount of money, B being insolvent and unable to repay it, such part performance was held to take the case out of the statute as far as C's rights were affected.⁸

² Colgrove v. Solomon, 34 Mich. 494; Nibert v. Baghurst, 47 N. J. Eq. 201; 20 Atl. 252.

³ Russell v. Briggs, 165 N. Y. 500; 53 L. R. A. 556; 59 N. E. 303 (and even collecting rents).

⁴ Harney v. Burhans, 91 Wis. 348; 64 N. W. 1031.

⁵ Spencer v. Spencer, 25 R. I. 724; 55 Atl. 637; *In re Field's Es-*

tate, 33 Wash. 63; 73 Pac. 768.

⁶ Hancock v. Melloy, 187 Pa. St. 371; 41 Atl. 313.

⁷ Barbour v. Barbour, 49 N. J. Eq. 429; 24 Atl. 227.

⁸ Johnson v. Portwood, 89 Tex. 235; 34 S. W. 596, 787 (citing on this point *Malins v. Brown*, 4 N. Y. 403).

An extreme example of this rule is found in a case in which A had conveyed realty to his wife in reliance on her promise to reconvey to him, and it was held by a divided court that performance on the part of the husband took the case out of the statute.⁹ An illustration of the general rule that change of possession of realty is a necessary element of part performance, and of the qualification thereto already discussed is found in contracts to devise realty. If the consideration for the promise to devise is the surrender of the custody of a child to the promisor and its adoption by him, the weight of authority is that full performance by the surrender of the custody of the child and its adoption, whether formal or informal does not prevent the statute from operating.¹⁰ So a contract between two sisters to make mutual wills is not withdrawn from the operation of the statute by making such wills, where one of the wills is revoked by the subsequent marriage of the testatrix.¹¹ So performance of personal services as consideration for a promise to devise realty does not withdraw the contract from the operation of the statute.¹²

On the other hand in jurisdictions which recognize the qualification that if the party performing cannot be restored to his former condition even by money damages, he may have specific

⁹ *Haussman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; 22 Atl. 1065. Such contract was said to be "fully performed by the other contracting party to it and therefore taken out of its operation." This case is clearly contrary to the weight of authority: see § 731. It cannot rest on any doctrine of fraud as the wife had made a conveyance at her husband's request, which was defective because he did not join with her in the deed, and accordingly the sole reason for non-performance on her part was his ignorance of the law of conveyancing.

¹⁰ *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379; 29 Atl. 15;

Dicken v. McKinley, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; *Pond v. Sheehan*, 132 Ill. 312; 8 L. R. A. 414; 23 N. E. 1018; *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; *Shahan v. Swan*, 48 O. S. 25; 29 Am. St. Rep. 517; 26 N. E. 222.

¹¹ *Hale v. Hale*, 90 Va. 728; 19 S. E. 739.

¹² *Sturges v. Taylor* (N. J. Eq.), 20 Atl. 369; *Richardson v. Orth*, 40 Or. 252; 66 Pac. 925; 69 Pac. 455; *Kling v. Bordner*, 65 O. S. 86; 61 N. E. 148; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

performance in equity even of an oral contract, a contract to devise realty has been held to be taken out of the statute by the performance by the adversary party of his agreement to live with and care for testator, and render personal services to him,¹³ or by his performance of his promise to surrender the custody of a child,¹⁴ or by allowing the adversary party to name a child.¹⁵ On the same principle a contract between several brothers and sisters to whom land descended as tenants in common that they would hold it as joint tenants, that on the death of each it should vest in the survivors and that on the death of the last survivor it should descend to the child of the only one of them who was married, was held to be withdrawn from the operation of the statute by the performance of the contract until invested in the last survivor.¹⁶ Many of the cases here given are cases of full performance on one side, leaving an act to be done on the other side, which is one of those named in this section of the statute. While in one sense they should be discussed under another heading¹⁷ they are discussed here partly because the general principles that control them are in cases like this the same in full performance on one side and in part performance; and partly because the courts often refer to them as cases of part performance.

¹³ *Owens v. McNally*, 113 Cal. 444; 33 L. R. A. 369; 45 Pac. 710; *Svábburg v. Fosseen*, 75 Minn. 350; 74 Am. St. Rep. 490; 43 L. R. A. 427; 78 N. W. 4; *Hiatt v. Williams*, 72 Mo. 214; 37 Am. Rep. 438; *Teske v. Dittberner*, — Neb. —; 98 N. W. 57; modifying, 65 Neb. 167; 91 N. W. 181; which reversed, 63 Neb. 607; 88 N. W. 658; *Brinton v. Van Cott*, 8 Utah 480; 33 Pac. 218.

¹⁴ *Jones v. Comer (Ky.)*, 77 S. W. 184; denying rehearing (Ky.), 76 S. W. 392; *Nowack v. Berger*, 133 Mo. 84; 54 Am. St. Rep. 663;

31 L. R. A. 810; 34 S. W. 489; *Wright v. Wright*, 99 Mich. 170; 23 L. R. A. 196; 58 N. W. 54; *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685; 25 L. R. A. 207; 59 N. W. 788.

¹⁵ *Daily v. Minnick*, 117 Ia. 563; 60 L. R. A. 840; 91 N. W. 913. Under a statute making payment of consideration part performance.

¹⁶ *Murphy v. Whitney*, 140 N. Y. 541; 24 L. R. A. 123; 35 N. E. 930. Hence the child to whom the property is to descend can enforce the contract against the last survivor.

¹⁷ See § 714.

§731. Payment of consideration.

It has already been stated that full payment of the purchase price alone will not take the contract out of the statute.¹ Still less will payment of part of the purchase price take the case out of the statute.² Thus, where A bought standing timber on B's land and paid part of the purchase price, such payment did not take the case out of the statute.³ Even under a contract to exchange realty, conveyance of one tract is not part performance with reference to the contract to convey the other.⁴

By special statute in some states as in Alabama the statute of frauds does not apply to contracts for the sale of realty where the vendee is in possession and has paid part or all of the purchase price.⁵ Neither possession nor payment of the purchase price will, without the other, prevent the application of the statute.⁶ Under such statute, however, it is not necessary to take the case out of the statute that the purchaser take possession under the contract. If he is in possession before the contract of sale, as where he holds under a lease⁷ and pays part of the purchase price under the contract, the statute of frauds does not apply. It is not necessary that the purchase price be paid at the same time that possession is taken.⁸ Performance by the vendee of the covenants on his part to be performed, such as conveying realty⁹ or personalty,¹⁰ or giving notes,¹¹ or per-

¹ See § 716.

² *Thompson v. Coal Co.*, 135 Ala. 630; 93 Am. St. Rep. 49; 34 So. 31; *Nelson v. Mfg. Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So. 695; *Temple v. Johnson*, 71 Ill. 13; *Felton v. Smith*, 84 Ind. 485; *Leis v. Potter*, — Kan. —; 74 Pac. 622; *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. 252; *Bruley v. Garvin*, 105 Wis. 625; 48 L. R. A. 839; 81 N. W. 1038; *Harney v. Burhans*, 91 Wis. 348; 64 N. W. 1031.

³ *Bruley v. Garvin*, 105 Wis. 625; 48 L. R. A. 839; 81 N. W. 1038.

⁴ *Riddell v. Riddell* (Neb.), 97 N. W. 609.

⁵ *Price v. Bell*, 91 Ala. 180; 8

So. 565; *McLure v. Tennille*, 89 Ala. 572; 8 So. 60.

⁶ *McKinnon v. Mixon*, 128 Ala. 612; 29 So. 690; *Nelson v. Mfg. Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So. 695; *Manning v. Pippen*, 95 Ala. 537; 11 So. 56.

⁷ *Franke v. Riggs*, 93 Ala. 252; 9 So. 359.

⁸ *Louisville, etc., Ry. v. Philyaw*, 94 Ala. 463; 10 So. 83.

⁹ *Webb v. Ballard*, 97 Ala. 584; 12 So. 106.

¹⁰ *Powell v. Higley*, 90 Ala. 103; 7 So. 440.

¹¹ *Logerfelt v. McKie*, 100 Ala. 430; 14 So. 281.

forming services¹² in consideration of the conveyance of the realty bargained for is such part performance as renders the contract enforceable.

In other states, as in Iowa, the statute with reference to contracts for the sale of realty is substantially the same as that for sales of personalty¹³ and by its terms the statute of frauds does not apply where there has been either possession of realty under the contract or payment of part or all of the "purchase money."¹⁴ In the meaning of the statute the "purchase money" may consist of money,¹⁵ of notes, and a mortgage securing them,¹⁶ of allowing the promisor to name a child,¹⁷ of the rendition of services as of an attorney,¹⁸ or furnishing board and care.¹⁹ Grantee's payment of a debt of an intestate ancestor of grantor, as the purchase price of realty sold under oral contract, which payment relieves land set apart to another heir of incumbrances thereon has been held to be part performance.²⁰ A deposit of money in a bank, subject to the order of vendor when the title becomes perfect,²¹ or an advance to vendor by his own agent under an arrangement with the vendee,²² do not constitute payment of the "purchase money" within the meaning of the statute.

§732. Omission to act, as part performance.

Mere omission to act cannot amount to part performance.¹ Thus, where a vendor who has reserved the right of taking

¹² East Tennessee, etc., Ry. v. Davis, 91 Ala. 615; 8 So. 349.

¹³ See § 706.

¹⁴ Pressley v. Roe, 83 Ia. 545; 50 N. W. 44.

¹⁵ Niles v. Welsh, 89 Ia. 491; 56 N. W. 657; Pressley v. Roe, 83 Ia. 545; 50 N. W. 44.

¹⁶ Devin v. Eagleson, 79 Ia. 269; 44 N. W. 545.

¹⁷ Daily v. Minnick, 117 Ia. 563; 60 L. R. A. 840; 91 N. W. 913.

¹⁸ Mitchell v. Colby, 95 Ia. 202; 35 L. R. A. 379; 63 N. W. 769.

¹⁹ Harlan v. Harlan, 102 Ia. 701; 72 N. W. 286.

²⁰ Oliver v. Powell, 114 Ga. 592; 40 S. E. 826.

²¹ Query v. Liston, 92 Ia. 288; 60 N. W. 524. So where such deposit was made without the knowledge or assent of the vendor. Mathes v. Bell, 121 Ia. 722; 96 N. W. 1093.

²² Benedict v. Bird, 103 Ia. 612; 72 N. W. 768.

¹ Augusta Southern R. R. v. Smith, etc., Co., 106 Ga. 864; 33 S. E. 28.

growing timber off the land sold for a certain time, subsequently makes an oral contract with his vendee for an extension of such time, his omission to take the timber off in the time specified in the original contract, though in reliance on the oral contract is not part performance.² If, however, omission to act amounts to a release of a property right, as where a widow refrains from claiming any interest in her deceased husband's estate under oral contract with the heirs,³ the contract price of such interest thus waived may be recovered.

§733. Part performance as applied to contracts not to be performed within the year.

The doctrine of part performance has been considered thus far solely with reference to contracts for an interest in realty. Whether the doctrine has any application to the other classes of contracts included in this section of the statute is a question upon which there is some diversity of opinion. The weight of authority is that part performance is a doctrine of equity which applies solely to contracts for the sale of some interest in realty.¹ With reference to contracts which cannot be performed within a year from the date of the making thereof, we have already seen that some courts hold that this clause of the statute has no application to contracts which are to be performed on one side within the year while performance on the other side is to last beyond the year.² Thus, if A lends B money to be re-paid at

² Clark v. Guest, 54 O. S. 298; 43 N. E. 862.

³ Andrews v. Broughton, 84 Mo. App. 640. But neither specific performance nor damages for breach of such a contract could be had. 78 Mo. App. 179.

¹ Maddison v. Alderson, 8 App. Cas. 467.

² Miles v. Estate Co., L. R. 32 Ch. Div. 266; Donellan v. Read, 3 Barn. & Ad. 899; McDonald v. Crosby, 192 Ill. 283; 61 N. E. 505; Curtis v. Sage, 35 Ill. 22; Hodgens

v. Shultz, 92 Ill. App. 84; Smalley v. Greene, 52 Ia. 241; 35 Am. Rep. 267; 3 N. W. 78; Atchison, etc., R. R. v. English, 38 Kan. 110; 16 Pac. 82; Dant v. Head, 90 Ky. 255; 29 Am. St. Rep. 369; 13 S. W. 1073; Kendall v. Garneau, 55 Neb. 403; 75 N. W. 852; Perkins v. Clay, 54 N. H. 518; Berry v. Doremus, 30 N. J. L. 399; Towsley v. Moore, 30 O. S. 184; 27 Am. Rep. 434; Duffee v. O'Brien, 16 R. I. 213; 14 Atl. 857; Seddon v. Rosenbaum, 85 Va. 928; 3 L. R. A. 337; 9 S. E. 326;

an interval greater than a year, A is allowed to enforce the contract.³

While performance by one party within the year removes such contracts from the operation of the statute in jurisdictions where this theory obtains, and while such performance is sometimes explained as if it were part performance,⁴ it is perhaps more accurate to say that these courts look on such contracts as not within the meaning of the statute. Performance within the year makes the executory part of the contract enforceable at law; an effect which technical part performance does not have. Thus, where A promises to give two thousand dollars to his granddaughter when she comes of age in consideration of her parents' relinquishing a defence to notes signed by them and held by A, performance by the parents within the year takes the case out of the statute.⁵

Even these courts hold that if the contract is not to be performed by either party within the year, part performance does not take the case out of the statute.⁶ Thus, an oral contract made on February 15, 1895, to issue a fire insurance policy for one year on the 24th of the next June and annually thereafter on the 24th of each June until otherwise ordered by the insured is not taken out of the statute by issuance of such policy for two consecutive years.⁷

It must be remembered that some courts hold that full performance on one side within the year does not withdraw the

Grace v. Lynch, 80 Wis. 166; 49 N. W. 751.

³ McDonald v. Crosby, 192 Ill. 283; 61 N. E. 505.

⁴ Piper v. Fosher, 121 Ind. 407; 23 N. E. 269; Westfall v. Perry (Tex. Civ. App.), 23 S. W. 740.

⁵ Piper v. Fosher, 121 Ind. 407; 23 N. E. 269.

⁶ Shumate v. Farlow, 125 Ind. 359; 25 N. E. 432; Lowman v. Sheets, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351; Wolke v. Fleming, 103 Ind. 105; 53 Am. Rep. 495; 2 N. E. 325; Clark County v.

Howell, 21 Ind. App. 495; 52 N. E. 769; Powell v. Crampton, 102 Ia. 364; 71 N. W. 579; Burden v. Knight, 82 Ia. 584; 48 N. W. 985; Thorp v. Bradley, 75 Ia. 50; 39 N. W. 177; Osborne v. Kimball, 41 Kan. 187; 21 Pac. 163; Thisler v. Mackey, 5 Kan. App. 217; 47 Pac. 175; Klein v. Ins. Co. (Ky.), 57 S. W. 250; Lally v. Lumber Co., 85 Minn. 257; 88 N. W. 846; Hillhouse v. Jennings, 60 S. C. 373; 38 S. E. 599.

⁷ Klein v. Ins. Co. (Ky.), 57 S. W. 250.

contract from the operation of the statute where the other side has agreed to perform acts which cannot be performed within the year.⁸ So an oral agreement by A, a guarantor, of an overdue note with B, the holder thereof, that if B would bid the property in and hold it till the redemption period had expired (which would carry performance past the year) A would pay the amount due on the notes and the costs of foreclosure if the property were not then redeemed, is not taken out of the statute by performance by B.⁹

If a contract is a contract for some interest in realty and also one which cannot be performed within the year, as a contract for a lease for more than one year, the courts are divided as to whether part performance can take it out of the statute. Some courts hold that part performance takes such contract out of the statute;¹⁰ and others that it does not.¹¹

§734. Part performance as applied to contracts in consideration of marriage.

A contract in consideration of marriage is not taken out of the statute, according to the weight of authority, by the marriage of the party to whom the promise is made in reliance on such promise.¹ There are some cases, how-

⁸ *Jackson Iron Co. v. Concentrating Co.*, 65 Fed. 298; 12 C. C. A. 636; *De Bord v. Holcomb*, 13 Colo. App. 161; 57 Pac. 548.

⁹ *Veazie v. Morse*, 67 Minn. 100; 69 N. W. 637.

¹⁰ So held in an action for rent, *Eubank v. Hardware Co.*, 105 Ala. 629; 17 So. 109. And in an action to recover the realty, *Dahn v. Barlow*, 93 Ala. 120; 9 So. 598.

¹¹ *Powell v. Crampton*, 102 Ia. 364; 71 N. W. 579; *Burden v. Knight*, 82 Ia. 584; 48 N. W. 985; *Thorp v. Bradley*, 75 Ia. 50; 39 N. W. 177.

¹ *Caton v. Caton*, L. R. 1 Ch. 137; *Lloyd v. Fulton*, 91 U. S. 479; *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; 1 L. R. A. 185; 19 Pac. 227; *Durham v. Taylor*, 29 Ga. 166; *Richardson v. Richardson*, 148 Ill. 563; 26 L. R. A. 305; 36 N. E. 608; affirming, 45 Ill. App. 362; *Keady v. White*, 168 Ill. 76; 48 N. E. 314; affirming, 69 Ill. App. 405; *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552; 11 N. E. 397; *Fletcher v. Fletcher*, 29 Ind. 564; *Manning v. Riley*, 52 N. J. Eq. 39; 27 Atl. 810; *Hunt v. Hunt*, 171 N. Y. 396; 59 L. R. A. 306; 64 N. E. 159; *Henry v. Henry*, 27 O. S. 121;

ever, in which the opposite view has been taken.²

§735. Part performance as applied to contracts to answer for the debt of another.

A promise to answer for the debt of another is not taken out of the statute by performance by the party to whom the promise is made.¹ While some cases are explained on the theory of part performance² they may as well be explained on the theory that promisor has made the debt his own. Thus, where A desired to get control of a soda-water fountain owned by B and leased to C, to prevent it from being used in competition, and to do this A agreed to pay to B the rent due him on the fountain from C, and B in consideration of A's promise to release C from the lease and from payment of arrears of rent, A's promise was held not within the statute.³

§736. Evidence of oral contract.

If part performance is relied upon to take an oral contract out of the statute of frauds the evidence of the oral contract must be clear, unequivocal and definite.¹ It is necessary to offer "unequivocal and satisfactory evidence of the particular agreement charged in the bill and answer."² Under the Iowa statute it has been held sufficient to charge the jury that the plaintiff must "satisfy" them that there has been part per-

Finch v. Finch, 10 O. S. 501; *Stanley v. Madison*, 11 Okla. 288; 66 Pac. 280; *Adams v. Adams*, 17 Or. 247; 20 Pac. 633.

In Missouri marriage and cohabitation are treated as part performance. *Nowack v. Berger*, 133 Mo. 24; 54 Am. St. Rep. 663; 31 L. R. A. 810; 34 S. W. 489.

¹ *McGauhey v. Latham*, 63 Ga. 67; rehearing denied, 147 Ind. 690; 37 L. R. A. 245; 47 N. E. 150.

² *English v. Richards Co.*, 109 Ga. 635; 34 S. E. 1002.

³ *English v. Richards Co.*, 109 Ga.

635; 34 S. E. 1002. The decision was clearly correct though the theory of part performance was unnecessary.

¹ *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Beall v. Clark*, 71 Ga. 818; *Sloniger v. Sloniger*, 161 Ill. 270; 43 N. E. 1111; *Truman v. Truman*, 79 Ia. 506; 44 N. W. 721; *Bennett v. Dyer*, 89 Me. 17; 35 Atl. 1004; *Woodbury v. Gardner*, 77 Me. 68; *Brown v. Brown*, 47 Mich. 378; 11 N. W. 205.

² *Williams v. Morris*, 95 U. S. 444. 457; quoted in *Buttz v. Col-*

formance before he can recover.³ Whatever the phraseology employed the courts usually required more than a mere preponderance of the evidence to prove such contract.

XII. EFFECT OF NON-COMPLIANCE WITH STATUTE.

§737. To what classes of contract the fourth section of the statute applies.

The fourth section of the statute of frauds applies to certain types of "special promise," "agreement" and "contract or sale." The courts have in some cases considered to what classes of contract this language can apply. It is held not to apply to a contract of record.¹ Thus, a recognizance to answer for the default of another is enforceable though unsigned.² The statute of frauds clearly applies to express simple contracts. It does not apply to quasi-contract.³ The statute by its terms applies to a "special promise." Accordingly a liability independent of a special promise is not within the statute, such as an implied trust in realty,⁴ or the liability of a party, receiving a benefit under an oral contract which by its terms cannot be performed within the year, to recompense the adversary party therefore.⁵ Thus, even in oral contracts within the statute, the party who has performed in whole or in part may often recover on a *quantum meruit*.⁶

On the same principle the statute of frauds has no application to estoppel *in pais*.⁷ So interests in realty may be affected by estoppel *in pais* resting purely in oral evidence. The owner

ton, 6 Dak. 306, 320; 43 N. W. 510; Doolittle v. Dinianny, 31 N. Y. 717. 350.

³ Hutton v. Doxsee, 116 Ia. 13; 89 N. W. 79.

⁴ Rayl v. Rayl, 58 Kan. 585; 50 Pac. 501.

¹ "No case can be found where a contract of record has been held to be within the statute of frauds." Huston v. Ry., 21 O. S. 235. *Contra*, Robinson v. Driver, 132 Ala. 169; 31 So. 495.

⁵ City of Greenville v. Waterworks Co., 125 Ala. 625; 27 So. 764.

See §§ 749-751.

⁶ See §§ 749-751.

² See § 552.

⁷ Foster v. Irrigation Co., 65 Fed. 536.

³ Goodwin v. Gilbert, 9 Mass.

may be estopped to deny that the title to realty is in another where such other has been misled by the conduct of the true owner.⁸ So the true owner may be estopped to allege title as to third persons who have been misled by appearances; as where the holder of a mechanic's lien,⁹ or the creditors of the owner's husband,¹⁰ seek to enforce their claims on the theory that the realty in question belongs to such other. So the owner of realty may be estopped to deny the existence of a lease,¹¹ or to allege the forfeiture of a lease.¹² So he may be estopped to deny the existence of an easement in his realty for the benefit of another,¹³ as a right to make use of a ditch,¹⁴ or a right of way,¹⁵ as a right of way belonging to a railway.¹⁶ All these subjects are outside of the operation of the statute of frauds.

§738. Whether contract is void.

While the courts not infrequently say that a contract within the statute of frauds and not complying with its requirements is void,¹ this is simply another example of inaccuracy in the use

⁸ Wright v. McCord, 113 Ga. 881; 39 S. E. 510; Cross v. Commission Co., 153 Ill. 499; 46 Am. St. Rep. 902; 38 N. E. 1038; Schafer v. Wilson, 113 Ia. 475; 85 N. W. 789; Springle v. Morrison, 3 Litt. (Ky.) 52; 14 Am. Dec. 41; Redmond v. Loan Association, 194 Pa. St. 643; 75 Am. St. Rep. 714; 45 Atl. 422; Wampol v. Kountz, 14 S. D. 334; 86 Am. St. Rep. 765; 85 N. W. 595; Polk v. Gunther, 107 Tenn. 16; 64 S. W. 25; Murray Mining and Mill Co. v. Havenor, 24 Utah 73; 66 Pac. 762.

⁹ Radant v. Mfg. Co., 106 Wis. 600; 82 N. W. 562.

¹⁰ Hauk v. Van Ingen, 196 Ill. 20; 63 N. E. 705.

¹¹ Brown v. Baruch, 24 Wash. 572; 64 Pac. 789.

¹² Conley v. Johnson, 69 Ark.

513; 86 Am. St. Rep. 209; 64 S. W. 277.

¹³ Mattes v. Frankel, 157 N. Y. 603; 68 Am. St. Rep. 804; 52 N. E. 585; De Herques v. Marti, 85 N. Y. 609.

¹⁴ Biggs v. Ditch Co., — Ariz. —; 64 Pac. 494.

¹⁵ Mattes v. Frankel, 157 N. Y. 603; 68 Am. St. Rep. 804; 52 N. E. 585; Grace v. Walker, 95 Tex. 39, 43; 65 S. W. 482; affirming on rehearing, 95 Tex. 39; 64 S. W. 930.

¹⁶ Hendrix v. Ry., 130 Ala. 205; 89 Am. St. Rep. 27; 30 So. 596; Louisville, etc., Ry. v. Coal Co., 111 Ky. 960; 55 L. R. A. 601; 64 S. W. 969.

¹ McKinnon v. Mixon, 128 Ala. 612; 29 So. 690; Bishop v. Martin (Ky.), 65 S. W. 807; McDonald v. Maltz, 78 Mich. 685; 44 N. W.

of the word "void," "void" in this instance being confused with "unenforceable." Such contracts are not void in the proper use of the term.²

Accordingly, persons who are not parties to an oral contract and who do not represent such parties cannot attack the contract as invalid by reason of the statute of frauds.³ Thus, in contracts for the sale of some interest in realty,⁴ third persons, such as adverse claimants of the property,⁵ gratuitous donees,⁶ persons having subsequent written contracts with the same vendor for the same realty, where the vendor conveys to the vendee under the prior oral contract,⁷ creditors of the vendor,⁸ even if they have obtained judgments which would be liens on the

337; *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; 28 N. W. 796; *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619; 28 N. W. 676; *Cram v. Thompson*, 87 Minn. 172; 91 N. W. 483; *Taylor v. Von Schraeder*, 107 Mo. 206; 16 S. W. 675; *Bloomfield State Bank v. Miller*, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569.

² *Lowman v. Sheets*, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351; *Cochran v. Ward*, 5 Ind. App. 89; 51 Am. St. Rep. 229; 29 N. E. 795; 31 N. E. 581; *Weber v. Weber* (Ky.), 76 S. W. 507; *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92; 15 Am. Dec. 48; *Stone v. Dennison*, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; *Gordon v. Collett*, 104 N. C. 381; 10 S. E. 564.

³ *Bullion, etc., Bank v. Otto*, 59 Fed. 256; *Chicago Dock Co. v. Kinzie*, 19 Ill. 289; *Wright v. Jones*, 105 Ind. 17; 4 N. E. 281; *Cowan v. Adams*, 10 Me. 374; 25 Am. Dec. 242; *Wood v. Lowney*, 20 Mont. 273; 50 Pac. 794; *Rickards v. Cunningham*, 10 Neb. 417; 6 N. W. 475; *Simmons v. More*, 100 N. Y.

140; 2 N. E. 640; *Durham, etc., Co. v. Guthrie*, 116 N. C. 381; 21 S. E. 952. "No man is bound to set up the statute of frauds as a defense, for the benefit or even at the requirement of another, in a personal action against him upon a claim, the obligation of which he recognizes as found in good faith and right." *Bullard v. Smith*, 139 Mass. 492, 498; citing, *Ames v. Jackson*, 115 Mass. 508; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369.

⁴ As in a sale of water rights, *Daum v. Conley*, 27 Colo. 56; 59 Pac. 753. Mining claims, *Book v. Mining Co.*, 58 Fed. 106; *Murray Hill, etc., Co. v. Havenor*, 24 Utah 73; 66 Pac. 762.

⁵ *McManus v. Matthews* (Tex. Civ. App.), 55 S. W. 589.

⁶ *Hill v. Groesbeck*, 29 Colo. 161; 67 Pac. 167.

⁷ *Maguire v. Heraty*, 163 Pa. St. 381; 43 Am. St. Rep. 800; 30 Atl. 151.

⁸ *Bell v. Beazley*, 18 Tex. Civ. App. 639; 45 S. W. 401. To the same effect see *Kemp v. Bank*, 109 Fed. 48; 48 C. C. A. 213.

realty contracted for, but for the contract,⁹ an assignee for the benefit of creditors,¹⁰ or an insurer of the interest of the vendee under the oral contract,¹¹ can none of them avail themselves of the fact that the contract did not comply with the requirements of the statute. So one who has made an oral promise to answer for the debt, default, or miscarriage of another and has performed such contract can compel exoneration from the principal debtor.¹² This is true even where such debtor has notified such guarantor not to perform.¹³ So where A has conveyed to B as trustee, A cannot avoid the deed because the trust was an oral one to secure a debt from A to C if B admits the liability to C.¹⁴

So if C induces B to break a contract between B and A,¹⁵ as a contract of employment,¹⁶ C cannot avoid liability on the ground that the contract between A and B was an oral contract which was not to be performed within the year.

Further proof that a contract within the statute of frauds and not complying with its terms is not void may be found in the fact that such contract is valid unless the defence of the statute is properly interposed,¹⁷ and in the fact that if an action on such a contract is brought in a jurisdiction in which the statute is not in force, such contract can be enforced as well as any other.¹⁸

Some statutes provide that such contracts are void and some

⁹ *Minns v. Morse*, 15 Ohio 568; (Ky.) 200; *Cahill v. Bigelow*, 18 Butler v. Thompson, 45 W. Va. 660; 72 Am. St. Rep. 838; 31 S. E. 660. *Contra*, *Gary v. Newton*, 201 Ill. 170; 66 N. E. 267.

¹⁰ *Walker's Assignee v. Walker* (Ky.), 55 S. W. 726. ¹¹ *Sneed v. Bradley*, 4 Sneed (Tenn.) 301.

¹² *Duckett v. Pool*, 33 S. C. 238; 11 S. E. 689.

¹³ See § 752.

¹⁴ *Cowell v. Ins. Co.*, 126 N. C. 684; 36 S. E. 184; *German-American, etc., Co. v. Surety Co.*, 190 Pa. St. 247; 42 Atl. 682. ¹⁵ *Leroux v. Brown*, 12 C. B. 801; 74 E. C. L. 801; *Pritchard v. Norton*, 106 U. S. 124; *Buhl v. Stephens*, 84 Fed. 922; *Douder v. Chesebrough*, 36 Conn. 39; 4 Am. Rep. 29; *Kleeman v. Collins*, 9 Bush. (Ky.) 460; *Emery v. Burbank*, 163 Mass. 326; 47 Am. St. Rep. 456; 28 L. R. A. 57; 39 N. E. 1026;

¹⁶ *Simpson v. Hall*, 47 Conn. 417. ¹⁷ *Beal v. Brown*, 13 All. (Mass.) 114.

¹⁸ *Auten v. Ry. Co.*, 104 Fed. 395; *Crawford v. Woods*, 6 Bush.

courts construe such provisions literally.¹⁹ Whether an oral contract within the statute of frauds is of such validity that its release is a valuable consideration for a new promise, based thereon, which is not itself within the statute is a question on which authorities are in conflict. On the one hand, the release of a voidable contract is a valuable consideration,²⁰ and in analogy a release of rights under an oral contract within the statute of frauds has been held a valuable consideration for a new contract.²¹ So where an oral contract within the statute has been broken and a note has been given in payment of damages caused by such breach the note has been held to be on valuable consideration.²² On the other hand, if the consideration of the new contract is denied, it can be proved only by oral evidence of the original contract; and thus the original contract would be indirectly enforced though resting in parol. Accordingly some courts hold that such release is not a valuable consideration, as of a contract to answer for the debt of another.²³ If such new contract is fully performed and performance is accepted, the statute does not apply.²⁴

§739. Whether contract is voidable.

Such contracts are said by many courts to be voidable.¹ This term is more nearly correct than "void," but it may be doubted whether it is the correct term to use, at least in many jurisdictions a contract is "voidable" in the proper sense from some

Third National Bank v. Steel, 129 Mich. 434; 88 N. W. 1050; Heaton v. Eldridge, 56 O. S. 87; 60 Am. St. Rep. 737; 36 L. R. A. 817; 46 N. E. 638.

¹⁹ Pierce v. Clarke, 71 Minn. 114; 73 N. W. 522 (overruling, Hagelin v. Wacks, 61 Minn. 214; 63 N. W. 624).

²⁰ See § 321.

²¹ Contract not to be performed within one year, Stout v. Ennis, 28 Kan. 706.

²² Anderson v. Best, 176 Pa. St. 498; 35 Atl. 194.

²³ Hall v. Soule, 11 Mich. 494. (But in this state oral contracts within the statute are held to be void.) Sale of goods, North v. Forest, 15 Conn. 400.

²⁴ Detroit, etc., R. R. v. Forbes, 30 Mich. 165.

¹ Thus in Lowman v. Sheets, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351, such a contract is said to be "not void but merely voidable."

defect in its formation, and as we shall see later,² the better view of the statute of frauds is that it has nothing to do with the formation of the contract, but merely with the evidence by which the contract is to be proved.

§740. Contract unenforceable.

If the statute of frauds is properly interposed as a defence to a contract which falls within its terms and does not comply with its requirements, such contract is unenforceable.¹ No action at law can be maintained to recover damages for its breach,² nor can a suit in equity be maintained for a breach of such contract.³ Thus, in case of a breach of an oral contract for the sale of realty, the vendee cannot recover the value of the realty.⁴

By the weight of authority an oral contract within the statute of frauds cannot be used as a defence, where the result of per-

² See § 741.

¹ *Sivell v. Hogan*, 119 Ga. 167; 46 S. E. 67; *Lyons v. Bass*, 108 Ga. 573; 34 S. E. 721; *Peck v. Harvesting Co.*, 196 Ill. 295; 63 N. E. 731; *Jackson v. Myers*, 120 Ind. 504; 22 N. E. 90; 23 N. E. 86; *Leis v. Potter*, — Kan. —; 74 Pac. 622; *Townsend v. Hargreaves*, 118 Mass. 325; *Riddell v. Riddell* (Neb.), 97 N. W. 609; *Vick v. Vick*, 126 N. C. 123; 35 S. E. 257; *Reed v. Adams*, 172 Pa. St. 127; 33 Atl. 700; *Bowen v. Sayles*, 23 R. I. 34; 49 Atl. 103; *Cleveland v. Evans*, 5 S. D. 53; 58 N. W. 8; *Lombard Investment Co. v. Carter*, 7 Wash. 4; 38 Am. St. Rep. 864; 34 Pac. 209. The statute "does not make an action void but prevents bringing an action for non-performance." *Trowbridge v. Weatherbee*, 11 All. (Mass.) 361.

² *Peck v. Machine Co.*, 94 Ill. App. 586; *Bromley v. Broyles* (Ky.), 58 S. W. 984; *McC Campbell v. McC Campbell*, 5 Litt. (Ky.) 92;

15 Am. Dec. 48; *Norton v. Preston*, 15 Me. 14; 32 Am. Dec. 128; *Hamilton v. Thirston*, 93 Md. 213; 48 Atl. 709; *Hallett v. Gordon*, 122 Mich. 567; 81 N. W. 556; 82 N. W. 827; *Lydick v. Holland*, 83 Mo. 703; *Smith v. Phillips*, 69 N. H. 470; 43 Atl. 183; *Rutan v. Hinchman*, 30 N. J. L. 255; *Baltzen v. Nicolay*, 53 N. Y. 467; *Jordan v. Furnace Co.*, 126 N. C. 143; 78 Am. St. Rep. 644; 35 S. E. 247; *McCracken v. McCracken*, 88 N. C. 272; *Hillhouse v. Jennings*, 60 S. C. 373; 38 S. E. 599.

³ *Dunphy v. Ryan*, 116 U. S. 491; *Andrews Bros. Co. v. Coke Co.*, 39 Fed. 353; *Green v. Groves*, 109 Ind. 519; 10 N. E. 401; *Bloomfield State Bank v. Miller*, 55 Neb. 243; 70 Am. St. Rep. 381; 44 L. R. A. 387; 75 N. W. 569.

⁴ *McDonald v. Maltz*, 78 Mich. 685; 44 N. W. 337; *Jordan v. Furnace Co.*, 126 N. C. 143; 78 Am. St. Rep. 644; 35 S. E. 247.

mitting such defence will be to enforce such contract.⁵ Thus, where A sues B in equity to restrain him from practicing medicine in a certain town contrary to a written contract between A and B, made when B sold his practice and good-will to A, B cannot set up the breach of a contemporaneous oral contract between A and B whereby A agreed to buy B's house and lot.⁶

These rules apply, however, only where the oral contract is sought to be enforced and have no application where the contract is pleaded for some other purpose. Thus, where A let B take possession of certain realty under an oral contract of purchase which B subsequently refused to perform, A can show such contract and breach in an action of forcible entry and detainer to recover such realty, for the possession of showing that B has no right of possession.⁷ So an oral lease may be shown in order to interrupt an adverse holding of realty by the claimant who accepts the lease.⁸

§741. Statute of frauds a rule of evidence.

The theory of the statute of frauds that best explains the greatest number of cases is that it is essentially a rule of evidence, and has no effect of any kind upon the formation of the contract, but solely on the means whereby it is to be proved.¹ It is not strictly correct to call an oral contract within the statute either void or voidable. It is, indeed, unenforceable, but only because proof is impossible for want of proper evidence; and this, only if the statute is taken advantage of at the trial in a proper manner.² The contracts enumerated in the fourth section of the statute of frauds are not required by the Common

⁵ *Bernier v. Mfg. Co.*, 71 Me. 506; 36 Am. Rep. 343; *King v. Welcome*, 5 Gray (Mass.) 41; *Lemon v. Randall*, 124 Mich. 687; 83 N. W. 994.

⁶ *Lemon v. Randall*, 124 Mich. 687; 83 N. W. 994.

⁷ *Leach v. Ritzke*, 86 Ill. App. 483.

⁸ *Campau v. Lafferty*, 43 Mich. 429; 5 N. W. 648.

¹ *Merchant v. O'Rourke*, 111 Ia. 351; 82 N. W. 759; *Townsend v. Hargreaves*, 118 Mass. 325; *Stone v. Dennison*, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; *Third National Bank v. Steel*, 129 Mich. 434; 88 N. W. 1050; *Herton v. Eldridge*, 56 O. S. 87; 60 Am. St. Rep. 737; 36 L. R. A. 817; 46 N. E. 638.

² See § 752.

Law to be in writing or to be proved by writing. Accordingly, in jurisdictions where the statute is not in force, oral contracts of these classes are enforceable,³ such as oral contracts for the sale of realty.⁴ Where this theory of the statute obtains an oral contract within the statute of frauds in force where such contract is made and is to be performed may be enforced in another jurisdiction where such statute is not in force.⁵ In some jurisdictions, however, the statute of frauds is said to affect the contract itself and not merely the means whereby it is to be proved.⁶

§742. Effect of consideration for contract.

Since the statute of frauds takes away no requisite of a valid contract but merely adds a requisite as to the means of proof,¹ a contract on valuable consideration for the conveyance of realty,² as in return for a contract to erect a party-wall,³ or for personal services,⁴ or for promisee's publishing a newspaper in the

³ *Wilson v. Owens*, 86 Fed. 371; 30 C. C. A. 257; *Myers v. Mathis* (Ind. Ter.), 46 S. W. 178.

⁴ *Maxwell Land Grant Co. v. Dawson*, 7 N. M. 133; 34 Pac. 191 (not affected on this point by its reversal in 151 U. S. 586); *McKennon v. Winn*, 1 Okla. 327; 22 L. R. A. 501; 33 Pac. 582.

⁵ See § 752.

⁶ "The courts of England have declared that the substance of contracts within the statute is not affected by the statute, but that whether they are to be enforced or not is dependent upon the enforcement of a rule of evidence, and therefore it is necessary in order to get the advantage of the statute, that it should be properly pleaded. Our court, however, holds that the statute affects the contract itself, and therefore whenever one is required to prove the contract which he seeks to enforce (if it be one

within the purview of the statute) he must show that it has been executed in contemplation of the statute, and that by legal evidence." *Jordan v. Furnace Co.*, 126 N. C. 143, 146; 78 Am. St. Rep. 644; 35 S. E. 247.

¹ See § 741.

² *Donahue's Appeal*, 62 Conn. 370; 26 Atl. 399; *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222; 5 N. E. 666; *Becker v. Mason*, 30 Kan. 697; 2 Pac. 850; *Dowling v. McKenney*, 124 Mass. 478; *Kelley v. Kelley*, 54 Mich. 30; 19 N. W. 580; *Woods v. Ward*, 48 W. Va. 652; 37 S. E. 520; *Koch v. Williams*, 82 Wis. 186; 52 N. W. 257; *Parish v. Williams* (Tex. Civ. App.), 53 S. W. 79; *Arnold v. Ellis*, 20 Tex. Civ. App. 262; 48 S. W. 883.

³ *Tillis v. Treadwell*, 117 Ala. 445; 22 So. 983.

⁴ Legal services. *Donahue's Appeal*, 62 Conn. 370; 26 Atl. 399;

town in which the land is situate,⁵ or becoming surety on an appeal bond, so that action involving title to the land in question may be appealed,⁶ are all of them within the statute.⁷

§743. Extrinsic evidence admissible to show informal memorandum incomplete.

If the memorandum is so incomplete on its face that it does not purport to be a complete contract, extrinsic evidence may be received to show if there were other terms of the contract,¹ and if there were such other terms the memorandum is insufficient.² Thus, a memorandum omitting terms of the verbal contract, as "to pay net cost and upon delivery" and that the goods sold should be "as per sample delivered or equal in quality to sample delivered,"³ or omitting terms as to time and place of delivery,⁴ are each insufficient. So a letter cannot ratify an unsigned contract,⁵ nor can an admission in the answer validate the oral contract set up in the petition⁶ where the contract in the second instrument is substantially different from that in the first. So if a given contract is alleged, a written memorandum which does not set forth all the terms as alleged is insufficient to prove such contract.⁷ If the evidence of the party seeking to enforce the contract shows a contract substan-

Masterson v. Little, 75 Tex. 682; 13 S. W. 154. Services as architect. *Koch v. Williams*, 82 Wis. 186; 52 N. W. 257. Services as surveyor, *Perifield v. Boreing* (Ky.), 22 S. W. 440.

⁵ *Sanborn v. Murphy*, 86 Tex. 437; 25 S. W. 610; affirming, 5 Tex. Civ. App. 509; 25 S. W. 459.

⁶ *Woods v. Ward*, 48 W. Va. 652; 37 S. E. 520.

⁷ Indeed if no valuable consideration exists, the question of the applicability of the statute is immaterial as the agreement is unenforceable.

¹ See § 1197 *et seq.*

² *Meux v. Hogue*, 91 Cal. 442; 27 Pac. 744; *Benedict v. Bird*, 103 Ia. 612; 72 N. W. 768; *Fisher v. Andrews*, 94 Md. 46; 50 Atl. 407.

³ *Fisher v. Andrews*, 94 Md. 46; 50 Atl. 407.

⁴ *Smith v. Shell*, 82 Mo. 215; 52 Am. Rep. 365.

⁵ *Meux v. Hogue*, 91 Cal. 442; 27 Pac. 744.

⁶ *Benedict v. Bird*, 103 Ia. 612; 72 N. W. 768.

⁷ *Nesham v. Selby*, L. R., 7 Ch. App. 406; *Williams v. Morris*, 95 U. S. 414; *Littell v. Jones*, 56 Ark. 139; 19 S. W. 497; *Whiting v. Butler*, 29 Mich. 122.

tially different from that shown by the memorandum no recovery can be had.⁸

§744. **Extrinsic evidence admissible if explanatory.**

The statute of frauds does not forbid the introduction of oral evidence. It merely requires a written note or memorandum of the contract. In certain cases where extrinsic evidence is admissible to explain an ordinary written contract, it may be introduced to explain a contract under the statute of frauds.¹ Extrinsic evidence is admissible to show the facts and circumstances surrounding the transaction, so as to put the court in the position of the parties thereto.²

Extrinsic evidence is admissible to show the meaning of abbreviations used in the memorandum.³ Thus extrinsic evidence is admissible to show the meaning given by custom or usage to such expressions as "O. K.,"⁴ "F. C. wool,"⁵ "bought thirteen at eleven five-eighths net you."⁶

⁸ Smith v. Shell, 82 Mo. 215; 52 Am. Rep. 365.

¹ Brewer v. Horst and Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418; Lee v. Butler, 167 Mass. 426; 57 Am. St. Rep. 466; 46 N. E. 52.

² Wylson v. Dunn, 34 Ch. Div. 569; Haigh v. Brooks, 10 Ad. & El. 309; Brewer v. Horst and Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418; Berry v. Kowalsky, 95 Cal. 134; 29 Am. St. Rep. 101; 30 Pac. 202; Mann v. Higgins, 83 Cal. 66; 23 Pac. 206; Callahan v. Stanley, 57 Cal. 476; Towle v. Carmelo, etc., Co., 99 Cal. 397; 33 Pac. 1126; Preble v. Abrahams, 88 Cal. 245; 26 Pac. 99; New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Ellis v. Bray, 79 Mo. 227; Regan v. Milby, 21 Tex. Civ. App. 21; 50 S. W. 587. "Parol evidence may be introduced to show the sit-

uation of the parties and the circumstances attendant upon the transaction for the purpose of applying the contract to the subject-matter and to show the connection of different writings constituting the memorandum with one another." Lee v. Butler, 167 Mass. 426, 428; 57 Am. St. Rep. 466; 46 N. E. 52.

³ Brewer v. Horst and Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418; New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112; Maurin v. Lyon, 69 Minn. 257; 65 Am. St. Rep. 568; 72 N. W. 72.

⁴ Moore v. Eisaman, 201 Pa. St. 190; 50 Atl. 982.

⁵ New England, etc., Co. v. Worsted Co., 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112.

⁶ Brewer v. Horst and Lachmund Co., 127 Cal. 643; 50 L. R. A. 240; 60 Pac. 418.

§745. Extrinsic evidence admissible to identify writing.

If the signed memorandum refers to another written instrument, extrinsic evidence is admissible to identify such other instrument.¹ If written contract provides for the division of "land purchased of" the other party without further description, and a deed for the land is subsequently given without reference to the written contract, oral evidence is admissible to show that no other land was contracted for than that conveyed.² The reference to the other writing must, however, either be made expressly, or must appear from the terms of the two instruments when compared.³

§746. Admissibility of extrinsic evidence for identification.

If the subject-matter¹ or parties² are identified by the contract with reasonable certainty, oral evidence is admissible to show the persons or things to which such description applies. So where certain wrecked steamboats were sold by description, location, and name, oral evidence is admissible to show that the names of two boats were reversed by mistake, and that the location and descriptions were correct.³ So if a person is described as one to whom a certain obligation is owing, oral evidence is admissible to show who such creditor is.⁴

§747. Extrinsic evidence inadmissible to show collateral contract.

Parol evidence cannot be received to add a new term to a written contract within the statute of frauds, even though such term is collateral and proper thus to be proved in the case of the ordinary written contract.¹

¹ *Beckwith v. Talbot*, 95 U. S. 289; *Lee v. Butler*, 167 Mass. 426; 57 Am. St. Rep. 466; 46 N. E. 52; *Peck v. Vandemark*, 99 N. Y. 29; 1 N. E. 41.

² *White v. Core*, 20 W. Va. 272.

³ See § 688.

⁴ *Chouteau v. Goddin*, 39 Mo. 201; *McWhirter v. Allen*, 1 Tex. Civ. App. 649; 20 S. W. 1007.

² *McLeod v. Adams*, 102 Ga. 533; 27 S. E. 680.

³ *Chouteau v. Goddin*, 39 Mo. 201.

⁴ *McLeod v. Adams*, 102 Ga. 533; 27 S. E. 680.

¹ *McMullen v. Helberg*, 6 L. R. Ir. 463. Contract in consideration of marriage. *Russell v. Russell*, 60 N. J. Eq. 282; 47 Atl. 37.

§748. Oral modification of contract.

A contract within the statute of frauds, complying with its requirements, cannot, according to the weight of authority, be modified subsequently by an executory oral agreement so as to make a new contract of such sort that it would itself be within the statute; since this would leave the contract part in writing and part oral.¹ Thus an oral extension of the time of performance,² as of a contract for the sale of realty,³ such as a contract for the sale of growing timber,⁴ or an oral agreement including a new subject-matter,⁵ or a modification providing for payment for realty by the conveyance of other realty instead of in money as required by the original contract,⁶ are none of them enforceable. But an oral agreement for the extension of time has been enforced so as to prevent a forfeiture for non-payment within the time originally limited.⁷ The original contract is enforceable disregarding the oral modifications.⁸ On the other hand if an oral modification of a contract within the statute is completely performed, this constitutes a discharge of the original contract.⁹ Thus, an oral modification of a con-

¹ Hickman v. Haynes, L. R. 10 C. P. 598; Marshall v. Lynn, 6 Mees. & W. 109; Swain v. Seamans, 9 Wall. (U. S.) 254; Snow v. Nelson, 113 Fed. 353; Lawyer v. Post, 109 Fed. 512; 47 C. C. A. 491; Platt v. Butcher, 112 Cal. 634; 44 Pac. 1060; Smith v. Taylor, 82 Cal. 533; 23 Pac. 217; Augusta Southern R. R. Co. v. Kilby Co., 106 Ga. 864; 33 S. E. 28; Bradley v. Harter, 156 Ind. 499; 60 N. E. 139; Davis v. Parish, Litt. Sel. Cas. (Ky.) 153; 12 Am. Dec. 287; Walter v. Bloede Co., 94 Md. 80; 50 Atl. 433; Whittier v. Dana, 10 All. (Mass.) 326; Abell v. Munson, 18 Mich. 306; 100 Am. Dec. 165; Warren v. Mfg. Co., 161 Mo. 112; 61 S. W. 644; Bullis v. Mining Co., 75 Tex. 540; 12 S. W. 397; Saveland v. Ry., 118 Wis. 267; 95 N. W. 130.

Atlee v. Bartholomew, 69 Wis. 43; 5 Am. St. Rep. 103; 33 N. W. 110.

² McConathy v. Lanham, — Ky. —; 76 S. W. 535; Bullis v. Mining Co., 75 Tex. 540; 12 S. W. 397.

³ Lawyer v. Post, 109 Fed. 512; 47 C. C. A. 491; Platt v. Butcher, 112 Cal. 634; 44 Pac. 1060.

⁴ Clark v. Guest, 54 O. S. 298; 43 N. E. 862.

⁵ Clark v. Fey, 121 N. Y. 470; 24 N. E. 703; Saveland v. Ry., 118 Wis. 267; 95 N. W. 130.

⁶ Bradley v. Harter, 156 Ind. 499; 60 N. E. 139.

⁷ Scheerschmidt v. Smith, 74 Minn. 224; 77 N. W. 34.

⁸ Sanderson v. Graves, L. R. 10 Exch. 234.

⁹ Hickman v. Haynes, L. R. 10 C. P. 598; Whittier v. Dana, 10 All. (Mass.) 326; Cummings v. Ar-

tract concerning realty, with reference to the number of lots to be sold,¹⁰ or the size of the mill to be constructed on the realty,¹¹ if fully performed and performance is accepted, is itself valid, and merges the prior contract. Some cases go still farther and, on the theory that the statute does not affect performance,¹² allow an oral executory modification of that part of the contract which does not bring it within the statute of frauds, to have full validity itself and to operate as a bar to that part of the original contract.¹³ Thus, an oral extension of the time of paying the purchase price of realty contracted for in writing has been held valid if made before the expiration of the time fixed by the original contract.¹⁴ This rule has been based on the doctrine of estoppel.

§749. Right of party not in default to recover a reasonable compensation.

While in case of a breach of a contract which falls within the statute of frauds and does not comply with its requirements, no recovery can be had for damages for breach of the executory part thereof, different considerations exist when property has been delivered or services rendered under such a contract. As will be considered hereafter¹ the party not in default has, in contracts not affected by the statute of frauds, the right to ignore the contract and sue for a reasonable compensation for property furnished or services rendered by him under such contract, whenever such facts arise as amount to a complete discharge thereof. Illegal contracts form an exception to this rule.² Now a contract is in no proper sense illegal because it falls within the terms of the statute of frauds and does not com-

nold, 3 Met. (Mass.) 486; 37 Am. Dec. 155.

¹⁰ Long v. Hartwell, 34 N. J. L. 116.

¹¹ Swain v. Seamens, 9 Wall. (U. S.) 254.

¹² Cummings v. Arnold, 3 Met. (Mass.) 486; 37 Am. Dec. 155.

¹³ Stearns v. Hall, 9 Cush. (Mass.) 31.

¹⁴ Brush-Swan Electric Light Co. v. Electric Co., 41 Fed. 163; Stearns v. Hall, 9 Cush. (Mass.) 31.

¹ See Ch. LXXIV.

² See § 519.

ply with its requirements.³ The statute of frauds was intended solely to prevent oral proof of contracts in actions based thereon; not to enable a party to a contract to retain benefits received thereunder without liability therefor.⁴ Accordingly, if A and B have entered into such a contract and A has delivered property to B in performance of such contract⁵ as under a contract not to be performed within the year,⁶ or has paid him money,⁷ as under a contract not to be performed within the year,⁸ or for the sale of realty,⁹ B must restore such property¹⁰ or make a reasonable compensation for such property¹¹ if B seeks to avoid the contract on the ground of the statute of frauds. The right to recover money thus paid exists even if the right to

³ See § 738 *et seq.*

⁴ *Henderson v. Treadway*, 69 Ill. App. 357; *Miller v. Roberts*, 169 Mass. 134; 47 N. E. 585; *Cadman v. Markle*, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315; *Emery v. Smith*, 46 N. H. 151; *Abbott v. Draper*, 4 Den. (N. Y.) 51; *Pierce v. Paine*, 28 Vt. 34.

⁵ *Peabody v. Fellows*, 177 Mass. 290; 58 N. E. 1019; *Hawley v. Moody*, 24 Vt. 603. Realty, *Peabody v. Fellows*, 177 Mass. 290; 58 N. E. 1019; *Andrews v. Broughton*, 78 Mo. App. 179. Personalty, *Dietrich v. Hoefelmeir*, 128 Mich. 145; 87 N. W. 111.

⁶ *Roberts v. Tennell*, 3 T. B. Mon. (Ky.) 246.

⁷ *Whyte v. Rosencrantz*, 123 Cal. 634; 69 Am. St. Rep. 90; 56 Pac. 436; *Walker v. Walker* (Ky.), 55 S. W. 726; *Jellison v. Jordan*, 68 Me. 373; *Root v. Burt*, 118 Mass. 521; *Scott v. Bush*, 26 Mich. 418; 12 Am. Rep. 311; *Moody v. Smith*, 70 N. Y. 598; *Gottschalk v. Witter*, 25 O. S. 76; *Love v. Burton* (Tenn. Ch. App.), 61 S. W. 91; *Taylor v. Deseve*, 81 Tex. 246; 16 S. W.

1008; *Moore v. Powell*, 6 Tex. Civ. App. 43; 25 S. W. 472; *Hawley v. Moody*, 24 Vt. 603.

⁸ *Montague v. Garnett*, 3 Bush. (Ky.) 297; *Weber v. Weber* (Ky.), 7 S. W. 507.

⁹ *Cook v. Doggett*, 2 All. (Mass.) 439; *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602; 35 N. W. 164; *Pressnell v. Lundin*, 44 Minn. 551; 47 N. W. 161; *Patterson v. Hawley*, 33 Neb. 440; 50 N. W. 324; *Durham, etc., Co. v. Guthrie*, 116 N. C. 381; 21 S. E. 952; *Bedell v. Tracy*, 65 Vt. 494; 26 Atl. 1031; *Harney v. Burhans*, 91 Wis. 348; 64 N. W. 1031.

¹⁰ *Dietrich v. Hoefelmeir*, 128 Mich. 145; 87 N. W. 111.

¹¹ *Wolke v. Fleming*, 103 Ind. 105; 53 Am. Rep. 495; 2 N. E. 325; *Dowling v. McKenney*, 124 Mass. 478; *Dix v. Marcy*, 116 Mass. 416; *Williams v. Bemis*, 108 Mass. 91; 11 Am. Rep. 318; *Luey v. Bundy*, 9 N. H. 298; 32 Am. Dec. 359; *Smith v. Smith*, 28 N. J. L. 208; 78 Am. Dec. 49; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128; 38 Am. Dec. 620.

specific performance exists.¹² If specific personalty has been delivered under a contract to exchange such personalty for realty, and has been retained by the vendor, who refuses performance the vendee may maintain an action for its reasonable value even if the vendor has not converted it into money. He is not obliged to resort to replevin or trover.¹³ So if A has rendered services of which B has received the benefit,¹⁴ as if services were rendered under a contract to convey realty in recompense therefor,¹⁵ or under a contract that cannot be performed within the year,¹⁶ especially where the services are rendered by an infant,¹⁷ B must make compensation for such services.¹⁸ Thus, if A renders services to B in consideration of an oral agreement by B to devise certain realty to A, A can recover a reasonable compensation from B's estate for services thus rendered.¹⁹ If A furnishes board to B under an oral contract whereby B agrees to devise property to A's child, and B does

¹² Reynolds v. Reynolds, 74 Vt. 463; 52 Atl. 1036.

¹³ Booker v. Wolf, 195 Ill. 365; 63 N. E. 265; reversing, 97 Ill. App. 139.

¹⁴ Bucki v. McKinnon, 37 Fla. 391; 20 So. 540; Hudson v. Hudson, 87 Ga. 678; 27 Am. St. Rep. 270; 13 S. E. 583; Schanzenbach v. Brough, 58 Ill. App. 526; Miller v. Eldridge, 126 Ind. 461; 27 N. E. 132; Schoonover v. Vachon, 121 Ind. 3; 22 N. E. 777; Taggart v. Tevanny, 1 Ind. App. 339; 27 N. E. 511; Smith v. Lotton, 5 Ind. App. 177; 31 N. E. 816; Aiken v. Nogle, 47 Kan. 96; 27 Pac. 825; Myers v. Korb (Ky.), 50 S. W. 1108; Hambell v. Hamilton, 3 Dana (Ky.) 501; Hamilton v. Thirston, 93 Md. 213; 48 Atl. 709; Cadman v. Markle, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315; Clowe v. Pine Product Co., 114 N. C. 304; 19 S. E. 153; Roberts v. Wood Working Co., 111 N. C. 432; 16 S. E. 415; Treece v. Treece, 5 Lea (Tenn.) 317; Koch

v. Williams, 82 Wis. 186; 52 N. W. 257; Tucker v. Grover, 60 Wis. 240; 19 N. W. 62; Cohen v. Stein, 61 Wis. 508; 21 N. W. 514.

¹⁵ Mills v. Joiner, 20 Fla. 479; Thomas v. McManus (Ky.); 64 S. W. 446; Tucker v. Grover, 60 Wis. 240; 19 N. W. 62.

¹⁶ Bethel v. Booth, — Ky. —;

¹⁷ Meyers v. Korb (Ky.), 50 S. 72 S. W. 803; Snyder v. Neal, 129 Mich. 692; 89 N. W. 588; Cadman v. Markle, 76 Mich. 448; 5 L. R. A. 707; 43 N. W. 315. W. 1108; Towsley v. Moore, 30 O. S. 184; 27 Am. Rep. 434.

¹⁸ Clark v. Davidson, 53 Wis. 317; 10 N. W. 384.

¹⁹ Hudson v. Hudson, 87 Ga. 678; 27 Am. St. Rep. 270; 13 S. E. 583; Miller v. Eldridge, 126 Ind. 461; 27 N. E. 132; Schoonover v. Vachon, 121 Ind. 3; 22 N. E. 777; Hamilton v. Thirston, 93 Md. 213; 48 Atl. 709; Estate of Kessler, 87 Wis. 660; 41 Am. St. Rep. 74; 59 N. W. 129.

not perform such contract, A can recover a reasonable compensation for such board and lodging.²⁰ So where B, the owner of realty, makes an oral contract with A for the sale thereof, and A takes possession and makes valuable improvements under circumstances which make specific performance impracticable, A may have compensation for such improvements,²¹ in equity in some jurisdictions,²² and in other jurisdictions even at law.²³ So compensation has been allowed at law for work in preparing ground and putting in a crop under an oral agreement for a lease.²⁴

§750. Right of party in default to recover a reasonable compensation.

In case of a contract not affected by the statute of frauds, and not affected either by defects in offer and acceptance or by peculiarities in the status of the parties thereto, the party who has broken the contract and is in default cannot, as a general rule, recover a reasonable compensation for what he has done under the contract.¹ The question then to be considered is whether the statute of frauds affects the operation of this general rule. If A, the party who has furnished property or rendered services to B under an oral contract within the statute of frauds seeks to avoid the contract and recover for his services or property, a question is presented on which there is a conflict of authority. In some jurisdictions it is held that he cannot

²⁰ Gay v. Mooney, 67 N. J. L. 27; 50 Atl. 596; affirmed in 67 N. J. L. 687; 52 Atl. 1131, on reasons given in opinion below.

²¹ Deischer v. Stein, 34 Kan. 39; 7 Pac. 608; Findley v. Wilson, 3 Litt. (Ky.) 390; 14 Am. Dec. 72; Hannibal, etc., R. R. v. Shortridge, 86 Mo. 662; Smith v. Smith, 28 N. J. L. 208; 78 Am. Dec. 49; Harris v. Frink, 49 N. Y. 24; 10 Am. Rep. 318; Pass v. Brooks, 125 N. C. 129; 34 S. E. 228.

²² King v. Thompson, 9 Pet. (U.

S.) 204; McNamee v. Withers, 37 Md. 171; Herring v. Pollard, 4 Humph. (Tenn.) 362; 40 Am. Dec. 653. Even where such compensation could not be had at law. Mathews v. Davis, 6 Humph. (Tenn.) 324.

²³ Luton v. Badham, 127 N. C. 96; 80 Am. St. Rep. 783; 53 L. R. A. 337; 37 S. E. 143; Thouvenin v. Lea, 26 Tex. 612.

²⁴ Thomas v. McManus (Ky.), 64 S. W. 446.

¹ See § 1603.

recover since he is basing his cause of action upon his own refusal to carry out his contract.² Thus a vendee of realty under an oral contract, who refuses to perform, cannot recover the purchase money paid in by himself,³ even in equity,⁴ nor can he recover for improvements on such realty.⁵ A vendor who refuses performance cannot recover for use and occupation,⁶ and an employee under an oral contract not to be performed within the year cannot abandon the employment with cause and recover on a *quantum meruit*.⁷

In other cases the party refusing performance has been allowed to recover a reasonable compensation.⁸ Thus, one who

² Clark v. Terry, 25 Conn. 395; Day v. Wilson, 83 Ind. 463; Gray v. Gray, 2 J. J. Mar. (Ky.) 21; Bacon v. Parker, 137 Mass. 309; Kriger v. Leppel, 42 Minn. 6; 43 N. W. 484; Galvin v. Prentice, 45 N. Y. 162; 6 Am. Rep. 58; Durham, etc., Co. v. Guthrie, 116 N. C. 381; 21 S. E. 952; Mack v. Bragg, 30 Vt. 571.

³ Thomas v. Brown, 1 Q. B. D. 714; York v. Washburn, 118 Fed. 316; Venable v. Brown, 31 Ark. 564; Crabtree v. Welles, 19 Ill. 55; Day v. Wilson, 83 Ind. 463; 43 Am. Rep. 76; Duncan v. Baird, 8 Dana (Ky.) 101; 33 Am. Dec. 479; Gray v. Gray, 2 J. J. Mar. (Ky.) 21; Plummer v. Bucknam, 55 Me. 105; Riley v. Williams, 123 Mass. 506; Kenniston v. Blakie, 121 Mass. 552; Coughlin v. Knowles, 7 Mete. (Mass.) 57; 39 Am. Dec. 759; McKinney v. Harvie, 38 Minn. 18; 8 Am. St. Rep. 640; 35 N. W. 668; Sennett v. Sheehan, 27 Minn. 328; 7 N. W. 266; Lane v. Shackford, 5 N. H. 130; Long v. Hartwell, 34 N. J. L. 116; Durham, etc., Co. v. Guthrie, 116 N. C. 381; 21 S. E. 952; Syme v. Smith, 92 N. C. 338; Cobb v.

Hall, 29 Vt. 510; 70 Am. Dec. 432; Johnson v. Mill Co., 28 Wash. 515; 68 Pac. 867.

⁴ Foust v. Shoffner, Phil. Eq. (N. C.) 242.

⁵ Young v. Pate, 3 J. J. Mar. (Ky.) 100; Luckett v. Williamson, 37 Mo. 388.

⁶ Greton v. Smith, 33 N. Y. 215.

⁷ Swazey v. Moore, 22 Ill. 63; 74 Am. Dec. 134; Kriger v. Leppel, 42 Minn. 6; 43 N. W. 484; Galvin v. Prentice, 45 N. Y. 162; 6 Am. Rep. 58; Abbott v. Inskip, 29 O. S. 59; Mack v. Bragg, 30 Vt. 571; Philbrook v. Belknap, 6 Vt. 383. See as to other contracts not to be performed within the year. Clark v. Terry, 25 Con. 395; Gottschalk v. Witter, 25 O. S. 76.

⁸ Swift v. Swift, 46 Cal. 266; Davenport v. Gentry, 9 B. Mon. (Ky.) 427; King v. Welcome, 5 Gray (Mass.) 41; Scott v. Bush, 26 Mich. 418; 12 Am. Rep. 311; s. c., 29 Mich. 523; Crawford v. Parsons, 18 N. H. 293; Mendelsohn v. Banov, 57 S. C. 147; 35 S. E. 499; Winters v. Elliott, 1 Lea (Tenn.) 676. "The principle (that no recovery can be had if the other party is willing to perform) has never prevailed in

rendered services upon a contract not to be performed within the year,⁹ or has paid money under a contract for the purchase of realty,¹⁰ has been allowed to recover a reasonable compensation therefor, or if he has made improvements on realty benefitting the vendor he has been allowed to recover.¹¹ However, if services have been rendered under such a contract payable in full each week, and such payments have been made up to the time of discharge, no recovery can be had for a reasonable compensation therefor.¹² Three separate grounds have been suggested for such holding: (1) that such contract is void,¹³ (2) that such contract is voidable at the election of either party,¹⁴ and (3) that to allow the oral contract to be used as a defense in an action for reasonable compensation would be to enforce indirectly a contract that could not be enforced directly.¹⁵ In Alabama the question as to the right of recovery seems to turn on the question of whether there has been part performance within the meaning of the statute, the right of recovery existing in all cases, irrespective of the question of who breaks the contract, until such part performance occurs.¹⁶

this state." *Nelson v. Improvement Co.*, 96 Ala. 515, 526; 38 Am. St. Rep. 116; 11 So. 695.

⁹ *Comes v. Lamos*, 16 Conn. 246; *Benier v. Mfg. Co.*, 71 Me. 506; 36 Am. Rep. 343; *King v. Welcome*, 5 Gray (Mass.) 41; *Freeman v. Foss*, 145 Mass. 361; 1 Am. St. Rep. 467; 14 N. E. 141.

¹⁰ *Nelson v. Improvement Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So. 695; *Allen v. Booker*, 2 Stew. (Ala.) 21; 19 Am. Dec. 33; *Tucker v. Grover*, 60 Wis. 233; 19 N. W. 92 (citing as showing the right of one paying money under an oral contract to recover the same, though the other party is willing to perform. *Clark v. Davidson*, 53 Wis. 317; 10 N. W. 384; *North-Western, etc., Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; *Hooker v. Knab*, 26 Wis. 511; *Thomas v. Sowards*, 25

Wis. 631; *Brandeis v. Neustadt*, 13 Wis. 142).

¹¹ *Masson v. Swan*, 6 Heisk. (Tenn.) 450.

¹² *Cohen v. Stein*, 61 Wis. 508; 21 N. W. 514.

¹³ *Tucker v. Grover*, 60 Wis. 233; 19 N. W. 92. "If he has the unqualified right to repudiate the contract then there is no contract, and no right upon which he can retain the money." *Flinn v. Barber*, 64 Ala. 193, 198; quoted in *Nelson v. Improvement Co.*, 96 Ala. 515, 525; 38 Am. St. Rep. 116; 11 So. 695.

¹⁴ *Winters v. Elliott*, 1 Lea (Tenn.) 676.

¹⁵ *King v. Welcome*, 5 Gray (Mass.) 41.

¹⁶ *Nelson v. Improvement Co.*, 96 Ala. 515; 38 Am. St. Rep. 116; 11 So. 695.

§751. Amount of recovery.

This right of recovery is in the nature of quasi-contract.¹ It is not an indirect means of enforcing the contract. It may be exercised even where an action on the contract has failed.² The contract itself "falls out of view as a ground of legal remedy and appears only to give color to the conduct of the parties in furnishing and accepting the service rendered. It affords the means of determining that the service was not a gift but a sale.³ . . ." Accordingly the party not in default may recover without showing performance on his part.⁴ So the measure of recovery is the benefit which the defendant has received under the contract, and not the contract price, nor what plaintiff has parted with. A's right to recover for property furnished or services rendered under an oral contract which falls within the statute of frauds is usually limited to such property or services as enured to the benefit of B.⁵ Hence, if money is advanced to a corporation under a contract with the stockholders thereof, which is unenforceable by reason of the statute of frauds, such money cannot be recovered from such stockholders.⁶ The liability of the party repudiating the contract to make compensation to the adversary party for loss sustained by him is not always thus limited, however. So where B, the owner of realty, had entered into an oral contract with A for mining coal on B's realty, and B repudiates the contract after A has done some work thereunder, A can recover from B the actual loss sustained by A in mining for coal.⁷ So where B agreed to convey to A certain realty not then owned by B, and A entered and made valuable improvements and B did not get title to such realty and hence was unable to convey, A was allowed to recover for

¹ See Ch. XXXVII.

² Action in quasi-contract successful. *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602; 35 N. W. 164. Action on contract failed. *Dickinson v. Wright*, 56 Mich. 42; 22 N. W. 312.

³ *Gay v. Mooney*, 67 N. J. L. 27, 29; 50 Atl. 596.

⁴ *Peabody v. Fellows*, 181 Mass. 26; 62 N. E. 1053.

⁵ *Dowling v. McKenney*, 124 Mass. 478; *Banker v. Henderson*, 58 N. J. L. 26; 32 Atl. 700.

⁶ *Gazzam v. Simpson*, 114 Fed. 71; 52 C. C. A. 19.

⁷ *Heilman v. Weinman*, 139 Pa. St. 143; 21 Atl. 29.

such improvements.⁸ In some jurisdictions the party who has furnished property or rendered services under an oral contract, subsequently repudiated by the adversary party as within the statute of frauds can not only recover a reasonable compensation for what he has done, but he can also introduce the oral contract in evidence for the purpose of showing what the parties had agreed upon as a reasonable compensation.⁹ Thus, where A and B have an oral contract of employment which cannot be performed within the year, and A renders services thereunder and B repudiates the contract, A can recover for services rendered at the contract rate.¹⁰ A reason often given for this holding is that the contract is not void, but simply unenforceable, so that no action can be maintained for its breach, and valid for every other purpose. This principle is sometimes pushed so far that recovery for the work actually done may be had under the contract on the theory that the statute does not apply to the executed part of a contract but only to the executory part.¹¹ This principle has been applied to a lease,¹² and to a contract to furnish water supply to run for twenty-five years.¹³ This view is repudiated in other jurisdictions on the ground that it amounts to a substantial repeal of the statute of frauds.¹⁴ In courts taking this last view, a reasonable compensation for property furnished or work done under an oral contract within the statute must be determined without reference to the terms of the oral contract.

⁸ *Smith v. Smith*, 28 N. J. L. 208; 78 Am. Dec. 49.

⁹ *Currier v. Barker*, 2 Gray (Mass.) 224; *Lally v. Lumber Co.*, 85 Minn. 257; 88 N. W. 846; *Spinney v. Hill*, 81 Minn. 316; 84 N. W. 116; *Kruger v. Leppel*, 42 Minn. 6; 43 N. W. 484.

¹⁰ *Murphy v. De Haan*, 116 Ia. 61; 89 N. W. 100; *Lally v. Lumber Co.*, 85 Minn. 257; 88 N. W. 846; *Spinney v. Hill*, 81 Minn. 316; 84 N. W. 116; *Kruger v. Leppel*, 42 Minn. 6; 43 N. W. 484.

¹¹ *City of Greenville v. Waterworks Co.*, 125 Ala. 625; 27 So. 761; *Murphy v. De Haan*, 116 Ia. 61; 89 N. W. 100; *Sanger v. French*, 157 N. Y. 213; 51 N. E. 979.

¹² *Lagerfelt v. McKee*, 100 Ala. 430; 14 So. 281.

¹³ *Graves County Water Co. v. Ligon*, 112 Ky. 775; 66 S. W. 725. Suit by property-owner for loss caused by insufficient supply.

¹⁴ *Riif v. Riibe*, — Neb. —; 94 N. W. 517.

§752. Methods of taking advantage of statute.

If, in an action on a contract within the statute of frauds and not complying with its requirements, the statute of frauds is not taken advantage of in a proper manner by raising the question on the pleadings or on the admission of oral evidence, the defence of the statute is waived and the contract can be enforced though oral, and though proved by oral evidence only.¹ If the pleading which sets up the oral contract does not show affirmatively that it is oral, a demurrer to such pleading cannot be sustained because of the statute of frauds. If the contract is pleaded in a manner sufficient to satisfy the common law rules before the statute of frauds, and if it does not appear affirmatively that it is an oral contract, it is pleaded in a manner sufficient to satisfy the statute and the adversary party must raise the question of the statute of frauds in some way other than by demurrer.² While in most of these cases the contract is

¹ *Carter v. Fischer*, 127 Ala. 52; 28 So. 376; *St. Louis, etc., Ry. v. Hall*—Ark.—; 74 S. W. 293; *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Tift v. Weslosky Co.*, 113 Ga. 681; 39 S. E. 503; *Sanford v. Davis*, 181 Ill. 570; 54 N. E. 977; *Walters v. Walters*, 132 Ill. 467; 23 N. E. 1120; *Tarleton v. Vietes*, 1 Gil. (Ill.) 470; 41 Am. Dec. 193; *Bryant v. Everly* (Ky.), 57 S. W. 231; *Iverson v. Cirkel*, 56 Minn. 299; 57 N. W. 800; *Missouri Real Estate Co. v. Sims*—Mo.—; 78 S. W. 1006; *Maybee v. Moore*, 90 Mo. 340; 2 S. W. 471; *Davis v. Greenwood*, 2 Neb. Unoff. 317; 96 N. W. 526; *Connor v. Hingtgen*, 19 Neb. 472; 27 N. W. 443; *Gough v. Williamson*, 62 N. J. Eq. 526; 50 Atl. 323; *Fee v. Sharkey*, 60 N. J. Eq. 446; 45 Atl. 1091; affirming 59 N. J. Eq. 284; 44 Atl. 673; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693; 12 L.

R. A. 463; 27 N. E. 256; *Duffy v. O'Donovan*, 46 N. Y. 223; *Suber v. Richards*, 61 S. C. 393; 39 S. E. 540; *Gregory v. Farris* (Tenn. Ch. App.), 56 S. W. 1059; *Smith v. Ruoha* (Tenn. Ch. App.), 54 S. W. 161; *Abba v. Smyth*, 21 Utah 109; 59 Pac. 756; *Sartwell v. Sowles*, 72 Vt. 270; 82 Am. St. Rep. 943; 48 Atl. 11; *Pike v. Pike*, 69 Vt. 535; 38 Atl. 265; *Battell v. Matot*, 58 Vt. 271; 5 Atl. 479; *Atkinson v. Washington and Jefferson College*—W. Va.—; 46 S. E. 263; *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. 220.

² *Evans v. Ry.*, 133 Ala. 482; 32 So. 138; *Gale v. Harp*, 64 Ark. 462; 43 S. W. 144; *Bradford Investment Co. v. Joost*, 117 Cal. 204; 48 Pac. 1083; *Curtiss v. Ins. Co.*, 90 Cal. 245; 25 Am. St. Rep. 114; 27 Pac. 211; *Baldwin v. Bank*, 17 Colo. App. 7; 67 Pac. 179; *Taliaferro v. Smiley*, 112 Ga. 62; 37 S. E. 106; *Draper v. Dry Goods Co.*, 103 Ga.

pleaded by the plaintiff the same rule applies where the defendant pleads it.³ But where by statute no reply is necessary to matter of defence set up in the answer, plaintiff may take advantage of the statute of frauds to avoid the contract alleged by defendant without further pleading.⁴ If the pleading which sets up the oral contract shows affirmatively that it is oral, some authorities hold that such pleading is not demurrable, on the ground that a demurrer admits the existence of the contract while the defence of the statute of frauds is not expressly interposed.⁵ The weight of authority, however, holds that such pleading can be demurred to, on the ground that it shows affirmatively the existence of a valid defence to the contract alleged.⁶

661; 68 Am. St. Rep. 136; 30 S. E. 566; Speyer v. Desjardins, 144 Ill. 641; 36 Am. St. Rep. 473; 32 N. E. 283; Switzer v. Skiles, 8 Ill. 529; 44 Am. Dec. 723; Hamilton v. Thurston, 93 Md. 213; 48 Atl. 709; Mullaly v. Holden, 123 Mass. 583; Stearns v. Ry., 112 Mich. 651; 71 N. W. 148; Harris Photographic Co. v. Fisher, 81 Mich. 136; 45 N. W. 661; Benton v. Schulte, 31 Minn. 312; 17 N. W. 621; Stillwell v. Hamm, 97 Mo. 579; 11 S. W. 252; Sharkey v. McDermott, 91 Mo. 647; 60 Am. Rep. 270; 4 S. W. 107; Reed v. Crane, 89 Mo. App. 670; Whitehead v. Burgess, 61 N. J. L. 75; 38 Atl. 802; Hinchman v. Rutan, 31 N. J. L. 496; Marston v. Swett, 66 N. Y. 206; 23 Am. Rep. 43; Gladwell v. Hume, 18 Ohio C. C. 845; Cranston v. Smith, 6 R. I. 231; Carroway v. Anderson, 1 Humph. (Tenn.) 61; Horm v. Shamblyn, 57 Tex. 243; Murphy v. Stell, 43 Tex. 123; Robbins v. Deverill, 20 Wis. 142. *Contra*, in Kentucky, where it is said to be "well settled that a contract which is not alleged to be in writing must be held to be by parol." Morgan v. Wickliffe, 110 Ky. 215; 61 S. W. 13; Hocker

v. Gentry, 3 Met. (Ky.) 463. So by statute in some jurisdictions. Horner v. McConnell, 158 Ind. 280; 63 N. E. 472; Windell v. Hudson, 102 Ind. 521; 2 N. E. 303; Ice v. Ball, 102 Ind. 42; 1 N. E. 66; Pulse v. Miller, 81 Ind. 190; Wiseman v. Thompson, 94 Ia. 607; 63 N. W. 346.

³ Walker v. Edmundson, 111 Ga. 454; 36 S. E. 800; Hurt v. Ford, 142 Mo. 283; 41 L. R. A. 823; 44 S. W. 228.

⁴ Steed v. Harvey, 18 Utah 367; 72 Am. St. Rep. 789; 54 Pac. 1011.

⁵ Hemings v. Doss, 125 N. C. 400; 34 S. E. 511; Williams v. Lumber Co., 118 N. C. 928; 24 S. E. 800; Loughran v. Giles, 110 N. C. 423; 14 S. E. 966.

⁶ Thompson v. Coal Co., 135 Ala. 630; 93 Am. St. Rep. 49; 34 So. 31; Gary v. Newton, 201 Ill. 170; 66 N. E. 267; Dicken v. McKinley, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; Speyer v. Desjardins, 144 Ill. 641; 36 Am. St. Rep. 473; 32 N. E. 283; Burden v. Knight, 82 Ia. 584; 48 N. W. 985; Richards v. Richards. 9 Gray (Mass.) 313; Howard v. Brower, 37 O. S. 402.

The question really turns on the local practice concerning pleadings which are sufficient in themselves but which go farther and show a valid defence or reply thereto which the adversary party may or may not take advantage of. If the party against whom the contract is sought to be enforced pleads, denying the existence of such contract and, at the trial, objects to the introduction of oral evidence to prove such contract the statute of frauds is properly invoked.⁷ Under such pleadings, the defence of the statute may also be raised by a motion to strike out oral evidence of the contract already introduced,⁸ or by a demurrer to the evidence.⁹ If, however, no objection is made to the introduction of oral evidence tending to prove the contract, the defence of the statute is thereby waived.¹⁰ Thus an objection that there was no written memorandum of the contract cannot be made after the evidence is all in and the argument to the jury has begun,¹¹ nor can it be raised for the first time in error

⁷ May v. Sloan, 101 U. S. 231; Feeney v. Howard, 79 Cal. 525; 12 Am. St. Rep. 162; 4 L. R. A. 826; 21 Pac. 984; Adams & Westlake Co. v. Westlake, 92 Ill. App. 616; Suman v. Springate, 67 Ind. 115; Indiana Trust Co. v. Finitzer, 160 Ind. 647; 67 N. E. 520; Thompson v. Frakes, 112 Ia. 585; 84 N. W. 703; Klein v. Ins. Co. (Ky.), 57 S. W. 250; Hamilton v. Thirston, 93 Md. 213; 48 Atl. 709; Third National Bank v. Steel, 129 Mich. 434; 88 N. W. 1050; Bean v. Lamprey, 82 Minn. 320; 84 N. W. 1016; Bambrick v. Bambrick, 157 Mo. 423; 58 S. W. 8; Hackett v. Watts, 138 Mo. 502; 40 S. W. 113; Riif v. Riibe, — Neb.—; 94 N. W. 517; Busick v. Van Ness, 44 N. J. Eq. 82; 12 Atl. 609; Browning v. Berry, 107 N. C. 231; 10 L. R. A. 726; 12 S. E. 195; Holler v. Richards, 102 N. C. 545; 9 S. E. 460; Birchell v. Neaster, 36 O. S. 331; Hillhouse v. Jennings, 60 S. C. 373; 38 S. E.

599; Moody v. Jones (Tex.), 37 S. W. 379; Williams-Hayward Shoe Co. v. Brooks, 9 Wyo. 424; 64 Pac. 342.

⁸ Hillhouse v. Jennings, 60 S. C. 373; 38 S. E. 599. (The court saying that such a motion might be treated as a demurrer to the evidence.)

⁹ Bambrick v. Bambrick, 157 Mo. 423; 58 S. W. 8. (In this case a peremptory instruction to the jury was held proper.) Apparently *contra*, Neuirth v. Engler, 83 Mo. App. 420; Miller v. Harper, 63 Mo. App. 293; Scharff v. Klein, 29 Mo. App. 549.

¹⁰ Cosand v. Bunker, 2 S. D. 294; 50 N. W. 84; Sartwell v. Sowles, 72 Vt. 270; 82 Am. St. Rep. 943; 48 Atl. 11; Pike v. Pike, 69 Vt. 535; 38 Atl. 265; Battell v. Matot, 58 Vt. 271; 5 Atl. 479.

¹¹ Montgomery v. Edwards, 46 Vt. 151; 14 Am. Rep. 618.

proceedings.¹² An answer which does not specifically deny the existence of the contract alleged but does so in effect by alleging another and a different contract, is such a denial of the contract as to invoke the statute of frauds.¹³ However, if the contract alleged by the defendant is that alleged by the plaintiff except that it does not cover so wide a subject-matter, plaintiff may have the contract, though oral, enforced as far as admitted by defendant.¹⁴ Some authorities, however, hold that a general denial is not a proper method of invoking the defence of the statute.¹⁵ In Iowa this question must be raised by demurrer if it appears on the face of the pleading, and is waived otherwise.¹⁶ If the existence of the contract is not denied, the statute of frauds may be invoked by a pleading denying that the contract alleged or any note or memorandum thereof was in writing and claiming the benefit of the statute.¹⁷ A pleading which alleges that the contract alleged by the adversary party was not in writing and is "contrary to the statute in such cases made and provided," contains sufficient allegations to interpose the statute of frauds as a defence.¹⁸ A pleading which merely alleges as a conclusion that defendant is not equitably or morally bound to carry out the agreement,¹⁹ or that the contract is

¹² *Marr v. Ry.*, 121 Ia. 117; 96 N. W. 716; *Hart v. Garcia* (Tex. Civ. App.), 63 S. W. 921.

¹³ *Barrett v. McAllister*, 33 W. Va. 738; 11 S. E. 220.

¹⁴ *Gough v. Williamson*, 62 N. J. Eq. 526; 50 Atl. 323.

¹⁵ *Martin v. Blanchett*, 77 Ala. 288; *Guynn v. McCauley*, 32 Ark. 97; *McLure v. Koen*, 25 Colo. 284; 53 Pac. 1058; *Wickham v. Association*, 80 Ill. App. 523; *Lawrence v. Chase*, 54 Me. 196; *Graffam v. Pierce*, 143 Mass. 386; 9 N. E. 819; *Matthews v. Matthews*, 154 N. Y. 288; 48 N. E. 531; *Crane v. Powell*, 139 N. Y. 379; 34 N. E. 911; *Hammer v. Sidway*, 124 N. Y. 538; 21

Am. St. Rep. 693; 12 L. R. A. 463; 27 N. E. 256; *Barnes v. Coal Co.*, 101 Tenn. 354; 47 S. W. 498; *Citty v. Mfg. Co.*, 93 Tenn. 276; 42 Am. St. Rep. 919; 24 S. W. 121.

¹⁶ *Wiseman v. Thompson*, 94 Ia. 607; 63 N. W. 346; *Marr v. Ry.*, 121 Ia. 117; 96 N. W. 716.

¹⁷ *Burt v. Wilson*, 28 Cal. 632; 87 Am. Dec. 142; *Wright v. Raftree*, 181 Ill. 464; 54 N. E. 998; *Thomas v. Churchill*, 48 Neb. 266; 67 N. W. 182; *Ashmore v. Evans*, 11 N. J. Eq. 151.

¹⁸ *Wright v. Raftree*, 181 Ill. 464; 54 N. E. 998.

¹⁹ *Battell v. Matot*, 58 Vt. 271; 5 Atl. 479.

barred by the statute,²⁰ without alleging the fact that neither the contract nor any note or memorandum thereof was in writing is insufficient.

XIII. PROMISES CONSISTING OF MORE THAN ONE COVENANT.

§753. Severable and inseverable contracts.

The enforceability of a contract for the sale of chattels when affected by the statute of frauds often depends on whether it is several or inseverable. This question may arise in two ways. First, the separate chattels may each sell at a price below the limit fixed by statute, but the sum total of the price of all the chattels sold may exceed such limit. In this case, if the sales are separate, each sale for a price below the statutory limit is not affected by the statute.¹ If, however, the transaction is one entire sale and the price exceeds the statutory limit the statute applies, though separate chattels are sold,² and though delivery is to be made in installments,³ and though the price of each chattel is estimated separately.⁴ This is not the rule for testing the severability of contracts for other purposes, such as illegality.⁵ Second, part of one lot of chattels sold may be received and accepted, or they may be paid for in part. Does this satisfy the statute as to other chattels sold between the same parties? The answer depends on whether the sales amount to one transaction or not. If separate chattels are sold under one contract, any act of receipt and acceptance or part payment which satisfies the statute as to one chattel, satisfies it as to all.⁶ This is true even though by the terms of the con-

²⁰ *Dinkel v. Gundelfinger*, 35 Mo. 172.

¹ *Johnson v. Buchanan*, 29 N. S. 27.

² *Jenness v. Wendell*, 51 N. H. 63; 12 Am. Rep. 48.

³ *Standard Wall Paper Co. v. Towns*, — N. H. —; 56 Atl. 744.

⁴ *Allard v. Greasert*, 61 N. Y. L.

⁵ See § 509.

⁶ *Garfield v. Paris*, 96 U. S. 557; *Kaufman Bros. v. Mfg. Co.*, 78 Ia. 679; 16 Am. St. Rep. 462; 43 N. W. 612; *Weeks v. Crie*, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107; *French v. Bank*, 179 Mass. 404; 60 N. E. 793; *Gilbert v. Lichtenberg*, 98 Mich. 417; 57 N. W. 259; *Earl Fruit Co. v. McKinney*, 65 Mo. App. 220; *Farmer v. Gray*,

tract delivery is to be made in installments.⁷ Thus, where A agreed to sell goods to B in a given district as long as B orders such goods and has a sale for them, one order under such a contract if received and accepted takes the entire contract out of the statute.⁸

If there are separate contracts of sale, acts of receipt and acceptance or of part payment which satisfy the statute as to one contract, do not satisfy it as to the others.⁹ So a contract to sell stock owned by several persons, made by one purporting, without authority, to act on their behalf, and performed by some of the owners, is not taken out of the statute as to an owner who ratified the sale orally but did nothing further.¹⁰

Contracts, as to the effect of receipt and acceptance or part payment, may be separate though entered into at the same time.¹¹ On the other hand, successive negotiations for the sale of different chattels may result at one contract of sale.¹² The question whether there is one contract or more than one is a question for the jury.¹³ Thus a finding by the jury that where orders were given at the same time on two separate lists, the contracts were separate, was not disturbed, though it appeared that the orders were placed on two lists instead of one, chiefly for convenience in writing the order.¹⁴

16 Neb. 401; 20 N. W. 276.

⁷ Gilbert v. Lichtenberg, 98 Mich. 417; 57 N. W. 259; Beyerstedt v. Mill Co., 49 Minn. 1; 51 N. W. 619.

⁸ "Each order was not a new contract, but in fulfillment of the old one." Kaufman Bros. v. Mfg. Co., 78 Ia. 679, 686; 16 Am. St. Rep. 462; 43 N. W. 612.

⁹ Brown v. Snider, 126 Mich. 198; 85 N. W. 570; McCormick Harvesting Machine Co. v. Cusack, 116 Mich. 647; 74 N. W. 1005; Hershey Lumber Co. v. Lumber Co., 66 Minn. 449; 69 N. W. 215; Tompkins v. Sheehan, 158 N. Y. 617; 53 N. E. 502.

¹⁰ Tompkins v. Sheehan, 158 N. Y. 617; 53 N. E. 502.

¹¹ Brown v. Snider, 126 Mich. 198; 85 N. W. 570.

¹² Weeks v. Crie, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107.

¹³ Weeks v. Crie, 94 Me. 458; 80 Am. St. Rep. 410; 48 Atl. 107; Brown v. Snider, 126 Mich. 198; 85 N. W. 570. "Whether negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact, properly to be passed upon by a jury." Weeks v. Crie, 94 Me. 458, 464; 80 Am. St. Rep. 410; 48 Atl. 107.

¹⁴ Brown v. Snider, 126 Mich. 198; 85 N. W. 570 (one order in

If A and B enter into an oral contract for the sale of distinct parcels of realty, at separate prices for each, and the purchaser takes possession of one parcel, such possession takes the contract out of the statute as to the realty taken possession of, but not as to the remaining parcels.¹⁵ Still less is a contract taken out of the statute by possession of other parcels of realty taken by other vendees under separate contracts with the same vendor.¹⁶ On the other hand, a contract for conveying several parcels at one time for a gross consideration is taken out of the statute by a delivery of the possession of one parcel.¹⁷

§754. Conjunctive promises.

If A and B make an oral contract whereby A agrees to do two things, one of which is within the statute of frauds and the other of which is not, B's right to enforce such oral contract if A interposes the statute of frauds as a defense, depends on whether the two promises are severable or not. If they are unseverable, B cannot recover for breach of either covenant.¹ Thus an oral contract to dispose of both real and personal property by will is unenforceable as to either.² So an oral contract to reconvey realty and to pay interest on a prior mortgage thereon is inseverable, and an action cannot be main-

this case was not signed by vendee).

¹⁵ *Cochran v. Ward*, 5 Ind. App. 89, 97; 51 Am. St. Rep. 229; 29 N. E. 795; 31 N. E. 581; *Myers v. Croswell*, 45 O. S. 543; 15 N. E. 866.

¹⁶ *Graves v. Goldthwait*, 153 Mass. 268; 10 L. R. A. 763; 26 N. E. 860.

¹⁷ *Miller v. Ball*, 64 N. Y. 286; *Smith v. Underdunk*, 1 Sandf. Ch. (N. Y.) 579.

¹ *Haviland v. Sammis*, 62 Conn. 44; 36 Am. St. Rep. 330; 25 Atl. 394; *Dicken v. McKinley*, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; *Pond v. Sheean*, 132 Ill. 312; 8 L. R. A. 414; 23 N. E. 1018; *Rainbolt v. East*, 56 Ind. 538; 26 Am.

Rep. 40; *Becker v. Mason*, 30 Kan. 697; 2 Pac. 850; *Dowling v. McKenney*, 124 Mass. 478; *Martin v. Martin's Estate*, 108 Wis. 284; 81 Am. St. Rep. 895; 84 N. W. 439; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

² *Dicken v. McKinley*, 163 Ill. 318; 54 Am. St. Rep. 471; 45 N. E. 134; *Pond v. Sheean*, 132 Ill. 312; 8 L. R. A. 414; 23 N. E. 1018; *Kling v. Bordner*, 65 O. S. 86; 61 N. E. 148; *Shahan v. Swan*, 48 O. S. 25; 29 Am. St. Rep. 517; 26 N. E. 222; *Martin v. Martin's Estate*, 108 Wis. 284; 81 Am. St. Rep. 895; 84 N. W. 439.

tained for failure to pay interest.³ However, an entire promise to pay in part one's own debt and in part the debt of another has been held enforceable as to the first part of the contract though not as to the second.⁴

If, on the other hand, the promises are severable, an action can be maintained for breach of the promise not within the statute of frauds, but not for breach of the promise within the statute.⁵ Thus an oral contract to buy real and personal property can be enforced as to the personal property, not falling within the statute of frauds as to such property where separate prices were fixed on the two kinds of property and they were treated in the contract as separate subjects of sale.⁶ So a verbal contract for the sale of personalty is not made invalid because a leasehold was surrendered as part of the same transaction.⁷ So A's promise to B to pay C's debt to B for board already incurred and to be thereafter incurred is severable.⁸

§755. Alternative promises.

If A and B enter into an oral contract by the terms of which A agrees either to perform an act which is not within the statute of frauds or at his election to perform a different act which is within the statute, and A interposes the statute of frauds to B's action on such contract, B cannot recover since he cannot show a breach of the contract without establishing by oral evidence a contract within the statute of frauds and showing a breach thereof.¹ Thus an oral contract to pay money or con-

³ Hurley v. Donovan, 182 Mass. 64; 64 N. E. 685.

⁴ A promise to a contractor by a third person to pay the entire contract price if he completed his contract after default by the adversary party. Rand v. Mather, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; overruling Loomis v. Newhall, 15 Pick. (Mass.) 159.

⁵ Adams v. Weaver, 117 Cal. 42; 48 Pac. 972; Lowman v. Sheets, 124 Ind. 416; 7 L. R. A. 784; 24 N. E.

351; Haynes v. Nice, 100 Mass. 327; 1 Am. Rep. 109; Rand v. Mather, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; Wooten v. Walters, 110 N. C. 251; 14 S. E. 734, 736.

⁶ Wooten v. Walters, 110 N. C. 251; 14 S. E. 734, 736.

⁷ Adams v. Weaver, 117 Cal. 42; 48 Pac. 972.

⁸ Haynes v. Nice, 100 Mass. 327; 1 Am. Rep. 109.

¹ Patterson v. Cunningham, 12 Me. 506; Andrews v. Broughton, 78

vey realty is unenforceable,² as a contract to devise land or bequeath personalty.³

XIV. SPECIAL STATUTES.

§756. Types of special statutes.

Local statutes have required other classes of contracts to be in writing or to be proved by writing. Thus contracts of corporations exceeding a certain amount,¹ or contracts of a married woman affecting the body of her estate,² come within the provisions of some statutes. Part performance of such a contract does not make it enforceable against a married woman, since she has no capacity in these jurisdictions to bind herself except as indicated by statute;³ but under some statutes the married woman may enforce an oral contract though it cannot be enforced against her.⁴ Other contracts are required to be in writing only where the interests of third persons are concerned. Thus a contract whereby a vendor reserves title to the property sold and delivered to the vendee until the purchase price is paid is required by some statutes to be in writing when the interests of a third person is to be affected thereby.⁵ The statutes of the United States require assignments of patents to be in writing⁶

Mo. App. 179; *Russell v. Briggs*, 165 N. Y. 500; 53 L. R. A. 556; 59 N. E. 303; *Howard v. Brower*, 37 O. S. 402.

² *Dyer v. Graves*, 37 Vt. 369; *Clark v. Davidson*, 53 Wis. 317; 10 N. W. 384; *Patterson v. Cunningham*, 12 Me. 506; *Andrews v. Broughton*, 78 Mo. App. 179; *Russell v. Briggs*, 165 N. Y. 500; 53 L. R. A. 556; 59 N. E. 303.

³ *Howard v. Brower*, 37 O. S. 402.

⁴ *Curtis v. Mining Co.*, 113 N. C. 417; 18 S. E. 705. A contract in excess of such amount is void *in toto* and not merely as to the excess. *Citizens' Savings Bank v. Vaughan*, 115 Mich. 156; 73 N. W. 143. Such statute in North Carolina does not

apply to foreign corporations. *Rumbough v. Improvement Co.*, 106 N. C. 461; 11 S. E. 528.

⁵ *Sydnor v. Boyd*, 119 N. C. 481; 37 L. R. A. 734; 26 S. E. 92. (Including her interest in a life insurance policy, taken out on her husband's life for her benefit.)

⁶ *Percifield v. Black*, 132 Ind. 384; 31 N. E. 955.

⁴ *Lister v. Vowell*, 122 Ala. 264; 25 So. 564.

⁵ *Harp v. Guano Co.*, 99 Ga. 752; 27 S. E. 181; *Mann v. Thompson*, 86 Ga. 347; 12 S. E. 746.

⁶ *Gates Iron Works v. Fraser*, 153 U. S. 332; *Baldwin v. Sibley*, 1 Cliff. (U. S.) 150.

and signed by the assignor.⁷ Such assignment need not be recorded as between the parties,⁸ though it must be recorded as against a subsequent *bona fide* assignee from the same assignor.⁹ An oral contract to convey a patent right has been enforced in equity.¹⁰ This statute does not include contracts for the sale of the right to secure a patent not yet issued,¹¹ nor to a contract to share in the proceeds of the sale of a patented article,¹² nor to a license to make use of a patent.¹³

A Federal statute¹⁴ requires contracts with the United States to be "reduced to writing and signed by the contracting parties with their names at the end thereof." Such contract not thus executed is unenforceable.¹⁵ The scope of these statutes is often different from the statute of frauds, as they affect the capacity of the parties or the form of the contract. Logically they do not belong here, but rather in the following chapter. Their general similarity to the statute of frauds has caused mention of them in this connection. Another class of statutes concerns contracts of public corporations. This is probably the class most frequently met with in litigation. From its connection with the subject of the capacity of public corporations to make contracts, a discussion of it is postponed.¹⁶

⁷ Gordon v. Anthony, 16 Blatch. (U. S.) 234.

⁸ Case v. Redfield, 4 McLean (U. S.) 526; Hildreth v. Turner, 17 Ill. 184; McKernan v. Hite, 6 Ind. 428.

⁹ Perry v. Corning, 7 Blatchf. (U. S.) 195; Harrison v. Ingersoll, 50 Mich. 36; 22 N. W. 268.

¹⁰ Burke v. Partridge, 58 N. H. 349.

¹¹ Dalzell v. Mfg. Co., 149 U. S. 315; Harrigan v. Smith, 57 N. J. Eq. 635; 42 Atl. 579; reversing 40 Atl. 13; Jones v. Rey-

nolds, 120 N. Y. 213; 24 N. E. 279.

¹² Blakeney v. Goode, 30 O. S. 351.

¹³ Jones v. Berger, 58 Fed. 1006; Nichols v. Marsh, 61 Mich. 509; 28 N. W. 699.

¹⁴ R. S. of U. S., § 3744.

¹⁵ St. Louis Hay, etc., Co. v. United States, 191 U. S. 159; Monroe v. United States, 184 U. S. 524; South Boston Iron Co. v. United States, 118 U. S. 37; Clark v. United States, 95 U. S. 539.

¹⁶ See § 692.

CHAPTER XXXVI.

CONTRACTS WHICH MUST BE IN WRITING.

§757. General scope of this class.

In considering the contracts which must be in writing as distinguished from those which merely must be proved by writing and which were considered in the preceding chapter,¹ it must be noted that these contracts are of two general classes. One class consists of those contracts which are required by statute to be in writing. For the most part these are contracts of persons of abnormal status, including, in some states, contracts of married women; in others contracts of private corporations and in many states contracts of public corporations. This class of contracts was referred to in the preceding chapter;² and since it is closely connected with questions of status, further discussion is deferred until the subject of parties has been considered.³ The other class of contracts which must be in writing consists of those contracts in which writing was required by the law-merchant. This part of the law-merchant has been thoroughly incorporated into Common Law and Equity. The negotiable contract has two aspects: first, the elements which such contracts must possess in order to be negotiable, including the extent to which the oral contract under which such negotiable contract is given is to be regarded as a part thereof: and second, the effect of negotiability as distinguished from assignability. While it may seem to break one subject in two, the first of these aspects will be considered here, leaving the second to be discussed under the general division of operation in connection with assignability.⁴

¹ See Ch. XXXV.

² See § 756.

³ See Ch. XLVIII.

⁴ See Ch. LIX.

§758. Elements of negotiable contracts — must be in writing.

In order to be negotiable a contract must possess certain elements.¹ It must be in writing. If in writing, lead-pencil is sufficient though not to be commended.² Since a negotiable contract must pass either by delivery or by indorsement and delivery, an oral negotiable contract is an impossibility.³ As will be shown in the following sections, no part of a negotiable contract can be oral. Whatever validity an incomplete written contract may have, it is impossible that it be negotiable.⁴ However, it has been held that where a bill or note does not show where it is to be paid, an oral agreement fixing the place of payment may be shown for the purpose of proving such demand as will bind the drawer and the indorser.⁵ The surrounding circumstances may, however, serve to explain words which would otherwise be indefinite. Thus where a note is made payable "twenty five after date," the surrounding circumstances may be resorted to in order to show that "days" is the word omitted.⁶

§759. Execution.

The requisites of a valid execution of a contract which by law must be in writing are in some respects like those of ordinary written contracts and in some respects quite different. A contract which is required by law to be in writing, such as a negotiable instrument, must be signed by the promisor.¹ Ex-

¹ A negotiable instrument is one "which runs to order or bearer, is payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not on a contingency." *Hatch v. Bank*, 94 Me. 348; 80 Am. St. Rep. 401; 47 Atl. 908. (Citing *Roads v. Webb*, 91 Me. 406, 410; 64 Am. St. Rep. 246; 40 Atl. 128); *Sivils v. Taylor*, 12 Okla. 47; 69 Pac. 867.

² *Reed v. Roark*, 14 Tex. 329; 65 Am. Dec. 127.

³ Accordingly, in such contracts extrinsic evidence is inadmissible which would be admissible under ordinary contracts in writing. See § 1197.

⁴ See §§ 761, 1197. Other branches of this subject are best considered in connection with the parol evidence rule.

⁵ *Pearson v. Bank*, 1 Pet. (U. S.) 89; *Meyer v. Hibsher*, 47 N. Y. 265.

⁶ *Boykin v. Bank*, 72 Ala. 262.

¹ *May v. Miller*, 27 Ala. 515; *Tevis v. Young*, 1 Met. (Ky.) 197; 71 Am. Dec. 474; *Lewis v. Bank*, 1

trinsic evidence is inadmissible to show the assent to an instrument of this character of a party who has not signed his name thereto.² No special form of signature is required, however. On this point the law of the negotiable contract seems to be the same as that of the ordinary written contract.³ It seems that a signature by mark,⁴ or by initials,⁵ or by printed signature in fac-simile,⁶ are each sufficient if intended as signatures. Delivery is essential to the validity of a negotiable instrument,⁷ If taken from the custody of the maker, without his assent, it has no validity even in the hands of a *bona fide* holder in the absence of negligence on the part of the maker or circumstances creating an estoppel.⁸ Delivery does not, however, require physical transfer to the payee. Leaving a note with the father of the payee is a sufficient delivery.⁹

§760. Definite parties.

The parties to the contract must be clearly described therein.¹ Thus a promise to an alternative payee is not negotiable.² However, if the alternative payees are united in interest so that a payment to one is in legal effect a payment to the other, the instrument may be negotiable; as where it is payable to certain

Neb. (Un.) 177; 95 N. W. 355.

² See § 761.

³ See §§ 571-575.

⁴ *Handyside v. Cameron*, 21 Ill. 588; 74 Am. Dec. 119; *Shank v. Butsch*, 28 Ind. 19; *Lyons v. Holmes*, 11 S. C. 429; 32 Am. Rep. 483.

⁵ *Weston v. Myers*, 33 Ill. 424.

⁶ *Pennington v. Baehr*, 48 Cal. 565.

⁷ *Lally v. Terrell*, 95 Me. 553; 85 Am. St. Rep. 433; 55 L. R. A. 730; 50 Atl. 896; *Harnett v. Holdrege* (Neb.), 97 N. W. 443. See § 577, *et seq.*

⁸ See § 1297.

⁹ *Enneking v. Woebkenberg*. — Wis. —; 92 N. W. 932.

¹ *Tevis v. Young*, 1 Metc. (Ky.) 197; 71 Am. Dec. 474; *McIntosh v. Lytle*, 26 Minn. 336; 37 Am. Rep. 410; 3 N. W. 983; *Randolph v. Hudson*, 12 Okl. 516; 74 Pac. 946; *Seay v. Bank*, 3 Sneed (Tenn.) 558; 67 Am. Dec. 579.

² *Carpenter v. Farnsworth*, 106 Mass. 561; 8 Am. Rep. 360. *Contra*, on the theory that "or" means "and" in such connection. *Quinby v. Merriitt*, 11 Humph. (Tenn.) 439. So a note to "Chas. R. Whitesell *et al.* or order" is non-negotiable. *Gordon v. Anderson*, 83 Ia. 224; 32 Am. St. Rep. 302; 12 L. R. A. 483; 49 N. W. 86.

trustees or their treasurer,³ or where, at Common Law, it was payable to a man or his wife.⁴

It is sufficient if the payee be pointed out by the instrument without being named. A note payable "to the estate of" A is negotiable.⁵ The addition of the word "trustee," to the name of the payee, does not make the payee uncertain.⁶ A note payable to "bearer" is negotiable.⁷ A blank for the name of the payee may be filled by a *bona fide* holder with his own name,⁸ or the instrument may be enforced without filling the blank, as payable to the order of the person for whom it was delivered.⁹ Other courts treat a negotiable instrument having the name of the payee blank as payable to bearer.¹⁰ If, however, the name of a specific payee has been inserted in a check and then crossed out, such check is non-negotiable.¹¹

§761. Adding party to negotiable instrument by extrinsic evidence.

A contract may be signed by A with his own name, but entered into by him on behalf of his real principal X, with the adversary party B. If the contract is one which the law requires to be in writing, B cannot use extrinsic evidence to show that X is the real principal and to hold him liable on the contract. The chief example under this rule is the negotiable instrument.¹ This is not because of the parol evidence rule, but because such

³ Holmes v. Jacques, L. R. 1 Q. B. 376.

⁴ Young v. Ward, 21 Ill. 223.

⁵ Stern v. Eichberg, 83 Ill. App. 442; Shaw v. Smith, 150 Mass. 166; 6 L. R. A. 348; 22 N. E. 887.

⁶ Central State Bank v. Spurlin, 111 Ia. 187; 82 Am. St. Rep. 511; 49 N. W. 661; 82 N. W. 493; Fox v. Trust Co. (Tenn. Ch. App.), 35 L. R. A. 678; 37 S. W. 1102.

⁷ New v. Walker, 108 Ind. 365; 58 Am. Rep. 40; 9 N. E. 386.

⁸ Cox v. Alexander, 30 Or. 438; 46 Pac. 794; Manhattan Savings

Institution v. Bank, 170 N. Y. 58; 88 Am. St. Rep. 640; 62 N. E. 1079.

⁹ Rich v. Starbuck, 51 Ind. 87.

¹⁰ Manhattan Savings Institution v. Bank, 170 N. Y. 58; 88 Am. St. Rep. 640; 62 N. E. 1079.

¹¹ Gordon v. Bank, — Mich. —; 94 N. W. 741.

¹ Cragin v. Lovell, 109 U. S. 194; Merrell v. Witherby, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; Heaton v. Myers, 4 Colo. 59; Pease v. Pease, 35 Conn. 131; 95 Am. Dec. 225; Bickford v. Bank,

contracts must consist entirely of the writing, and parties cannot be added by parol. Thus if a check is signed "A, agent," the real principal cannot be held liable on the check.² The same rule applies to a note signed by "A, agent."³ The principal, if unknown when the note was given, may be held liable on the original debt;⁴ but if the principal is known, taking such note is an election to hold the agent.⁵ Holding the principal on such debt is in the nature of quasi-contract.⁶ Even in negotiable instruments, however, one who does business in the name of another or in a fictitious name and signs negotiable instruments by that name may be held liable thereon.⁷ Thus where A did business under the name "Pompton Iron Works," and signed notes by such name, he may be held liable thereon.⁸ However,

42 Ill. 238; 89 Am. Dec. 436; Wing v. Glick, 56 Ia. 473; 41 Am. Rep. 118; Kansas National Bank v. Bay, 62 Kan. 692; 84 Am. St. Rep. 417; 54 L. R. A. 408; 64 Pac. 596; Trask v. Roberts, 1 B. Mon. (Ky.) 201; Bedford Commercial Ins. Co. v. Covell, 8 Met. (Mass.) 442; Williams v. Robbins, 16 Gray (Mass.) 77; 77 Am. Dec. 396; Stackpole v. v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; Lewis v. Bank, 1 Neb. (Un.) 177; 95 N. W. 355; Webster v. Wray, 19 Neb. 558; 56 Am. Rep. 754; 27 N. W. 644; Bank v. Cook, 38 O. S. 442; Anderton v. Shoup, 17 O. S. 125; Manufacturers', etc., Bank v. Follett, 11 R. I. 92; 23 Am. Rep. 418; Tarver v. Garlington, 27 S. C. 107; 13 Am. St. Rep. 628; 2 S. E. 846; Arnold v. Sprague, 34 Vt. 402. "It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and cannot, therefore, maintain an action upon the note against any other person." Bartlett v. Tucker, 104 Mass. 336, 339; 6 Am. Rep. 240; quoted in Kansas National Bank v. Bay, 62 Kan. 692, 695; 84

Am. St. Rep. 417; 54 L. R. A. 408; 64 Pac. 596. *Contra*, Mechanics' Bank v. Bank, 5 Wheat. (U. S.) 326; Hancock Bank v. Joy, 41 Me. 568; Sharpe v. Bellis, 61 Pa. St. 69; 100 Am. Dec. 618.

² Anderton v. Shoup, 17 O. S. 125.

³ Shuey v. Adair, 18 Wash. 188; 39 L. R. A. 473; 51 Pac. 388. *Contra*, Kenyon v. Williams, 19 Ind. 44.

⁴ Chemical National Bank v. Bank, 156 Ill. 149; 40 N. E. 328; Lovell v. Williams, 125 Mass. 439; Harper v. Bank, 54 O. S. 425; 44 N. E. 97.

⁵ Merrell v. Witherby, 120 Ala. 418; 74 Am. St. Rep. 39; 23 So. 994; 26 So. 974; Bank v. Hooper, 5 Gray (Mass.) 567; 66 Am. Dec. 390.

⁶ See § 789 *et seq.*

⁷ Pease v. Pease, 35 Conn. 131; 95 Am. Dec. 225; Melledge v. Iron Co., 5 Cush. (Mass.) 158; 51 Am. Dec. 59; Tarver v. Garlington, 27 S. C. 107; 13 Am. St. Rep. 628; 2 S. E. 846. See obiter in Chandler v. Coe, 54 N. H. 561.

⁸ Fuller v. Hooper, 3 Gray (Mass.) 334.

where a note was signed "H. R. Sloan by C. M. Bay, Attorney in Fact," and the payee knew that Bay had no authority to sign Sloan's name, it was held that Bay was not liable on the note even if he did business under Sloan's name.⁹ In the absence of estoppel, one who signs an assumed name to a contract required by law to be in writing is liable on the contract only when such assumed name is used by him as his trade name under which he does business.¹⁰ Otherwise his liability is in tort. If A signs a name not his own to a note, either a fictitious name or the name of a real person which he has no right to use, and does not hold such name out as his own, and it is not the name under which he does business, he cannot be held on such note.¹¹ If the instrument is executed in such a way as to show affirmatively that B is making the contract through his agent A, extrinsic evidence that A was really acting for himself is inadmissible,¹² as where A signs a non-negotiable contract "X per A,"¹³ or where A signs a promissory note "X by A, Atty. in Fact."¹⁴ A warehouse receipt, even if made negotiable by statute,¹⁵ is not a negotiable instrument within the meaning of this rule. A party cannot be added to a negotiable contract by oral evidence, even where no liability is sought to be enforced against him. Thus in an action by indorsee against indorser on non-payment of the note, such evidence cannot be used to show that one who signed as agent was in fact principal, and hence that as no demand had been made on him the indorser was discharged.¹⁶

⁹ *Kansas National Bank v. Bay*, 62 Kan. 692; 84 Am. St. Rep. 417; 54 L. R. A. 408; 64 Pac. 596.

¹⁰ *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240.

¹¹ *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240.

¹² *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764; 11 S. W. 165.

¹³ *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764; 11 S. W. 165.

¹⁴ *Kansas National Bank v. Bay*,

62 Kan. 692; 84 Am. St. Rep. 417; 54 L. R. A. 408; 64 Pac. 596. To the same effect, see *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171; 5 L. R. A. 496; 43 N. W. 166.

¹⁵ *Anderson v. Flouring Mills*, 37 Or. 483; 82 Am. St. Rep. 771; 50 L. R. A. 235; 60 Pac. 839.

¹⁶ *Reeve v. Bank*, 54 N. J. L. 208; 33 Am. St. Rep. 675; 16 L. R. A. 143; 23 Atl. 853.

§762. Discharging party to negotiable instrument by extrinsic evidence.

If a party to a negotiable instrument who has signed in such a way as to assume a personal liability, attempts to show that the oral understanding of the parties was that he was signing merely as agent on behalf and thus to relieve himself from liability on the instrument, such attempt violates two rules at once — the rule requiring a negotiable instrument to consist entirely of writing, and the parol evidence rule which forbids the contradiction of any complete written contract by a prior or contemporaneous oral contract.¹ Accordingly, such oral agreements are without effect and the party bound by the terms of the instrument cannot relieve himself from liability thereon by this means.² This rule applies even though the agent thus executing the instrument adds the word “agent” or some word of equivalent import to his signature, as long as the form of the signature is such that the word thus added is regarded as a mere *descriptio personae* and does not affect the nature of the liability assumed.³ The conflict that exists as to the nature of personal liability arises out of a difference in judicial opinion as to what is a mere *descriptio personae* and what shows an intent not to assume personal liability.⁴ Even if the maker describes himself in the body of the negotiable instrument as an agent, but signs his individual name without the addition of any designation of agency, such contract is held in many jurisdictions to impose an individual liability upon the agent, and to be so free from ambiguity that oral evidence is inadmissible to discharge the agent.⁵ Thus a note whereby “We or either of us as directors” of a certain corporation promise to pay, signed by individual names, cannot be shown to be the note of the corporation for the pur-

¹ See Ch. LVI.

² Nash v. Towne, 5 Wall. (U. S.) 689; Hypes v. Griffin, 89 Ill. 134; 31 Am. Rep. 71; Mathews v. Mattress Co., 81 Ia. 246; *sub nomine*, Matthews v. Mattress Co., 19 L. R. A. 676; 54 N. W. 225; Morell v. Coddling, 4 All. (Mass.) 403; Lieb-

scher v. Kraus, 74 Wis. 387; 17 Am. St. Rep. 171; 5 L. R. A. 496; 43 N. W. 166.

³ See § 1233 *et seq.*

⁴ See Ch. LIII.

⁵ Nash v. Towne, 5 Wall. (U. S.) 689; Hypes v. Griffin, 89 Ill. 135; 31 Am. Rep. 71.

pose of relieving the makers from liability.⁶ In some jurisdictions the addition of some word denoting agency to the names of the promisors in a negotiable instrument in the body of the instrument, and to their signatures still leaves them liable individually and extrinsic evidence is inadmissible to relieve them from liability. Thus a note whereby "We, the Trustees," of a certain cemetery association promise to pay, signed by their individual names, with the addition of the word "Trustee," imposes personal liability so clearly that oral evidence is inadmissible to disprove it.⁷ In some jurisdictions it is held that when the form of signature is ambiguous the real understanding of the parties may be shown for the purpose of determining the character of the liability assumed.⁸

§763. Promise or order.

The contract must be either a promise to pay or an order commanding another to pay.¹ The former is a promissory note or bond: the latter a bill of exchange or check. So a promise by A to B to accept an order from C, with C's name indorsed thereon, is not a bill of exchange, the order not having been drawn.² Accordingly a mere acknowledgment of a debt,³ such as an I. O. U.,⁴ is not negotiable. The difficulty and cause of disagreement among the courts is to determine when such an instrument amounts to a promise to pay. If a receipt contains an express promise to repay it may be a promissory note, as a receipt containing the words, "Which we promise to replace . . . on de-

⁶ *Titus v. Kyle*, 10 O. S. 444.

⁷ *Reiff v. Mulholland*, 65 O. S. 178; 62 N. E. 124. (In this case reformation had been sought in equity and refused. On trial at law oral evidence was admitted and judgment rendered for defendants. The Supreme Court reversed this judgment and entered judgment for plaintiff on the conceded facts.)

⁸ *Kean v. Davis*, 21 N. J. L. 683.

¹ *Torpey v. Tebo*, 184 Mass. 307;

68 N. E. 223; *Hitchcock v. Cloutier*, 7 Vt. 22.

² *Allen v. Leavens*, 26 Or. 164; 46 Am. St. Rep. 613; 26 L. R. A. 620; 37 Pac. 488.

³ *Currier v. Lockwood*, 40 Conn. 349; 16 Am. Rep. 40; *Gay v. Roake*, 151 Mass. 115; 21 Am. St. Rep. 434; 7 L. R. A. 392; 23 N. E. 835; *Brenzter v. Wightman*, 7 W. & S. (Pa.) 264.

⁴ *Gay v. Roake*, 151 Mass. 115;

mand."⁵ If a receipt provides for repayment, it is a promissory note, though it contains no express promise to pay.⁶ Thus the words "payable,"⁷ or "to be paid,"⁸ make the instrument in which they are contained a note instead of a mere receipt. So a statement of time at which the debt is due,⁹ as "due . . . on demand,"¹⁰ may import a promise. Some authorities, however, go farther and treat all due-bills as promissory notes, on the theory that they contain an implied promise to pay.¹¹ An acknowledgment of a debt evidenced by a lost note and a renewal of such note is in effect a promise to pay such debt, and may itself be negotiable.¹²

§764. For money only.

The contract must be one for the payment of money only. Accordingly, a promise to pay in work, as a railroad ticket,¹ or in property other than money,² even if such other property is itself negotiable as bills of exchange,³ checks,⁴ notes,⁵ or United States bonds,⁶ is not negotiable. But a promise to pay in "current funds" has been held to mean current money, and hence to be negotiable;⁷ and so of "current funds of the state of

21 Am. St. Rep. 434; 7 L. R. A. 392; 23 N. E. 835.

⁵ Moore v. Gano, 12 Ohio 300.

⁶ Messmore v. Morrison, 172 Pa. St. 300; 34 Atl. 45.

⁷ Johnson School Township v. Bank, 81 Ind. 515; Kimball v. Huntington, 10 Wend. (N. Y.) 675; 25 Am. Dec. 590.

⁸ Ubsdell v. Cunningham, 22 Mo. 124.

⁹ Cowan v. Halleck, 9 Colo. 572; 13 Pac. 700.

¹⁰ Smith v. Allen, 5 Day (Conn.) 337. *Contra*, Brown v. Gilman, 13 Mass. 158.

¹¹ Stewart v. Smith, 28 Ill. 397; Long v. Straus, 107 Ind. 94; 57 Am. Rep. 87; 6 N. E. 123; 7 N. E. 763; Cummings v. Freeman, 2 Humph. (Tenn.) 143.

¹² Woodbridge v. Deaught, 118 Ga. 671; 45 S. E. 266.

¹ Frank v. Ingalls, 41 O. S. 560.

² May v. Lansdown, 6 J. J. Mar. (Ky.) 165; Gushee v. Eddy, 11 Gray (Mass.) 502; 71 Am. Dec. 728; Rhodes v. Lindly, 3 Ohio 51; 17 Am. Dec. 580; Hyland v. Blodgett, 9 Or. 166; 42 Am. Rep. 799.

³ First National Bank v. Slette, 67 Minn. 425; 64 Am. St. Rep. 429; 69 N. W. 1148.

⁴ National Bank of Farmersville v. Bank, 84 Tex. 40; 19 S. W. 334.

⁵ Williams v. Sims, 22 Ala. 512.

⁶ Easton v. Hyde, 13 Minn. 90.

⁷ Bull v. Bank, 123 U. S. 105; Telford v. Patton, 144 Ill. 611; 33 N. E. 1119; Hatch v. Bank, 94 Me. 348; 80 Am. St. Rep. 401; 47 Atl. 908; Kirkwood v. Bank,

Ohio,"⁸ or "currency."⁹ A note payable in notes of a specific bank,¹⁰ or in bank-notes generally,¹¹ is not negotiable. A promise to pay foreign money is negotiable.¹² A reference to collateral security does not destroy negotiability.¹³ A power of attorney to confess judgment is held in some jurisdictions to destroy negotiability;¹⁴ in others not to do so.¹⁵ However, a power to confess judgment at any time after its date, whether it is due or not, makes the date of its maturity in effect uncertain, and for that reason destroys negotiability.¹⁶

§765. For a sum certain.

The promise or order must be for a sum certain. If the amount to be paid cannot be determined from the face of the contract itself, the contract is not negotiable.¹ A note expressing the amount in figures in one corner, the amount

40 Neb. 484; 42 Am. St. Rep. 683; 24 L. R. A. 444; 58 N. W. 1016; Citizens' National Bank v. Brown, 45 O. S. 39; 4 Am. St. Rep. 526; 11 N. E. 799. *Contra*, Johnson v. Henderson, 76 N. C. 227; Texas, etc. Co. v. Carroll, 63 Tex. 48.

⁸ White v. Richmond, 16 Ohio 5. So Ehle v. Bank, 24 N. Y. 548. *Contra*, Chambers v. George, 5 Litt. (Ky.) 335.

⁹ Howe v. Hartness, 11 O. S. 449; 78 Am. Dec. 312.

¹⁰ Irvine v. Lowry, 14 Pet. (U. S.) 293; Shamokin Bank v. Street, 16 O. S. 1.

¹¹ Kirkpatrick v. McCullough, 3 Humph. (Tenn.) 171; 39 Am. Dec. 158. *Contra*, if payable in "current Ohio bank-notes." Swetland v. Creigh, 15 Ohio 118.

¹² Canada currency. Black v. Ward, 27 Mich. 191; 15 Am. Rep. 162. Mexican dollars. Hogue v. Williamson, 85 Tex. 553; 34 Am. St. Rep. 823; 20 L. R. A. 481; 22 S. W. 580. *Contra*, Canada money,

Thompson v. Sloan, 23 Wend. (N. Y.) 71; 35 Am. Dec. 546.

¹³ Roblee v. Bank, — Neb. —; 95 N. W. 61; (citing Fleckner v. Bank, 8 Wheat. (U. S.) 338; Knipper v. Chase, 7 Ia. 145; Towne v. Rice, 122 Mass. 67; Blumenthal v. Jassoy, 29 Minn. 177; 12 N. W. 517).

¹⁴ Richards v. Barlow, 140 Mass. 218; 6 N. E. 68; Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191; 48 N. W. 1086; Sweeney v. Thickstun, 77 Pa. St. 131.

¹⁵ Tolman v. Janson, 106 Ia. 455; 76 N. W. 732; Gilmore v. Hirst, 56 Kan. 626; 44 Pac. 603; Osborn v. Hawley, 19 Ohio 130.

¹⁶ Wisconsin Yearly Meeting, etc., v. Babler, 115 Wis. 289; 91 N. W. 678.

¹ "An instrument for a specified sum of money, and also for the payment of something else the value of which is not ascertainable, but depends upon extrinsic evidence, is not a note." Lowe v. Bliss, 24 Ill. 168, 170; 76 Am. Dec. 742.

being omitted in the body of the note is for a sum certain.² A note for "eight hundred and sixty-eight," the word dollars being omitted, is made certain by the figures \$868.³ A promise to pay whatever amount might be collected⁴ or to pay a certain sum of money and whatever premiums might be due upon a certain policy,⁵ or to pay a certain sum and all taxes assessed against the realty mortgaged to secure such debt,⁶ or to pay interest and taxes on the note itself,⁷ or a promise to pay a "bill of two hundred sixty-five 50-100 dollars"⁸ are none of them for a sum certain. A clause giving the payee bank the right to appropriate to the payment of the note, before or after maturity, the amount on deposit by the makers or either of them, does not make the amount due uncertain.⁹ But a clause giving the holder power to sell certain collateral security before maturity and apply the proceeds to the note has been held to make the amount uncertain.¹⁰ So provision for the payment of uncertain sums at uncertain times before maturity, leaving uncertain the amount due at maturity, destroys negotiability¹¹ since it leaves the amount to be paid at maturity uncertain. A provision in a mortgage for the payment of taxes,¹² does not destroy the negotiability of the note secured thereby. But if referred to in the note, and if by statute the mortgagee's interest is to be taxed separate from the mortgagor's, a clause in a mortgage requiring the mortgagor to pay all taxes on the realty de-

² *Witty v. Ins. Co.*, 123 Ind. 411; 18 Am. St. Rep. 327; 8 L. R. A. 365; 24 N. E. 141. *Contra*, *Vinson v. Palmer*, — Fla. —; 34 So. 276.

³ *McCoy v. Gilmore*, 7 Ohio (1st Part) 268.

⁴ *Legro v. Staples*, 16 Me. 252.

⁵ *Palmer v. Ward*, 6 Gray (Mass.) 340.

⁶ *Walker v. Thompson*, 108 Mich. 686; 66 N. W. 584.

⁷ *Smith v. Myers*, 207 Ill. 126; 69 N. E. 858; affirming 107 Ill. App. 410.

⁸ *Bradt v. Krank*, 164 N. Y. 515; 79 Am. St. Rep. 662; 58 N. E. 657.

⁹ *Louisville Banking Co. v. Gray*, 123 Ala. 251; 82 Am. St. Rep. 120; 26 So. 205 (citing *Hodges v. Shuler*, 22 N. Y. 114).

¹⁰ *Smith v. Marland*, 59 Ia. 645; 13 N. W. 852.

¹¹ *Roblee v. Bank*, — Neb. —; 95 N. W. 61.

¹² *Garnett v. Myers*, 65 Neb. 280; 91 N. W. 400. As where such provision is substantially what the law imposes. *Bradbury v. Kinney*, 63 Neb. 754; 89 N. W. 257. And see *Wilson v. Campbell*, 110 Mich. 580; 35 L. R. A. 544; 68 N. W. 278.

destroys negotiability.¹³ A promise to pay attorney's fees,¹⁴ either a certain per cent of the amount of the note,¹⁵ or to pay reasonable attorney's fees,¹⁶ does not make the instrument non-negotiable. One reason for this is that such provisions do not operate unless the note is dishonored, when it ceases to be negotiable.¹⁷ Another reason suggested in other jurisdictions is that such clause is void.¹⁸ In other jurisdictions a promise to pay attorney's fees destroys negotiability¹⁹ since the amount due is rendered uncertain. Statutes providing that a negotiable instrument must not contain any other contract make such notes non-negotiable,²⁰ whether such contract provides for a fixed per cent,²¹ as an attorney's fee, or merely such sum as the court should hold to be reasonable.²² A contract to pay a certain

¹³ Brooke v. Struthers, 110 Mich. 562; 35 L. R. A. 536; 68 N. W. 272.

¹⁴ Gaar v. Banking Co., 11 Bush. (Ky.) 180; 21 Am. Rep. 209; Stark v. Olsen, 44 Neb. 646; 63 N. W. 37; Clifton v. Bank, 75 Miss. 929; 23 So. 394; Bank v. Fuqua, 11 Mont. 285; 28 Am. St. Rep. 461; 14 L. R. A. 588; 28 Pac. 291.

¹⁵ Montgomery First National Bank v. Slaughter, 98 Ala. 602; 39 Am. St. Rep. 88; 14 So. 545; Dorsey v. Wolff, 142 Ill. 589; 34 Am. St. Rep. 99; 18 L. R. A. 428; 32 N. E. 495; Shenandoah National Bank v. Marsh, 89 Ia. 273; 48 Am. St. Rep. 381; 56 N. W. 458.

¹⁶ Oppenheimer v. Bank, 97 Tenn. 19; 56 Am. St. Rep. 778; 33 L. R. A. 767; 36 S. W. 705.

¹⁷ Farmers' National Bank v. Mfg. Co., 52 Fed. 191; 17 L. R. A. 595; Hunter v. Clarke, 184 Ill. 158; 75 Am. St. Rep. 160; 56 N. E. 297; Salisbury v. Stewart, 15 Utah 308; 62 Am. St. Rep. 934; 49 Pac. 777.

¹⁸ Maynard v. Mier, 85 Ind. 317; Witherspoon v. Musselman, 14 Bush. (Ky.) 214; 29 Am. Rep. 404; Chandler v. Kennedy, 8 S. D. 56; 65

N. W. 439. So where by statute such clause is void unless defendant files a plea in action on note. Jones v. Crawford, 107 Ga. 318; 45 L. R. A. 105; 33 S. E. 51.

¹⁹ Roads v. Webb, 91 Me. 406; 64 Am. St. Rep. 246; 40 Atl. 128; Altman v. Rittershofer, 68 Mich. 287; 13 Am. St. Rep. 341; 36 N. W. 74; Sylvester Bleckley Co. v. Alewine, 48 S. C. 308; 37 L. R. A. 86; 26 S. E. 609; Baird v. Vines, — S. D. —; 99 N. W. 89.

²⁰ Meyer v. Weber, 133 Cal. 681; 65 Pac. 1110; Findlay v. Pott, 131 Cal. 385; 63 Pac. 694; Adams v. Seaman, 82 Cal. 636; 7 L. R. A. 224; 23 Pac. 53; Stadler v. Bank, 22 Mont. 190; 74 Am. St. Rep. 582; 56 Pac. 111. (Contrary rule before statute. Bank v. Fuqua, 11 Mont. 285; 28 Am. St. Rep. 461; 11 L. R. A. 588; 28 Pac. 291.) Lippincott v. Rich, 22 Utah 196; 61 Pac. 526. Contrary rule before statute. Salisbury v. Stewart, 15 Utah 308; 62 Am. St. Rep. 934; 49 Pac. 777.

²¹ First National Bank v. Babcock, 94 Cal. 96; 28 Am. St. Rep. 94; 28 L. R. A. 94; 29 Pac. 415.

²² Kendall v. Parker, 103 Cal. 319;

amount "with exchange" is non-negotiable by the weight of authority.²³ The reason generally given for this rule is that it is impossible to determine in advance what the rate of exchange will be, and that the amount due at maturity cannot therefore be determined. But if such provision is merely inserted to make it clear that the promisor is to bear the expense of having the money transmitted to the place of payment, it does not impose any greater burden upon the promisor than the same note would have done had this provision been omitted.²⁴ If such clause makes the note non-negotiable then every note payable at a certain place should on the same principle be non-negotiable. Accordingly, some courts hold that such a clause does not destroy negotiability.²⁵ A provision that the rate of interest shall be higher after maturity does not make the contract non-negotiable,²⁶ nor does a provision that interest on a debt due on demand shall be paid only if demand is not made within a certain time.²⁷ In some jurisdictions a provision that default at maturity should increase the rate from the date of the instrument has been held not make it non-negotiable.²⁸ In others a provi-

42 Am. St. Rep. 117; 37 Pac. 401.

²³ Windsor Savings Bank v. McMahon, 38 Fed. 283; 3 L. R. A. 192; Lowe v. Bliss, 24 Ill. 168; 76 Am. Dec. 742; Nicely v. Bank, 15 Ind. App. 563; 57 Am. St. Rep. 245; 44 N. E. 572; Culbertson v. Nelson, 93 Ia. 187; 57 Am. St. Rep. 266; 27 L. R. A. 222; 61 N. W. 854; Flagg v. School District, 4 N. D. 30; 25 L. R. A. 363; 58 N. W. 499.

²⁴ Bullock v. Taylor, 39 Mich. 137; 33 Am. Rep. 356.

²⁵ Clark v. Skeen, 61 Kan. 526; 78 Am. St. Rep. 337; 49 L. R. A. 190; 60 Pac. 327; Smith v. Kendall, 9 Mich. 241; 80 Am. Dec. 83; Hastings v. Thompson, 54 Minn. 184; 40 Am. St. Rep. 315; 21 L. R. A. 178; 55 N. W. 968; Haslack v. Wolf, — Neb. —; 60 L. R. A. 434; 92 N. W. 574.

²⁶ De Hass v. Dibert, 70 Fed. 227; 30 L. R. A. 189; Towne v. Rice, 122 Mass. 67; Hollinshead v. Stuart, 8 N. D. 35; 42 L. R. A. 659; 77 N. W. 89; Merrill v. Hurley, 6 S. D. 592; 55 Am. St. Rep. 859; 62 N. W. 958.

²⁷ Certificate of deposit: Hatch v. Bank, 94 Me. 348; 80 Am. St. Rep. 401; 47 Atl. 908. As where the deposit was to bear interest if left six months: no interest after six months. Kirkwood v. Bank, 40 Neb. 484; 42 Am. St. Rep. 683; 24 L. R. A. 444; 58 N. W. 1016.

²⁸ Crump v. Berdan, 97 Mich. 293; 37 Am. St. Rep. 345; 56 N. W. 559; Smith v. Crane, 33 Minn. 144; 53 Am. Rep. 20; 22 N. W. 633; Hope v. Barker, 112 Mo. 338; 34 Am. St. Rep. 387; 20 S. W. 567.

sion for a reduction in the rate of interest if paid at maturity makes the contract non-negotiable.²⁹ A provision for increasing the rate of interest in the event of certain specified defaults is held to be void and hence not to destroy negotiability.³⁰ A contract to pay costs of collection does not destroy negotiability, since if it adds any legal liability it is for attorney's fees only.³¹

§766. Contract must be absolute.

The payment must be unconditional. If some event which may or may not happen is a condition precedent to the payment, the contract is not negotiable.¹ Thus payment out of a particular fund,² when certain work is done,³ within a year after certain work is done,⁴ if the maker enjoyed the use of certain premises under his lease,⁵ or six months after date "if elected county commissioner,"⁶ or if the payee satisfies a certain mort-

²⁹ *Hegeler v. Comstock*, 1 S. D. 138; 8 L. R. A. 393; 45 N. W. 331. So of a provision "This note to be discounted at 12 per cent., if paid before maturity." *National Bank v. Feeney*, 9 S. D. 550; 46 L. R. A. 732; 70 N. W. 874; affirmed on rehearing, 11 S. D. 109; 75 N. W. 896; affirmed on second rehearing, 12 S. D. 156; 76 Am. St. Rep. 594; 80 N. W. 186.

³⁰ *Kendall v. Selby*, — Neb. —; 92 N. W. 178.

³¹ *Nicely v. Bank*, 15 Ind. App. 563; 57 Am. St. Rep. 245; 44 N. E. 572. Where held to mean attorney's fees. *Montgomery v. Crossthwait*, 90 Ala. 553; 24 Am. St. Rep. 832; 12 L. R. A. 140; 8 So. 498. *Contra*, of a provision for the payment of "other costs" in addition to attorney's fees. *Johnson v. Schar*, 9 S. D. 536; 70 N. W. 838; *Baird v. Vines*, — S. D. —; 99 N. W. 89.

¹ *National Savings Bank v. Cable*, 73 Conn. 568; 48 Atl. 428; *White v. Smith*, 77 Ill. 351; 20 Am. Rep. 251; *Jackman v. Bowker*, 4 Met.

(Mass.) 235; *Shaver v. Telegraph Co.*, 57 N. Y. 459; *Iron City National Bank v. McCord*, 139 Pa. St. 52; 23 Am. St. Rep. 166; 11 L. R. A. 559; 21 Atl. 143.

² *National Savings Bank v. Cable*, 73 Conn. 568; 48 Atl. 428; *Hoagland v. Erck*, 11 Neb. 580; 10 N. W. 498; *Harriman v. Sanborn*, 43 N. H. 128; *Munger v. Shannon*, 61 N. Y. 251; *Woodward v. Smith*, 104 Wis. 365; 80 N. W. 440; *Thompson v. Mercantile Co.*, 10 Wyo. 86; 66 Pac. 595.

³ *Chandler v. Carey*, 64 Mich. 237; 8 Am. St. Rep. 814; 31 N. W. 309; *Fletcher v. Thompson*, 55 N. H. 308; *Home Bank v. Drumgoole*, 109 N. Y. 63; 15 N. E. 747.

⁴ *Chicago, etc., Bank v. Trust Co.*, 190 Ill. 404; 83 Am. St. Rep. 138; 60 N. E. 586.

⁵ *Jennings v. Bank*, 13 Colo. 417; 16 Am. St. Rep. 210; 22 Pac. 777.

⁶ *Specht v. Beindorf*, 56 Neb. 553; 42 L. R. A. 429; 76 N. W. 1059. (This is also illegal. See § 410.)

gage,⁷ or in case a given contract is not performed,⁸ is in each case conditional and the instrument is non-negotiable. A provision for payment on return of the instrument properly endorsed requires nothing more than the law imposes and does not destroy negotiability.⁹

§767. Time of Payment.

Closely connected with the last element is the rule that a certain time of payment must be fixed. This does not mean that the exact date of payment is ascertainable from the contract itself. An instrument payable on some event which is bound to come to pass is negotiable even if the exact date cannot be determined in advance. Thus a note payable on demand,¹ or at the death of a given person,² is negotiable. If no time of payment is given in the note, it is in legal effect payable on demand and is negotiable.³ So a clause providing that default in the interest may, at the option of the payee, make the principal fall due at a time earlier than that fixed by the instrument, does not prevent the contract from being negotiable.⁴ A note due on or

⁷ Hayes v. Gwin, 19 Ind. 19.

⁸ Costello v. Crowell, 127 Mass. 293; 34 Am. Rep. 367.

⁹ Miller v. Austen, 13 How. (U. S.) 218; Drake v. Markle, 21 Ind. 433; 83 Am. Dec. 358; Hatch v. Bank, 94 Me. 348; 80 Am. St. Rep. 401; 47 Atl. 908; Kirkwood v. Bank, 40 Neb. 484; 42 Am. St. Rep. 683; 24 L. R. A. 444; 58 N. W. 1016; Frank v. Wessels, 64 N. Y. 155. *Contra*, Hubbard v. Mosely, 11 Gray (Mass.) 170; 71 Am. Dec. 698.

¹ White v. Smith, 77 Ill. 351; 20 Am. Rep. 251.

² Crider v. Shelby, 95 Fed. 212; Bristol v. Warner, 19 Conn. 7; Beatty v. College, 177 Ill. 280; 69 Am. St. Rep. 242; 42 L. R. A. 797; 52 N. E. 432; Price v. Jones, 105 Ind. 543; 55 Am. Rep. 230; 5 N. E. 683; Carnwright v. Gray, 127 N. Y. 92;

24 Am. St. Rep. 424; 12 L. R. A. 845; 27 N. E. 835.

³ Swatts v. Bowen, 141 Ind. 322; 40 N. E. 1057; Palmer v. Palmer, 36 Mich. 487; 24 Am. Rep. 605; Jones v. Brown, 11 O. S. 601.

⁴ De Hass v. Dibert, 70 Fed. 227; 30 L. R. A. 189; Hunter v. Clarke, 184 Ill. 158; 75 Am. St. Rep. 160; 56 N. E. 297; Clark v. Skeen, 61 Kan. 526; 78 Am. St. Rep. 337; 49 L. R. A. 190; 60 Pac. 327; Markey v. Corey, 108 Mich. 184; 62 Am. St. Rep. 698; 36 L. R. A. 117; 66 N. W. 493; Hollinshead v. Stuart, 8 N. D. 35; 42 L. R. A. 659; 77 N. W. 89; United States National Bank v. Floss, 38 Or. 68; 84 Am. St. Rep. 752; 62 Pac. 751; Merrill v. Hurley, 6 S. D. 592; 55 Am. St. Rep. 859; 62 N. W. 958. So with a contract that if the mortgagor

before a certain date,⁵ or within a certain period,⁶ or in a certain time, the payee to have the option of paying in a shorter period,⁷ is negotiable. In all these cases the time of payment, though not ascertainable when the instrument is given, is bound to arrive eventually. Some authorities, however, treat contracts for the payment of money on or before a certain date as non-negotiable.⁸ A clause in a mortgage, referred to in a note, making the note due on failure to pay taxes and assessments for thirty days after they were due, was held to make the note non-negotiable.⁹ A similar clause giving the holder of the note the option of declaring it due on default in paying taxes and assessments does not destroy negotiability.¹⁰ A clause in a mortgage not referred to in the note giving the mortgagee the option of declaring the whole debt due on any default was held not to affect the note and hence to leave it negotiable.¹¹ An instrument payable on the happening of an event which may not happen is conditional and therefore non-negotiable, as a note payable when a certain suit is settled,¹² or an estate is settled,¹³ or when a canal is com-

does not pay insurance premiums, the mortgagee may declare the debt due. *Consterdine v. Moore*, 65 Neb. 291; 91 N. W. 399.

⁵ *Hunter v. Clarke*, 184 Ill. 158; 75 Am. St. Rep. 160; 56 N. E. 297; *First National Bank v. Skeen*, 101 Mo. 683; 11 L. R. A. 748; 14 S. W. 732; *Jordan v. Tate*, 19 O. S. 586; *Albertson v. Laughlin*, 173 Pa. St. 525; 51 Am. St. Rep. 777; 34 Atl. 216. So a clause making a note due in four years payable on sale or removal of timber on the land for which such note was given, before the end of such time does not destroy negotiability. *Joergenson v. Joergenson*, 28 Wash. 477; 92 Am. St. Rep. 888; 68 Pac. 913. See to the same effect, *Charlton v. Reed*, 61 Ia. 166; 47 Am. Rep. 808; 16 N. W. 64; *Walker v. Woollen*, 54 Ind. 164; 23 Am. Rep. 639. *Contra*,

First National Bank of Port Huron v. Carson, 60 Mich. 432; 27 N. W. 589.

⁶ *Leader v. Plante*, 95 Me. 339; 85 Am. St. Rep. 415; 50 Atl. 54.

⁷ *American National Bank v. Paper Co.*, 19 R. I. 149; 61 Am. St. Rep. 746; 29 L. R. A. 103; 32 Atl. 305.

⁸ *Mahoney v. Fitzpatrick*, 133 Mass. 151; 43 Am. Rep. 502.

⁹ *Brooke v. Struthers*, 110 Mich. 562; 35 L. R. A. 536; 68 N. W. 272.

¹⁰ *Wilson v. Campbell*, 110 Mich. 580; 35 L. R. A. 544; 68 N. W. 278.

¹¹ *White v. Miller*, 52 Minn. 367; 19 L. R. A. 673; 54 N. W. 736.

¹² *Burgess v. Fairbanks*, 83 Cal. 215; 17 Am. St. Rep. 230; 23 Pac. 292; *Shelton v. Bruce*, 9 Yerg. (Tenn.) 24.

¹³ *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273.

pleted.¹⁴ A clause providing for an extension of time for a definite period at the option of the maker does not make the contract non-negotiable.¹⁵ A provision making the right to renewal contingent on some specific event has been held to make the contract non-negotiable.¹⁶ A general provision for renewal, not for a specific time,¹⁷ or a clause giving a majority of bond-holders the right to waive default in payment,¹⁸ makes the time of payment uncertain and destroys negotiability.

§768. Words of negotiability.

A negotiable contract must contain words of negotiability.¹ The customary words of negotiability are: "or order," or "or bearer," but other words showing an intent that the contract might be transferred, such as "or assigns,"² are sufficient.

§769. Recital of consideration unnecessary.

It is customary for a negotiable instrument containing a recital of a consideration, as by the use of the words "for value received." This, however, is not essential.¹ Thus a check is

¹⁴ Weidler v. Kauffman, 14 Ohio 455.

¹⁵ Anniston Loan and Trust Co. v. Stickney, 108 Ala. 146; 31 L. R. A. 234; 19 So. 63.

¹⁶ Miller v. Poage, 56 Ia. 96; 41 Am. Rep. 82; 8 N. W. 799. *Contra*, Capron v. Capron, 44 Vt. 410.

¹⁷ Glidden v. Henry, 104 Ind. 278; 54 Am. Rep. 316; 1 N. E. 369; Matchett v. Machine Works, 29 Ind. App. 207; 94 Am. St. Rep. 272; 64 N. E. 229; Rosenthal v. Rambo, 28 Ind. App. 265; 62 N. E. 637; Merchants', etc., Bank v. Fraze, 9 Ind. App. 161; 53 Am. St. Rep. 341; 36 N. E. 378; Oyler v. McMurray, 7 Ind. App. 645; 34 N. E. 1004; Woodbury v. Roberts, 59 Ia. 348; 44 Am. Rep. 685; 13 N. W. 312; Second National Bank of Richmond v. Wheeler, 75 Mich. 546; 42 N. W.

963; Citizens' National Bank v. Piolet, 126 Pa. St. 194; 12 Am. St. Rep. 860; 4 L. R. A. 190; 17 Atl. 603. *Contra*, Witty v. Ins. Co., 123 Ind. 411; 18 Am. St. Rep. 327; 8 L. R. A. 365; 24 N. E. 141.

¹⁸ McClelland v. R. R., 110 N. Y. 469; 6 Am. St. Rep. 397; 1 L. R. A. 299; 18 N. E. 237.

¹ Graves v. Mining Co., 81 Cal. 303; 22 Pac. 665; Carnwright v. Gray, 127 N. Y. 92; 24 Am. St. Rep. 424; 12 L. R. A. 845; 27 N. E. 835; Smurr v. Forman, 1 Ohio 272. *Contra*, under Mississippi statute, where a contract containing restrictions on assignability was held negotiable. Greenwood Lodge v. Priebsch, — Miss. —; 35 So. 427.

² Murphy v. Improvement Co., 97 Fed. 723.

³ Bristol v. Warner, 19 Conn. 7;

negotiable without the words "value received," though by statute such words are necessary in a note.² So a recital of any valuable consideration is sufficient.³ On the other hand, the recital of a consideration does not operate, as notice to the indorsee of failure of consideration, or other defense arising thereon which might operate as a defense against the payee.⁴ A provision in a note that title to the property for which it is given shall revert in the vendor if the note is not paid at maturity destroys its negotiability,⁵ while a provision that title shall not pass until the note is paid does not.⁶

§770. Contracts under seal.

The law of negotiable instruments is derived from the Law Merchant. The Seal is derived from the common law. Accordingly, at common law a sealed instrument could not be negotiable.¹ Thus if two guarantors sign, and A adds a seal while B does not, the note is negotiable as to B but not as to A.² This rule, however, is no longer in force in many jurisdictions.³ A corporate seal does not destroy negotiability since it is merely the common-law form whereby the corporation indicates its assent. To hold that it destroyed negotiability would be to hold that a corporation could not issue negotiable paper.⁴ "The at-

Archer v. Clafin, 31 Ill. 306; *Dean v. Carruth*, 108 Mass. 242; *Clarke v. Marlow*, 20 Mont. 249; 50 Pac. 713; *Hubbell v. Fogartie*, 3 Rich. L. (S. C.) 413; 45 Am. Dec. 775.

² *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34; 46 Am. St. Rep. 424; 26 L. R. A. 568; 27 S. W. 397.

³ *Garrigus v. Missionary Society*, 3 Ind. App. 91; 50 Am. St. Rep. 262; 28 N. E. 1009. (A note "to advance the cause of missions and to induce others to contribute.")

⁴ *Siegel v. Bank*, 131 Ill. 569; 19 Am. St. Rep. 51; 7 L. R. A. 537; 23 N. E. 417; *Clanin v. Machine Co.*, 118 Ind. 372; 3 L. R. A. 863; 21 N. E. 35; *Ferris v. Tavel*, 87 Tenn.

386; 3 L. R. A. 414; 11 S. W. 93.

⁵ *Wright v. Taver*, 73 Mich. 493; 3 L. R. A. 50; 41 N. W. 517.

⁶ *Choate v. Stevens*, 116 Mich. 28; 43 L. R. A. 277; 74 N. W. 289.

¹ *Conine v. Ry.*, 3 Houst. (Del.) 288; 89 Am. Dec. 230; *Brown v. Jordhal*, 32 Minn. 135; 50 Am. Rep. 560; 19 N. W. 650; *Osborn v. Kistler*, 35 O. S. 99; *McLaughlin v. Braddy*, 63 S. C. 433; 90 Am. St. Rep. 681; 41 S. E. 523.

² *McLaughlin v. Braddy*, 63 S. C. 433; 90 Am. St. Rep. 681; 41 S. E. 523.

³ *Porter v. McCollum*, 15 Ga. 528.

⁴ *Kneeland v. Lawrence*, 140 U. S. 209; *Chicago, etc., Co. v. Bank*, 136

taching of a corporate seal bears a strong analogy to the signature of a natural person and is its substantial equivalent."⁵ A seal which may be treated as surplusage does not destroy negotiability.⁶ Some authorities, however, hold that a corporation seal makes the instrument a specialty and destroys negotiability.⁷

- U. S. 268; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Reid v. Bank*, 70 Ala. 199; *Chase National Bank v. Faurat*, 149 N. Y. 532; 35 L. R. A. 605; 44 N. E. 164; *Pittsburgh, etc., Ry. v. Lynde*, 55 O. S. 23; 44 N. E. 596; *American National Bank v. Paper Co.*, 19 R. I. 149; 61 Am. St. Rep. 746; 29 L. R. A. 103; 32 Atl. 305; *Landauer v. Improvement Co.*, 10 S. D. 205; 72 N. W. 467.
- ⁵ *Pittsburgh, etc., Ry. v. Lynde*, 55 O. S. 23, 49; 44 N. E. 596.
- ⁶ *Stevens v. Ball Club*, 142 Pa. St. 52; 11 L. R. A. 860; 21 Atl. 797; *Mackay v. Church*, 15 R. I. 121; 2 Am. St. Rep. 881; 23 Atl. 108.
- ⁷ *Coe v. Ry.*, 8 Fed. 534; *Frevall v. Fitch*, 5 Whart. (Pa.) 325; 34 Am. Dec. 558.

CHAPTER XXXVII.

IMPLIED CONTRACTS AND QUASI-CONTRACTS.

I. GENERAL NATURE.

§771. Nature of implied contract.

As has been said before,¹ the term “contract” as used at Common Law included all rights which could be enforced by one of the actions *ex contractu*. By the Common-Law classification every contract was either express or implied, as these two classes exhausted the entire general class of contracts. If from all the rights of action which at Common Law could be enforced by actions *ex contractu* we subtract the rights arising out of express contract we have left a miscellaneous group of rights which the Common Law in its later and classic form grouped under the head of implied contracts. With the abolition of Common-Law forms of action in many jurisdictions, and its reconstruction on a rational basis in others, the necessity of defining such legal ideas as contract and tort without reference to the rigid form of action by which only it once was enforceable, has become apparent. Substantive law has been arranged and classified as the main division of the law, to which, in theory at least, the adjective law of pleading, practice, evidence, remedies, and procedure, is supplemental, whereas under the Common Law ideas substantive law was in reality a mere appendix and supplement to the law of procedure. The modern law, as has been said before,² has treated the term “contract” as including all agreements which are enforceable at law. When we analyze the common law class of implied contracts and apply to it the modern test of what a contract is, we find that the Common Law class of

¹ See § 11.

² See §§ 10-12, 14.

implied contracts is made up of two distinct classes of rights. One class consists of rights arising out of an agreement enforceable at law, and therefore just as truly a contract at modern law as the express contract. It differs from the express contract only in this: that while in express contract the parties arrive at their agreement by words, whether oral or written, sealed or unsealed, in implied contracts of this type they have arrived at their agreement by their acts and conduct. This type of contract is known as the genuine implied contract, the contract implied as of fact, or simply, the implied contract. The other class of rights includes all the classes of rights in the Common Law class of implied contracts left after deducting all the rights which originate in a genuine agreement between the parties. To state the same fact in another way, it consists of all rights which the common law enforced by an action *ex contractu*, but which do not originate in a genuine agreement of the parties. This last class has been called contract implied in law, a contract created by law,³ constructive contract or quasi-contract. This type of liability is merely "an implication of law that arises from the facts and circumstances independent of agreement or presumed intention."⁴ The term quasi-contract,

² Bishop on Contracts, Ch. VIII.

⁴ *Pracht v. Daniels*, 20 Colo. 100, 103; 36 Pac. 845. "There is some confusion in the statement of the law applicable to what are frequently called implied contracts, arising from the fact that obligations generally different have been classed as such, not because of any real analogy, but because where the procedure of the Common Law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists or can in reason be supposed to exist—the favorite remedy of implied assumpsit could be adopted. This was so in that large class of cases, where suit is brought to recover money paid by mistake or has been obtained by

fraud. Here it is said the law implies a promise to repay the money, when it was well understood that the promise was a mere fiction, and in most cases without any foundation whatever in fact. The same practice was adopted where necessities had been furnished an insane person or a neglected wife or child. In all these cases no true contract exists. They are, by many authors, termed *quasi* contracts, a term borrowed from the civil law. In all these cases no more is meant than that the law imposes a civil obligation on the defendant to restore money so obtained, or to compensate one who has furnished necessities to his wife or child, where he has neglected his duty to provide for

while but little used in law is a term of considerable antiquity in English law. The term "*quasi ex contractu*" is used in Bracton⁵ to include "agency, wardship, the division of a common property, the distribution of an inheritance, an action arising out of a testament, a suit to recover a sum paid and not due,

them, or, by reason of mental infirmity, is unable to obtain them for himself. But contracts that are true contracts are frequently termed implied contracts, as, where from the facts and circumstances, a court or jury may fairly infer, as a matter of fact, that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are, or can be, indulged. The evidence must satisfy the court and jury, that the parties understood that each sustained to the other a contractual relation; and that by reason of this relation the defendant is indebted to the plaintiff for services performed or for goods sold and delivered. In the leading case of *Hertzog v. Hertzog*, 29 Pa. St. 465, the distinction is clearly stated by Judge Lowrie. After quoting from Blackstone, and observing that his language is open to criticism, he says: 'There is some looseness of thought in supposing that reason and justice ever dic-

tate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of parties to transactions, and are dictated only by their natural and accordant wills. When the intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances really existing, and then the contract thus ascertained, is called an implied one. . . . It is quite apparent, therefore, that radically different relations are classified under the same term, and this often gives rise to indistinctness of thought. And this was not at all necessary; for we have another well authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are only implied ones. In one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy: in the other it is a fact legitimately inferred. In one the intention is disregarded; in the other it is ascertained and enforced. In one the duty defines the contract; in the other the contract defines the duty.'" *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104, 113; 61 N. E. 152; quoting *Hertzog v. Hertzog*, 29 Pa. St. 468.

⁵ Bracton f. 100b, Twiss's edition, Vol. II., 118.

and such like." We thus see that Bracton's classes of quasi-contract were much the same as those of modern law. It is classed with contract for the historical reasons already given even if the facts show affirmatively that there was no real agreement between the parties.⁶ There is still confusion of thought as to what implied contracts are. Thus it has been suggested that a genuine agreement, reached not by means of express words but by means of acts and conduct, is an express contract and not an implied contract.⁷ In discussing genuine implied contracts, the questions usually presented are what presumptions of law arise on the facts in evidence, or what inferences of fact will the law permit to be drawn therefrom. In constructive contracts the questions usually presented are, (1) under the facts does any liability of the defendant to the plaintiff exist; and further, (2) if there is a liability, can it be enforced in an action *ex contractu*. The latter question is of little importance to-day in jurisdictions where the Common Law forms of actions have been abolished. If facts appear giving a right to recover for money had and received, a fictitious promise need not be alleged.⁸

⁶ "It must be remembered, that the promise upon which the action rests, is not the direct act of the parties, but a promise which the law implies from the facts, on the theory that a party is willing and undertakes to do what he ought to do. It does not militate against the promise which the law implies that the facts are inconsistent with the intent or promise to pay over. . . . While it may seem illogical for the law to imply a promise on the part of one whose conduct and declarations clearly disprove any intention to promise, still it is constantly done. It is one of the fictions of the law which it seems convenient, if not necessary, to retain until the

courts adopt the doctrine that such contracts are created by law, rather than implied by it." *Siems v. Bank*, 7 S. D. 338, 342; 64 N. W. 167.

⁷ "Express contracts which are proved by the declarations and conduct of the parties and other circumstances, all of which are explainable only upon the theory of a mutual agreement, are often called, although not with entire accuracy, implied contracts; and this distinction will explain the ambiguity of some authorities and the apparent contrariety of others." *Hinkle v. Sage*, 67 O. S. 256, 263; 65 N. E. 999.

⁸ *Waite v. Willis*, 42 Or. 288; 70 Pac. 1034.

II. WORK AND LABOR.

§772. Work and labor done at request.

If one person performs work and labor for another of a sort for which compensation is customary, intending to charge therefor, and the person for whom the work is done either has requested expressly or impliedly, before the doing of such work, that it should be done, or after it was done, has voluntarily accepted the benefits arising therefrom, the person for whom the work is done, is liable to the person who does it.¹ If there is an express contract for doing the work, the rights of the parties are controlled by the rules on the subject of express contracts already discussed. If there is no express contract since this liability exists by reason of a genuine though not an express agreement, it is a genuine implied contract.² If the services are rendered at the request of the person for whom they are rendered, an implied promise on his part to make reasonable compensation therefor exists if no express contract has been made.³ So, where a board of health directs one of its members to inspect a case of diphtheria, and such services are not within the official

¹ *Lafayette Ry. Co. v. Tucker*, 124 Ala. 514; 27 So. 447; *Nichols v. Vinson*, 9 Houst. (Del.) 274; 32 Atl. 225; *Palmer v. Miller*, 19 Ind. App. 624; 49 N. E. 975; *Baxter v. Knox* (Ky.), 44 S. W. 972; *Day v. Caton*, 119 Mass. 513; 20 Am. Rep. 347; *Eggleston v. Boardman*, 37 Mich. 14; *Courier, etc., Co. v. Wilson* (Neb.), 90 N. W. 1120; *Gnichtel v. Jewell*, 59 N. J. Eq. 651; 44 Atl. 1099; affirming 41 Atl. 227; *Bonyng v. Field*, 81 N. Y. 159.

² "Where, in the absence of an express contract, valuable services are rendered by one person to another which are knowingly accepted, the law will imply a promise to pay a fair and reasonable compensation for such services." *McFarland v. Dawson*, 125 Ala. 428, 432; 29 So.

327; citing *Hood v. League*, 102 Ala. 228; 14 So. 572; *Wood v. Brewer*, 66 Ala. 570.

³ *Spearman v. Texarcana*, 58 Ark. 348; 22 L. R. A. 855; 24 S. W. 883; *Clark v. Clark*, 46 Conn. 586; *Lockwood v. Robbins*, 125 Ind. 398; 25 N. E. 455; *Wadleigh v. McDowell*, 102 Ia. 480; 71 N. W. 336; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Blaisdell v. Gladwin*, 4 Cush. (Mass.) 373; *Ten Eyck v. R. R.*, 74 Mich. 226; 16 Am. St. Rep. 633; 3 L. R. A. 378; 41 N. W. 905; *Ryans v. Haspes*, 167 Mo. 342; 67 S. W. 285; *Emery v. Cobbey*, 27 Neb. 621; 43 N. W. 410; *Masterson v. Masterson*, 121 Pa. St. 605; 15 Atl. 652; *Miller v. Tracy*, 86 Wis. 330; 56 N. W. 866.

duty of the member of such board, the person rendering such services may recover a reasonable compensation therefor.⁴ Where a director of a corporation, at the request of the board of directors, attends to obtaining a right of way, and in doing so does work outside of his official duty as director, the corporation is liable to him for reasonable compensation.⁵ So, where A acted as body servant and nurse for B for several years, and B without making any express contract for paying A any certain amount of wages, had promised to provide for him handsomely, A was allowed to recover a reasonable compensation for work done by him for B.⁶ If an attorney renders services without any express agreement as to the amount of compensation therefor, he is entitled to recover a reasonable compensation for the work done.⁷ A previous request made by A to B, to perform services for A makes A liable therefor even though he does not make an express promise to pay B therefor.⁸ Thus where a managing editor is requested by the editor in chief to do the work of the latter a promise on the part of the editor in chief to pay him is implied.⁹ A request for work so made as to show that the party making it does not intend compensation therefor creates no implied liability. Thus A owned a building which

⁴ *Spearman v. Texarcana*, 58 Ark. 348; 22 L. R. A. 855; 24 S. W. 883.

⁵ *Ten Eyck v. R. R.*, 74 Mich. 226; 16 Am. St. Rep. 633; 3 L. R. A. 378; 41 N. W. 905. A subsequent fair and reasonable agreement between such director and the board of directors, fixing the amount of such compensation, is therefore enforceable.

⁶ *Ryans v. Haspes*, 167 Mo. 342; 67 S. W. 285. In such action, sums of money given by B to A as gratuities cannot be deducted from the amount which A should recover.

⁷ *Miller v. Tracy*, 86 Wis. 330; 56 N. W. 866. If he is retained by an administrator to do work for the estate he may recover from the administrator personally.

⁸ *Weeks v. North Sidney*, 26 N. S. 396; *Spearman v. Texarcana*, 58 Ark. 348; 22 L. R. A. 855; 24 S. W. 883; *Sonoma County v. Santa Rosa*, 102 Cal. 426; 36 Pac. 810; *Ten Eyck v. R. R.*, 74 Mich. 226; 16 Am. St. Rep. 633; 3 L. R. A. 378; 41 N. W. 905; *Blaisdell v. Gladwin*, 4 Cush. (Mass.) 373; *Schwab v. Pierro*, 43 Minn. 520; 46 N. W. 71; *Pangborn v. Phelps*, 63 N. J. L. 346; 43 Atl. 977; *Fuller v. Mowry*, 18 R. I. 424; 28 Atl. 606; *Bonner v. Bradley*, 14 Tex. Civ. App. 234; 36 S. W. 1014; *Isham v. Parker*, 3 Wash. 755; 29 Pac. 835.

⁹ *Pangborn v. Phelps*, 63 N. J. L. 346; 43 Atl. 977.

was being erected for him by B, the chief contractor. X, a subcontractor, was doing the plastering under his contract with B. X plastered one room which he claimed that B was not bound by his contract with A to have plastered. A knew that he was plastering such room and demanded that he plaster it, claiming that B was bound by his contract with A to have it plastered. Even if A was wrong in his contention, he was not liable to X on an implied contract.¹⁰

§773. Public officers.

Reasons of public policy make the case of the public officer an exception to the general rule that a request for the rendition of services implies a promise to pay therefor. If the law fixes a specified compensation for certain services to be rendered by a public officer, he cannot recover extra compensation for such services even if they are reasonably worth it.¹ So after having performed the services he has no right of action for additional compensation on the ground that the compensation was less than the services were worth.² If the law makes no provision for compensation for any or all of the official duties of a public officer he can make no charge therefor.³ If he is not willing to perform such work for nothing, he should resign. If he collects compensation from the municipality for which he acts, which is

¹⁰ *Hartnett v. Christopher*, 61 Mo. App. 64.

¹ *Brown v. United States*, 9 How. (U. S.) 487; *Kreitz v. Behrensmeyer*, 149 Ill. 496; 24 L. R. A. 59; 36 N. E. 983; *Moore v. Independent District*, 55 Ia. 654; 8 N. W. 631; *Rogers v. Simmons*, 155 Mass. 259; 29 N. E. 580; *O'Shea v. Kavanaugh*, 65 Neb. 639; 91 N. W. 578; *State v. Meserve*, 58 Neb. 451; 78 N. W. 721; *Clark v. Lucas County*, 58 O. S. 107; 50 N. E. 356.

² *Mullett v. United States*, 150 U. S. 566; *Irwin v. Yuba County*,

119 Cal. 686; 52 Pac. 35; *Ex parte Harrison*, 112 Ind. 329; 14 N. E. 225; *Hamil v. Carroll County*, 106 Ia. 523; 69 N. W. 1122; 71 N. W. 425; *Gardner v. Newaygo County*, 110 Mich. 94; 67 N. W. 1091.

³ *Torbert v. Hale County*, 131 Ala. 143; 30 So. 453; *Marshall County v. Johnson*, 127 Ind. 238; 26 N. E. 821; *Tippecanoe County v. Barnes*, 123 Ind. 403; 24 N. E. 137; *Twinam v. Lucas County*, 104 Ia. 231; 73 N. W. 473; *State v. Brown*, 146 Mo. 401; 47 S. W. 504; *Crocker v. Brown County*, 35 Wis. 284.

not authorized by law, he may be compelled to refund.⁴ Thus a statute authorized the appointment of a commissioner to revise the statutes, but made no provision for his compensation. He has no right of action for the reasonable value of his services.⁵ However, it has been held that an attorney is not a public officer in this sense. Hence if the statute authorizes the county to employ an attorney in disbarment proceedings and does not provide for compensation, he may nevertheless recover a reasonable compensation.⁶

§774. Elements of implied request.

If the person for whom services of a kind usually made the subject of charge are rendered knows of their rendition, he is liable therefor though he has made no express request, in the absence of special circumstances negating his liability.¹ If the person for whom the work is done knows that it is being done and that the person doing expects compensation from the person for whom it is done, and believes that such compensation will be made, and the latter does nothing to correct such impression, he is liable for the work thus done.² In the absence of an express previous request it is necessary that the person for whom the work is done should know that it is being done and further that it is being done for his benefit and also upon his liability. If A employs B to do certain work, and B employs C to aid him therein, no implied contract between A and C exists, even if A knows that C is doing the work and that A will ultimately receive the benefit thereof, since A is liable over to B on his contract for the work thus done.³ Thus where a railroad lets a contract for grading to B and B employs C to work thereon, these

⁴ *St. Croix County v. Webster*, 111 Wis. 270; 87 N. W. 302.

⁵ *Harris v. State*, 9 S. D. 453; 69 N. W. 825.

⁶ *Hyatt v. Hamilton County*, 121 Ia. 292; 63 L. R. A. 614; 96 N. W. 855.

¹ *Lewis v. Meginniss*, 30 Fla. 419; 12 So. 19.

² *Kiser v. Holladay*, 29 Or. 338; 45 Pac. 759.

³ *Petterson v. Ry.*, 134 Cal. 244; 66 Pac. 304.

facts do not give C a right of action against the railroad.⁴ Hence the fact that C believed that A was employing him is immaterial as affecting A's liability if A did not know of such belief and did not so act as to justify such belief.⁵

§775. Acceptance of work and labor.

If the services are accepted voluntarily, a previous request is not necessary to the creation of liability.¹ Thus if a litigant knows that a stenographer is taking and transcribing testimony during a trial for the use of the attorney of the litigant, the latter, on accepting the benefit of such services is liable therefor.² So if A nurses and cares for B, and B accepts such services he is liable therefor.³ If A renders services on a farm owned in part by B and in part by C, and such services are rendered for the benefit of both, and A expects to be paid by both, B and C are jointly liable for such services if they accept them knowing of A's belief.⁴ So if water is furnished to a village, and the authorities accepting it were authorized to contract therefor, and were not required by law to make contracts in a specified form, the village is liable for a reasonable compensation therefor.⁵

The principle that voluntary acceptance of services creates a liability to pay therefor often takes us into cases of constructive contract, since there is often no enforceable contract in fact between the parties.

⁴ *Petterson v. Ry.*, 134 Cal. 244; 66 Pac. 304.

⁵ *Petterson v. Ry.*, 134 Cal. 244; 66 Pac. 304.

¹ *Nichols v. Vinson*, 9 *Houst.* (Del.) 274; 32 *Atl.* 225; *Rockford, etc., Ry. v. Wilcox*, 66 *Ill.* 417; *Palmer v. Miller*, 19 *Ind. App.* 624; 49 *N. E.* 975; *Shoemaker v. Roberts*, 103 *Ia.* 681; 72 *N. W.* 776; *Viley v. Pettit*, 96 *Ky.* 576; 29 *S. W.* 438; *Baxter v. Knox (Ky.)*, 44 *S. W.* 972; *Snyder v. Neal*, 129 *Mich.* 692; 89 *N. W.* 588; *Port Jervis Water*

Works Co. v. Port Jervis, 151 *N. Y.* 111; 45 *N. E.* 388; *Moffitt v. Glass*, 117 *N. C.* 112; 23 *S. E.* 104; *Kiser v. Holladay*, 29 *Or.* 338; 45 *Pac.* 759; *Wheeler v. Hall*, 41 *Wis.* 447.

² *Palmer v. Miller*, 19 *Ind. App.* 624; 49 *N. E.* 975.

³ *Baxter v. Knox (Ky.)*, 44 *S. W.* 972.

⁴ *Snyder v. Neal*, 129 *Mich.* 692; 89 *N. W.* 588.

⁵ *Port Jervis Water Works Co. v. Port Jervis*, 151 *N. Y.* 111; 45 *N. E.* 388.

§776. Acceptance of benefits not optional.

This rule, however, applies only where the party for whom the services are rendered is free to take their benefit or to reject it. If the services are of such nature that he has no choice but to accept them, he cannot be said to accept them voluntarily. Such acceptance, therefore, creates no liability.¹ Thus if an attorney is retained by unauthorized agents of a church to prefer charges against a clergyman, and he prefers such charges and prosecutes the case and procures the suspension of such clergyman from the ministry by reason of such charges, his services are not so accepted by the church as to make it liable to him, by a resolution that by reason of such suspension, such clergyman should be required to leave the parsonage owned by the church.² So one who voluntarily acts as janitor cannot recover though the occupant of the building is benefited thereby.³ So if work is done in putting a heating plant in a building under a special contract, and the contract is not performed and what has been done cannot be removed without injury to the building, no recovery can be had for such work.⁴ So if a building has been repaired,⁵ or painted,⁶ or if a stone base has been built under an iron fence, and the fence has been painted,⁷ or a bridge has been constructed,⁸ or a street laid down,⁹ and the contract under which the services have been rendered is either unenforceable,¹⁰ or has not been performed,¹¹ the owner of such real prop-

¹ *Parsbley v. Church*, 147 N. Y. 583; 30 L. R. A. 574; 42 N. E. 15; *Riddell v. Ventilating Co.*, 27 Mont. 44; 69 Pac. 241 (decided under a statute which substantially re-enacts the Common Law rule as far as the particular case is concerned).

² *Parsbley v. Church*, 147 N. Y. 583; 30 L. R. A. 574; 42 N. E. 15.

³ *Cleveland County v. Seawell*, 3 Okla. 281; 41 Pac. 592.

⁴ *Riddell v. Ventilating Co.*, 27 Mont. 44; 69 Pac. 241.

⁵ *Davis v. School District*, 24 Me. 349.

⁶ *Ginther v. Shultz*, 40 O. S. 104.

⁷ *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96.

⁸ *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406; 54 N. E. 372.

⁹ *Detroit v. Paving Co.*, 36 Mich. 335.

¹⁰ *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96; *Buchanan Bridge Co. v. Campbell*, 60 O. S. 406; 54 N. E. 372.

¹¹ *Ginther v. Shultz*, 40 O. S. 104.

erty has no choice but to make use of the property upon which such work has been done, and therefore his making use of such property is not an acceptance of such services so as to create a liability to pay therefor. Some cases, however, do not seem to enforce this distinction. Thus where A placed a bath-tub, wash-bowl and other plumbing in B's house under a contract with whose terms he did not comply, and A makes use of the house with such plumbing in it, A is liable for such plumbing in *quantum meruit*.¹² So where A constructs a system of waterworks for a city under a contract to furnish one with a capacity of two hundred and fifty thousand gallons a day and the system actually furnished has a capacity of only fifty thousand gallons a day, and the city makes use of the system actually constructed, it is liable therefor.¹³ But in these last cases it may be that under the particular facts, the party accepting the services may be held to have had the option to accept or not. So if A renders services in saving B's property without B's knowledge or assent, A cannot recover therefor; and the fact that B retains and uses the property thus saved is not such an acceptance of A's services as to make B liable therefor.¹⁴ Thus where A voluntarily repaired a broken levee on B's land without B's request, A cannot recover from B for such work.¹⁵ So in a leading case, A was about to burn over some stubble, and he notified B, whose wheat was stacked near the field to be burned over, to remove such wheat. B promised to do so, but neglected it. While the stubble was burning the wind changed, and B's wheat was threatened with destruction. A saved it, B knowing nothing of the matter until afterwards. It was held that A could not recover from B for his services.¹⁶

¹² Gross v. Creyts, 130 Mich. 672; 90 N. W. 689.

¹³ Sherman v. Connor, 88 Tex. 35; 29 S. W. 1053.

¹⁴ Watson v. Ledoux, 8 La. Ann. 68.

¹⁵ New Orleans, etc., Ry. v. Turcan, 46 La. Ann. 155; 15 So. 187.

¹⁶ Bartholomew v. Jackson, 20 Johns. (N. Y.) 28; 11 Am. Dec. 237.

§777. Services rendered as gratuity.

If A renders services for B, and A does not intend at the time of their rendition to make any charge therefor, and B knows of such intention, A cannot subsequently, upon changing his mind, recover for such services as upon an implied contract, even if such work was done with B's knowledge or at B's request.¹ The operation of this principle is clearest where the services are rendered under an express agreement that no charge shall be made therefor. If A performs services for B under an express agreement that they are to be gratuitous, he cannot subsequently recover therefor.² The principle is by no means limited to cases of express agreement that no compensation shall be made, but extends to cases where from the acts of the parties and the surrounding circumstances it is apparent that the party by whom the services were rendered did not intend to charge therefor and the party for whom they were rendered accepted them in reliance upon such intention. Thus where services are rendered solely because of friendship and mutual accommodation,³ as where a real estate broker and an attorney interchange services for accommodation,⁴ or one renders services as attorney in fact, both parties knowing that the services are to be gratuitous,⁵ or

¹ *Levy v. Gillis*, 1 Penn. (Del.) 119; 39 Atl. 785; *Evans v. Henry*, 66 Ill. App. 144; *Hill v. Hill*, 121 Ind. 255; 23 N. E. 87; *McFadden v. Ferris*, 6 Ind. App. 454; 32 N. E. 107; *Tank v. Rohweder*, 98 Ia. 154; 67 N. W. 106; *Cole v. Clark*, 85 Me. 336; 21 L. R. A. 714; 27 Atl. 186; *Allen v. Allen*, 60 Mich. 635; 27 N. W. 702; *Cicotte v. Church*, 60 Mich. 552; 27 N. W. 682; *Woods v. Ayres*, 39 Mich. 345; 33 Am. Rep. 396; *Buelterman v. Meyer*, 132 Mo. 474; 34 S. W. 67; *Woods v. Land*, 30 Mo. App. 176; *Disbrow v. Durand*, 54 N. J. L. 343; 33 Am. St. Rep. 678; 24 Atl. 545; *Doyle v. Trinity Church*, 133 N. Y. 372; 31 N. E.

221; *Potter v. Carpenter*, 71 N. Y. 74; *Forbis v. Inman*, 23 Or. 68; 31 Pac. 204; *Hoffeditz v. Iron Co.*, 141 Pa. St. 58; 21 Atl. 764; *Crampton v. Seymour*, 67 Vt. 393; 31 Atl. 889; *State v. St. Johnsbury*, 59 Vt. 332; 10 Atl. 531; *Gross v. Cadwell*, 4 Wash. 670; 30 Pac. 1052.

² *Sidway v. Live Stock Co.*, 163 Mo. 342; 63 S. W. 705.

³ *Tank v. Rohweder*, 98 Ia. 154; 67 N. W. 106; *Rabasse's Succession*, 49 La. Ann. 1405; 22 So. 767.

⁴ *Gross v. Cadwell*, 4 Wash. 670; 30 Pac. 1052.

⁵ *Royston v. McCully* (Tenn.), 52 L. R. A. 899; 59 S. W. 725.

one renders political services for a friend in a campaign,⁶ or one friend indorses a note for another, the note being ultimately paid out of the maker's property and no loss resulting to the indorser by reason thereof,⁷ no recovery can be had. If services are rendered without the intent of making a charge therefor, or of creating a legal liability thereby, the fact that the person rendering them did so in the hope that the party receiving them would be grateful therefor, and would manifest such gratitude in some substantial form, such as a gift or legacy, does not give to the party rendering such services a right to recover a reasonable compensation therefor if such hopes are disappointed.⁸ So services rendered for each other by persons who are under contract to intermarry,⁹ as where one party furnishes board to the other,¹⁰ cannot be recovered for upon breach of the contract to marry, as on an implied contract. The remedy, if any, is by an action for breach of the express promise to marry, and not by an action in *quantum meruit*. So if a woman believes a man to be single, and marries him and keeps house for him, she cannot recover for services thus rendered, when she discovers that he is already married.¹¹ Where a man marries a woman believing her single, and she was already married, he cannot recover on an implied contract for furnishing her with board, lodging, medical attendance and the like. His damages of this sort are inseparable from his claim for damages for deceit; and accordingly will not survive against her estate.¹² Where no such liability exists

⁶ *Levy v. Gillis*, 1 Penn. (Del.) 119; 39 Atl. 785.

⁷ *Hagar v. Whitmore*, 82 Me. 248; 19 Atl. 444. (The indorser subsequently sought to recover compensation for ever having incurred liability.)

⁸ *Osbourne v. Governors, etc.*, 2 Stra. 728; *Guenther v. Birkicht's Administrator*, 22 Mo. 439; *Castle v. Edwards*, 63 Mo. App. 564; *Swires v. Parsons*, 6 Watts. & S. (Pa.) 357.

⁹ *La Fontain v. Hayhurst*, 89 Me.

388; 56 Am. St. Rep. 430; 36 Atl. 623.

¹⁰ *Clary v. Clary*, 93 Me. 220; 44 Atl. 921.

¹¹ *Cooper v. Cooper*, 147 Mass. 370; 9 Am. St. Rep. 721; 17 N. E. 892. *Contra*, *Fox v. Dawson*, 8 Mart. (O. S.) (La.) 94; *Higgins v. Breen*, 9 Mo. 497.

See § 533.

¹² *Payne's Appeal*, 65 Conn. 397; 48 Am. St. Rep. 215; 33 L. R. A. 418; 32 Atl. 948.

a subsequent note payable to the order of the maker, not indorsed by him, but delivered to the person performing such services creates no liability.¹³ Board and lodging furnished to one who comes on invitation as a guest are understood to be gratuitous and no recovery can be had therefor.¹⁴ By statute in Kentucky no recovery can be had for board and lodging unless furnished by the keeper of a tavern or house of private entertainment or unless under a contract therefor.¹⁵ So where A does work on land which he claims in good faith as his own, recovery therefor from the real owner, after the claimant is defeated by the real owner in an action for the possession of the real property, cannot be had.¹⁶ He may, however, set off the increase in the value of the property resulting from his improvements against the amount due from him for rents and profits.¹⁷ This right of set-off is founded on "broad and growing principles of equity,"¹⁸ and was originally an innovation at Common Law. The Civil Law allowed compensation for the value of the improvements less the use of the land.¹⁹ This rule of the Civil Law was adopted by equity. Equity required the real owner to do equity if he was obliged to ask aid of equity to recover his property, and to make compensation for the increase in value due to

¹³ Rabasse's Succession, 49 La. Ann. 1405; 22 So. 767.

¹⁴ Action by husband: invitation given by his wife to her sister, Harrison v. McMillan, 169 Tenn. 77; 69 S. W. 973.

¹⁵ Hancock v. Hancock's Administrator (Ky.), 69 S. W. 757.

¹⁶ Dudley v. Johnson, 102 Ga. 1; 29 S. E. 50; Lunquest v. Ten Eyck, 40 Ia. 213; Pharr v. Broussard, 106 La. 59; 30 So. 296; Russell v. Blake, 2 Pick. (Mass.) 505; Bonner v. Wiggins, 52 Tex. 125; Moore v. Ligon, 30 W. Va. 146; 3 S. E. 572.

¹⁷ Potts v. Cullum, 68 Ill. 217; Petit v. R. R., 119 Mich. 492; 75 Am. St. Rep. 417; 78 N. W. 554;

Jones v. Merrill, 113 Mich. 433; 67 Am. St. Rep. 475; 71 N. W. 838; Tice v. Fleming, 173 Mo. 49; 96 Am. St. Rep. 479; 72 S. W. 689; Jackson v. Loomis, 4 Cow. (N. Y.) 168; 15 Am. Dec. 347; Estate of Gleeson, 192 Pa. St. 279; 73 Am. St. Rep. 808; 43 Atl. 1032; Putnam v. Tyler, 117 Pa. St. 570; 12 Atl. 43; Dawson v. Grow, 29 W. Va. 333; 1 S. E. 564; Davis v. Louk, 30 Wis. 308.

¹⁸ Tice v. Fleming, 173 Mo. 49, 56; 96 Am. St. Rep. 479, 483; 72 S. W. 689. See also Barton v. Land Co., 27 Kan. 634.

¹⁹ Putnam v. Ritchie, 6 Paige (N. Y.) 390.

the improvements placed thereon by the innocent claimant.²⁰ According to the weight of authority, equity could give no further relief, than by way of set-off. Affirmative compensation could not be had.²¹ In other cases, however, equity has ignored the restriction to set-off and allowed compensation for improvements to the extent of the increase in value due thereto, even if they exceed the amount of rents and profits.²² Modern statutes known as occupying claimant acts, or betterment acts, have extended these principles in specific classes of cases. No discussion of these statutes will, however, be undertaken here. So one who by mistake erects a house on the land of another cannot have compensation therefor.²³ The right of recovery exists only in favor of one who in good faith believes himself to be the owner. Thus a tenant for life,²⁴ or for years,²⁵ cannot, in any form of action, have compensation for increase in value due to improvements made by him. One who performs work and labor upon his own property cannot hold others liable therefor upon an implied contract. He must be taken as having done the work for his own benefit, whatever his secret intention may have been. Thus where A's cattle were sold at auction, and the title thereto did not pass until possession was delivered and the money paid or security given, A cannot recover from the purchaser for keeping such cattle between the time of the auction and the time of

²⁰ *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486; 21 L. R. A. 489; 34 N. E. 476; *Parsons v. Moses*, 16 Ia. 440; *Sale v. Crutchfield*, 8 Bush. (Ky.) 636; *Miner v. Beekman*, 50 N. Y. 337.

²¹ *McCloy v. Arnett*, 47 Ark. 445; 2 S. W. 71; *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271; *Dudley v. Johnson*, 102 Ga. 1; 29 S. E. 50; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168; 15 Am. Dec. 347; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430.

²² *Taylor v. James*, 109 Ga. 327;

34 S. E. 674; *Effinger v. Kenney*, 92 Va. 245; 23 S. E. 742.

²³ *Dutton v. Ensley*, 21 Ind. App. 46; 69 Am. St. Rep. 340; 51 N. E. 380.

²⁴ *Springfield v. Bethel*, 90 Ky. 593; 14 S. W. 592; *Moore v. Simonson*, 27 Or. 117; 39 Pac. 1105.

²⁵ *Jones v. Hoard*, 59 Ark. 42; 43 Am. St. Rep. 17; 26 S. W. 193; *Windon v. Stewart*, 43 W. Va. 711; 28 S. E. 776; *Willoughby v. Furnishing Co.*, 93 Me. 185; 44 Atl. 612; *Wolf v. Holton*, 92 Mich. 136; 52 N. W. 459.

giving security.²⁶ A cotenant in possession cannot recover compensation from his cotenants for work done in taking care of the common property as in collecting the rents.²⁷ The principle that no recovery can be had for services rendered by A, whereby B is benefited if A does not intend to make a charge against B therefor, applies even in cases where A believed when he performed the services, that he was bound by a contract with X,²⁸ or by some positive rule of law²⁹ to render such services. Thus where A believing that he is doing work under his contract with X does work which B is under contract to do, A cannot recover from B.³⁰ So, where A is employed by the government to transport mail, and he does not only the work which is required by his contract with the government, but also work which the railroad which hauls the mail is bound to do by reason of its contract with the government, he cannot recover from the railroad where he does this work, thinking that he is bound by his contract with the government to do it.³¹ So, a county auditor cannot recover from the treasurer where the auditor has made certain tax apportionments and statements which it was the legal duty of the treasurer to make, where both auditor and treasurer are under the impression that it is the auditor's duty to make such apportionment and statements.³² Whether a public corporation or an individual furnished support to a pauper can recover therefor from such pauper if he proves to have property, or subsequently acquires property, depends in the absence of statute on whether the pauper has been guilty of any fraud in inducing such person to furnish such support. If he has not been guilty of fraud, he is not liable in the absence of statute.³³

²⁶ *Chalmers v. McAuley*, 68 Vt. 44; 33 Atl. 767.

²⁷ *Switzer v. Switzer*, 57 N. J. Eq. 421; 41 Atl. 486.

²⁸ *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104; 61 N. E. 152; *Johnson v. Ry.*, 69 Vt. 521; 38 Atl. 267.

²⁹ *Keough v. Wendelschafer*, 73 Minn. 352; 76 N. W. 46.

³⁰ *Rohr v. Baker*, 13 Or. 350; 10 Pac. 627.

³¹ *Columbus, etc., Ry. v. Gaffney*, 65 O. S. 104; 61 N. E. 152; *Johnson v. Ry.*, 69 Vt. 521; 38 Atl. 267. *Contra*, *McClary v. R. R.*, 102 Mich. 312; 60 N. W. 695.

³² *Keough v. Wendelschafer*, 73 Minn. 352; 76 N. W. 46.

³³ *Kennebunkport v. Smith*, 22 Me. 445; *Deer Isle v. Eaton*, 12 Mass. 327; *Charleston v. Hubbard*, 9 N. H. 195; *Albany v. McNamara*,

Thus, if a pauper subsequently acquired property, he is not liable for support furnished to him by a public corporation.⁸⁴ If, however, the pauper has received such support through fraudulent representations as to his financial condition, the person furnishing such support has been allowed to recover. Thus, where a voluntary charitable association, thinking A a pauper through A's misrepresentations, supported A, and A promised to make a will in favor of such association, when it began to suspect that A was not in need of support, and A subsequently revoked the will made in performance of this contract and made another will, it was held that equity could not give specific performance of a promise to make a will, as the consideration was a past consideration, but that the voluntary association could recover for the support furnished.⁸⁵ In some jurisdictions the statute specifically provides for a recovery against a pauper for support furnished, if such pauper has or subsequently acquires property.⁸⁶ A right of action against one to whom support has been furnished as a pauper is limited by the statute giving such right. Thus a statute giving a right of action against certain relatives who were primarily liable for the support of a pauper does not give a right of action against such pauper.⁸⁷ Under a constitutional provision that no special legislation shall be made with reference to the estates of persons under disability, an insane pauper can not be required, on acquiring property, to pay a greater sum for support than one who is not a pauper would have been obliged to pay.⁸⁸ Thus, in the absence of statute, the estate of an insane person is not liable for support furnished if there is no special contract therefor.⁸⁹ In some cases, already

117 N. Y. 168; 6 L. R. A. 212; 22 N. E. 931; *Montgomery County v. Nyce*, 161 Pa. St. 82; 28 Atl. 999; *Fairbanks v. Benjamin*, 50 Vt. 99.

⁸⁴ *Deer Isle v. Eaton*, 12 Mass. 327; *Charleston v. Hubbard*, 9 N. H. 195.

⁸⁵ *Eggers v. Anderson*, 63 N. J. Eq. 264; 55 L. R. A. 570; 49 Atl. 578.

⁸⁶ *Cutler v. Maker*, 41 Me. 594; *East Sudbury v. Belknap*, 1 Pick. (Mass.) 512; *Directors v. Nyce*, 161 Pa. St. 82; 28 Atl. 999.

⁸⁷ *Bremer County v. Curtis*, 54 Ia. 72; 6 N. W. 135.

⁸⁸ *Schroer v. Asylum*, — Ky. —; 68 S. W. 150.

⁸⁹ *Montgomery County v. Gupton*, 139 Mo. 303; 39 S. W. 447; 40 S. W. 1094.

cited, language is used which seems to support the broad principle that one who performs services with another without intending to charge therefor, cannot recover even if the services are of a sort for which charges are usually made, and the party for whom the services are rendered does not know that the other party does not intend to make a charge. While this principle is supported by occasional dicta, the cases in which the point is actually presented for decision, do not go so far. The secret uncommunicated intention of one party to a contract is generally of no importance, and as it cannot be invoked to confer legal rights upon him, it ought not to be invoked to defeat legal rights. The true rule seems to be that one who performs services, such as are usually the subject of charge, at the request of the party for whom they are performed, whether express or implied, is entitled to recover therefor, even if at the time he renders the services his own secret intention was to make no charge for such services.⁴⁰ Thus, where A performed work for a shooting club at the request of the officers thereof in obtaining leases of land for the use of such club, he can recover a reasonable compensation for such work, even though he did not intend to make any charge if the club would buy his house, which they did, and employ him as steward at a salary, which they did not do.⁴¹ So, a physician who performed services which he intended at the time of performing them to be gratuitous, can recover therefor irrespective of his intention, if the other party was not induced by such intention to accept the services.⁴² Thus, where A has rendered services for B, not intending to charge therefor, an instruction by a court to the jury, in an action by A to recover a reasonable compensation to the effect that A's intention to make no charge will not prevent recovery unless A's "conduct and course of dealing was such as to justify B in believing and un-

⁴⁰ *Thomas v. Shooting Club*, 121 N. C. 238; 28 S. E. 293; *Moore v. Ellis*, 89 Wis. 108; 61 N. W. 291.

⁴¹ "Here as the implied promise is not met by any agreement that

there should be nothing paid, the plaintiff is entitled to recover." *Thomas v. Shooting Club*, 121 N. C. 238, 240; 28 S. E. 293.

⁴² *Prince v. McRae*, 84 N. C. 674.

derstanding that no charge was intended," was held correct.⁴³ In some cases the rights of the parties who have rendered mutual services, which are intended by the parties to be reciprocal and gratuitous, have been worked out on a somewhat different theory. Thus, where A was B's ward and lived in B's family, and rendered services for B and his family, not expecting to be paid for such services, but expecting such services would offset her board, A can recover a reasonable compensation for such services when B has as a matter of fact made a charge against her for her board, and settled his accounts by applying her estate in his hands to the payment of such account for board.⁴⁴ From one point of view, strict logic might hold that A should have resisted B's charge for board by showing the circumstances under which the board was furnished. A seems, however, to have learned of the facts too late to resist the settlement of B's accounts, and her rights were decided on the theory that she had performed the services either under a mistake of fact or by reason of B's fraud and concealment.

§778. Services between members of the same family.—General principles.

Services rendered between members of the same family form a common example of services rendered as a gratuity. Persons who live together as members of the same family, and render personal services each to the other, generally do so from motives of affection and not because of the expectation of a financial reward therefor. Accordingly, the mere rendition of personal services between persons so situated, does not establish a liability on the part of the person receiving such services to make compensation to the person rendering them, even though the services may be performed at the express request of the person receiving the benefit thereof or may be voluntarily accepted by him.¹

⁴³ *Moore v. Ellis*, 89 Wis. 108; 61 N. W. 291.

⁴⁴ *Boardman v. Ward*, 40 Minn. 399; 12 Am. St. Rep. 749; 42 N. W. 202.

¹ *Morris v. Simpson*, 3 *Houst. (Del.)* 568; *Poole v. Baggett*, 110 Ga. 822; 36 S. E. 86; *Collar v. Patterson*, 137 Ill. 403; 27 N. E. 604; *Stock v. Stoltz*, 137 Ill. 349; 27 N.

Conversely, no recovery can be had by the party to such relationship who furnishes board and lodging.² This principle is sometimes spoken of as an exception to the general rule that liability exists where services for which compensation is usually made, are rendered by one person to another at the previous request of such other, or are voluntarily accepted by him. It is not, however, properly speaking, an exception to that rule, because such services as are here described, are not ordinarily the subject of compensation. It is rather an illustration of the principle that services rendered for which the party rendering them does not expect to make a charge, and accepted by the person for whom they are rendered with that understanding, do not create a legal liability.

§779. Who are members of family.—Husband and wife.

As between husband and wife, there is not only a presumption that mutual services are gratuitous,¹ but in many jurisdictions an express promise to make compensation therefor is unenforceable as against public policy.² Thus a contract whereby a husband agrees to pay his wife for services,³ even if not per-

E. 604; *Hill v. Hill*, 121 Ind. 255; 23 N. E. 87; *McGarvey v. Roods*, 73 Ia. 363; 35 N. W. 488; *Cowan v. Musgrave*, 73 Ia. 384; 35 N. W. 496; *Spitzmiller v. Fisher*, 77 Ia. 289; 42 N. W. 197; *Coleman v. Simpson*, 2 Dana (Ky.) 166; *Bixler v. Sellman*, 77 Md. 494; 27 Atl. 137; *Harris v. Harris*, 106 Mich. 246; 64 N. W. 15; *Harris v. Smith*, 79 Mich. 54; 6 L. R. A. 702; 44 N. W. 169; *Allen v. Allen*, 60 Mich. 635; 27 N. W. 702; *Baxter v. Gale*, 74 Minn. 36; 76 N. W. 954; *Louder v. Hart*, 52 Mo. App. 377; *Callahan v. Higgins*, 43 Mo. App. 130; *Woods v. Land*, 30 Mo. App. 176; *Moore v. Moore*, 58 Neb. 268; 78 N. W. 495; *Clark v. Sanborn*, 68 N. H. 411; 36 Atl. 14; *Barhites' Appeal*, 126 Pa.

404; 17 Atl. 617; *Newell v. Lawton*, 20 R. I. 307; 38 Atl. 946; *Murphy v. Murphy*, 1 S. D. 316; 9 L. R. A. 820; 47 N. W. 142; *Beale v. Hall*, 97 Va. 383; 34 S. E. 53; *Riley v. Riley*, 38 W. Va. 283; 18 S. E. 569; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

² *Tank v. Rohweder*, 98 Ia. 154; 67 N. W. 106.

¹ *Lapworth v. Leach*, 79 Mich. 16; 44 N. W. 338.

² See § 426.

³ *Kedey v. Petty*, 153 Ind. 179; 54 N. E. 798; *Michigan Trust Co. v. Chapin*, 106 Mich. 384; 58 Am. St. Rep. 490; 64 N. W. 334; *Coleman v. Burr*, 93 N. Y. 17; 45 Am. Rep. 160; *In re Collister*, 153 N. Y.

formed at their home, but in business,⁴ or a contract whereby a wife agrees to support her husband⁵ are void.

§780. Persons related by consanguinity.

Where parents and children are living together as members of a family, services rendered by one for the other, come within this rule, and do not of themselves establish any implied contract to make compensation therefor.¹ Thus, if a parent renders services for a child,² as where a father takes care of a horse for his son,³ there is no implied promise to pay therefor. The same principle applies where a parent furnishes provisions to her daughter as a gift. The husband of the daughter cannot be held liable to make compensation therefor, as on an implied contract.⁴ So, if a child renders services to a parent,⁵ as where

294; 60 Am. St. Rep. 620; 47 N. E. 268.

⁴ Whitaker v. Whitaker, 52 N. Y. 368; 11 Am. Rep. 711. *Contra*, Nuding v. Urich, 169 Pa. St. 289; 32 Atl. 409.

⁵ Corcoran v. Corcoran, 119 Ind. 138; 12 Am. St. Rep. 390; 4 L. R. A. 782; 21 N. E. 468.

¹ Borum v. Bell, 132 Ala. 85; 31 So. 454; Poole v. Baggett, 110 Ga. 822; 36 S. E. 86; O'Kelly v. Faulkner, 92 Ga. 521; 17 S. E. 847; Hudson v. Hudson, 90 Ga. 581; 16 S. E. 349; Stock v. Stoltz, 137 Ill. 349; 27 N. E. 604; Robnett v. Robnett, 43 Ill. App. 191; King v. Kelly, 28 Ind. 89; Niehaus v. Cooper, 22 Ind. App. 610; 52 N. E. 761; Weir v. Weir, 3 B. Mon. (Ky.) 645; 39 Am. Dec. 487; Wright v. Senn, 85 Mich. 191; 48 N. W. 545; Penter v. Roberts, 51 Mo. App. 222; Garcia v. Candelaria, 9 N. M. 374; 54 Pac. 342; Ulrich v. Ulrich, 136 N. Y. 120; 18 L. R. A. 37; 32 N. E. 606; Wilkes v. Cornelius, 21 Or. 348; 28

Pac. 135; Zimmerman v. Zimmerman, 129 Pa. 229; 15 Am. St. Rep. 720; 18 Atl. 129; Butler v. Slam, 50 Pa. St. 456; Hatch v. Hatch, 60 Vt. 160; 13 Atl. 791; Harshberger v. Alger, 31 Gratt. (Va.) 53; Riley v. Riley, 38 W. Va. 283; 18 S. E. 569; Pritchard v. Pritchard, 69 Wis. 373; 34 N. W. 506; Leary v. Leary, 68 Wis. 662; 32 N. W. 623; Hall v. Finch, 29 Wis. 278; 9 Am. Rep. 559; 32 N. W. 623.

² Larsen v. Hansen, 74 Cal. 320; 16 Pac. 5; Stoneburner v. Motley, 95 Va. 784; 30 S. E. 364; Bostwick v. Bostwick, 71 Wis. 273; 37 N. W. 405.

³ Stoneburner v. Motley, 95 Va. 784; 30 S. E. 364.

⁴ Anderson v. Baird (Ky.), 40 S. W. 923.

⁵ Perry v. Perry, 2 Duv. (Ky.) 312; Kostuba v. Miller, 137 Mo. 161; 38 S. W. 946; Ulrich v. Ulrich, 136 N. Y. 120; 18 L. R. A. 37; 32 N. E. 606.

board, care and lodging are furnished to a parent by a child,⁶ there is no implied liability on the part of the parent to make compensation therefor. This principle is not confined to cases where a child is a minor, and is therefor not to be referred solely to the fact that the earnings of the minor are the property of his parents. The principle is the same where an adult child lives with his parents as a member of the family, and receives his board and renders services. Even in such a case, there is, on the one hand, no implied liability of the child to pay for his board; and, on the other hand, there is no implied liability of the parents to pay for the services of the child.⁷ So, where an uncle, A, requested a minor child, B, who had been emancipated by his father, C, to work for C, and had expressed his approval of his conduct in so doing, no implied contract exists on the part of A to pay B for such services.⁸ The same principle applies to services rendered by brothers and sisters, each for the other, where they are living together in one family. No liability to make compensation is created by the mere fact of the rendition of the services in the absence of anything to show some understanding that compensation should be made.⁹ Accordingly the courts commits no error in refusing to allow a question to be answered, which was intended to call forth evidence that the sister had rendered the services at the request of her brother.¹⁰ The same principle applies as between grandparents and grandchildren.¹¹ If they are living together in one family, a grandchild cannot recover for personal services rendered to his grand-

⁶ Niehaus v. Cooper, 22 Ind. App. 610; 52 N. E. 761; Turner v. Turner, 100 Ky. 373; 38 S. W. 506; Gorrell v. Taylor, 107 Tenn. 568; 64 S. W. 888; Nicholas v. Nicholas, 100 Va. 660; 42 S. E. 669, 866.

⁷ Wall v. Wall, 69 Ill. App. 389; Schwachtgen v. Schwachtgen, 65 Ill. App. 127; Donovan v. Driscoll, 116 Ia. 339; 90 N. W. 60.

⁸ Bristol v. Sutton, 115 Mich. 365; 73 N. W. 424.

⁹ Fuller v. Fuller, 21 Ind. App. 42; 51 N. E. 373; Ayres v. Hull, 5 Kan. 419; Martin v. Sheridan, 46 Mich. 93; 8 N. W. 722; Hayes v. Cheatham, 6 Lea (Tenn.) 1; Taylor v. Lincumfelter, 1 Lea (Tenn.) 83; Morrissey v. Faucett, 28 Wash. 52; 68 Pac. 352.

¹⁰ Morrissey v. Faucett, 28 Wash. 52; 68 Pac. 352.

¹¹ Dodson v. McAdams, 96 N. C. 149; 60 Am. Rep. 408.

parents.¹² Similar considerations apply to services rendered between persons more remotely related, living together as one family, as between cousins.¹³

§781. Persons related by affinity.

This principle is not limited, however, to blood relationship. If a son-in-law or daughter-in-law renders services for parents-in law, while members of the same family,¹ as by furnishing board and lodging,² no implied contract exists by reason of such facts alone. The same principle applies to mutual services rendered between step-parents and step-children.³ Thus, if a step-father voluntarily supports his step-children,⁴ or a step-child voluntarily renders services for a step-father,⁵ no implied contract exists. Accordingly, if a step-daughter renders services to the family, in reliance upon a promise made by her mother that she should receive compensation for such services, she cannot recover from the estate of her step-father for such services unless it can be shown that he not only knew that the promise had been made, but that he also knew that she continued to render such services upon such promise.⁶ The principle that a contract for compensation is not implied between a step-father and step-daughter, has been carried so far that an attorney who procured a divorce for his step-daughter, who at that time was living in his family and rendering domestic services, could not recover therefor four years after. In the meantime, however,

¹² *Castle v. Edwards*, 63 Mo. App. 564; *Murphy v. Murphy*, 1 S. D. 316; 9 L. R. A. 820; 47 N. W. 142; *Jackson v. Jackson*, 96 Va. 165; 31 S. E. 78.

¹³ *Neal v. Gilmore*, 79 Pa. St. 421.

¹ *Hinkle v. Sage*, 67 O. S. 256; 65 N. E. 999.

² *Mariner v. Collins*, 5 Harr. (Del.) 290; *Thompson v. Halstead*, 44 W. Va. 390; 29 S. E. 991; *Schmidt's Estate*, 93 Wis. 120; 67 N. W. 37.

³ *Kirchgassner v. Rodick*, 170 Mass. 543; 49 N. E. 1015; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

⁴ *Livingston v. Hammond*, 162 Mass. 375; 38 N. E. 968; *Haggerty v. McCanna*, 25 N. J. Eq. 48.

⁵ *Harris v. Smith*, 79 Mich. 54; 6 L. R. A. 702; 44 N. W. 169.

⁶ *Harris v. Smith*, 79 Mich. 54; 6 L. R. A. 702; 44 N. W. 169.

he had set up claims for certain disbursements made by him in a foreclosure suit brought by her, but had not made any claim for such legal services.⁷ However, a step-father who supports his step-children on his wife's land undertakes their support only by his labor as applied to their property. Hence in an action by them against him to recover railroad ties, made from timber growing on such land, he may counter-claim for their support.⁸

Similar principles apply where services are rendered between brothers-in-law, sisters-in-law and the like, while members of one family.⁹

§782. De facto membership of same family.

The principle under discussion is not limited to cases of relationship by blood or affinity, but it applies also to persons who are *de facto* members of the same family, even if there is no relationship of any kind between them.¹ Thus, if a child has been taken into a family as a member thereof by persons in no way related to it, there is on the one hand no implied contract that the child, or the parents of the child, should make compensation for its board;² nor, on the other hand, that the persons who take such child into their family, are to make compensation for the services performed by such child.³ This rule applies even where an "adopted" child remains a member of the family after becoming of age.⁴

§783. Limitations of doctrine.

Some jurisdictions limit this doctrine to cases where the services rendered are purely personal in their nature, and such as

⁷ *Baxter v. Gale*, 74 Minn. 36; 177 Mass. 321; 58 N. E. 1023.
76 N. W. 954.

⁸ *Kempson v. Goss*, 69 Ark. 235; App. 442; 41 N. E. 838.
62 S. W. 582.

⁹ *Hill v. Hill*, 121 Ind. 255; 23 64 Pac. 192; *Graham v. Stanton*,
N. E. 87. 177 Mass. 321; 58 N. E. 1023.

¹ *Walker v. Taylor*, 28 Colo. 233; ⁴ *Lang v. Dietz*, 191 Ill. 161; 60
64 Pac. 192; *Graham v. Stanton*, N. E. 841.

would ordinarily be inspired by affection or the sense of duty.¹ Thus, it has been held that there is an implied contract to pay for such services as washing, or making and mending clothing rendered between persons living together.² This doctrine is by its terms limited to services rendered between members of the same family. If the persons are related, but not living together, this doctrine has no application.³ Thus, if a woman who does washing and housecleaning for a living does work of the same sort for her daughter and her daughter's husband, and is not a member of the latter's household, there is an implied agreement on his part to pay therefor.⁴ So if A, a middle-aged man, works a year for his brother, B, in superintending the building of certain houses for B, and during such period A lives with his own family in one of B's houses, B is liable to pay A a reasonable compensation, even though A had been a guest at B's home for six weeks at the time of the beginning of such work, before his family had rejoined him.⁵ On the other hand, the mere fact that the persons between whom the services are rendered are living in the same house, is not conclusive that they are members of the same family.⁶ If the persons who reside in the same house are not so related that one of them is bound in law to support the other, it is, in case of a dispute, a question of fact in what capacity the person who renders the services is residing in that house. Thus a nephew who lives with his uncle and renders services in connection with his uncle's business may recover if it can be shown that the board furnished him was in part compensation for the services rendered by him.⁷ So where a wealthy man supported his second cousin at his house, it was a question of fact for the jury, whether she lived there

¹ *Hurst v. Lane*, 105 Ga. 506; 31 S. E. 135; *Frailey v. Thompson* (Ky.), 49 S. W. 13.

² *Frailey v. Thompson* (Ky.), 49 S. W. 13.

³ *Williams v. Williams*, 114 Wis. 79; 89 N. W. 835.

⁴ *Winter v. Greiling*, 114 Wis. 378; 90 N. W. 425.

⁵ *Williams v. Williams*, 114 Wis. 79; 89 N. W. 835.

⁶ *Gill v. Staylor*, 93 Md. 453; 49 Atl. 650; *Sprague v. Sea*, 152 Mo. 327; 53 S. W. 1074.

⁷ *Gill v. Staylor*, 93 Md. 453; 49 Atl. 650.

merely as a member of his family, or whether she was living there as housekeeper; in the latter case there would be an implied contract on his part to pay for her services without any express contract.⁸ So a nephew may recover for board furnished his aunt, where he shows that she came to his house on a temporary visit, was taken ill while there, and remained there on account of ill health seven months, until her death.⁹ So, where a person is shown to be living in another's house as a boarder, under an express contract for a compensation, he is liable for services rendered not included in the express agreement, such as nursing in sickness.¹⁰ It has, however, been held that where a devise is given A on the condition that she furnish a home for her uncle, B, on the property devised to her, as long as he lives, and she accepts such devise, and her uncle lives with her, a family relation is thereby created between uncle and niece, so that she cannot recover for services in caring for him in the absence of an express contract on his part.¹¹

§784. When services not gratuitous.

The rule that there is no implied agreement for a compensation for services between persons in domestic relations living together as members of a family, is merely a *prima facie* rule. In the absence of any evidence there is a presumption that such services are gratuitous.¹ This presumption is rebuttable,² and it has been held error when evidence has been introduced to show that there was an understanding for compensation to charge that there was a presumption of law against such claim.³

⁸ *Sprague v. Sea*, 152 Mo. 327; 53 S. W. 1074.

⁹ *Glenn v. Gerald*, 64 S. C. 236; 42 S. E. 155.

¹⁰ *Pfeiffer v. Michelsen*, 112 Mich. 614; 71 N. W. 156; *Cates v. Gilmer* (Tenn. Ch. App.), 48 S. W. 280.

¹¹ *Lackey's Estate*, 181 Pa. St. 638; 37 Atl. 813.

¹ "A presumption of law arises that such service is gratuitous."

Bixler v. Sellman, 77 Md. 494, 496; 27 Atl. 137.

² *Pitts v. Pitts*, 21 Ind. 309; *Resso v. Lehan*, 96 Ia. 45; 64 N. W. 689; *Bixler v. Sellman*, 77 Md. 494; 27 Atl. 137; *Ulrich v. Ulrich*, 136 N. Y. 120; 18 L. R. A. 37; 32 N. E. 606; *Gorrell v. Taylor*, 107 Tenn. 568; 64 S. W. 888.

³ *Ulrich v. Ulrich*, 136 N. Y. 120; 18 L. R. A. 37; 32 N. E. 606.

The force of the presumption has been held to depend upon the relationship of the parties, the presumption becoming "weaker and therefore more easily rebutted as the relationship recedes."⁴ It is for the person alleging that such mutual services were not gratuitous to prove that fact.⁵ An express contract to make compensation between the persons between whom such services are rendered is sufficient to create a liability on the part of the person receiving such services to make compensation therefor,⁶ as where a father promises to make compensation to his son for furnishing board and lodging.⁷ Thus where a brother-in-law induces his sister-in-law, who was a member of the family and worked in her brother-in-law's store as well as in the family, to believe that she would receive pay for such services, he is liable to her therefor, even if he did not intend to make such compensation, and was jesting when he made the statement on which she relied.⁸ It is not necessary, however, that the express contract between the parties should be enforceable. Even though for some reason it may be unenforceable as a contract, it may, nevertheless, suffice to show that the services were not rendered gratuitously.⁹ Thus, where a step-daughter rendered services for her step-father under an oral agreement which is unenforceable by reason of the statute of frauds, she may recover a reasonable compensation for the services thus rendered.¹⁰ So where a mother makes an agreement with the guardians of her insane son when he comes to live at her house that she shall be paid for caring for him out of his estate, such agreement is sufficient to show that such services were not rendered gratuitously even

⁴ *Gorrell v. Taylor*, 107 Tenn. 568; 64 S. W. 888.

⁵ *Enger v. Lofland*, 100 Ia. 303; 69 N. W. 526; *Bixler v. Sellman*, 77 Md. 494; 27 Atl. 137.

⁶ *Frailley v. Thompson* (Ky.), 49 S. W. 13; *O'Connor v. Beckwith*, 41 Mich. 657; 3 N. W. 166; *Johanke v. Schmidt*, 79 Minn. 261; 82 N. W. 582; *Jackson v. Jackson*, 96 Va. 165; 31 S. E. 78; *Harris v. Orr*, 46

W. Va. 261; 76 Am. St. Rep. 815; 33 S. E. 257.

⁷ *Harris v. Orr*, 46 W. Va. 261; 76 Am. St. Rep. 815; 33 S. E. 257.

⁸ *Platt v. Durst*, 42 W. Va. 63; 32 L. R. A. 404; 24 S. E. 580.

⁹ *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

¹⁰ *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; 4 L. R. A. 55; 42 N. W. 252.

though the contract was unenforceable because the appointment of the guardians was void.¹¹ So it has been held that recovery can be had for services rendered upon the understanding that the party for whom they were rendered would make compensation by will, where he dies without making any such provision in his will, even though there was no agreement as to the amount of such compensation.¹² So, if there has been an express enforceable contract, the person rendering such services may, in case of a breach of such contract for any reason, recover a reasonable compensation for such services.¹³ Thus, where a son supported his father for life, under a contract by which the father was to devise to the son certain realty, and the father by reason of subsequent insanity, was unable to perform such contract, the son may recover a reasonable compensation for such services, not exceeding the value of the land to be devised to him.¹⁴ So recovery may be had for services rendered by a son to a father under a contract which has since been rescinded, in which case the son is obliged to account for personalty received by him under such contract and not surrendered when the contract was terminated.¹⁵ While an express contract is the most satisfactory and safe method of showing that the services were not intended to be gratuitous, it is not, however, necessary. If the facts and circumstances of the case show that there is in fact an understanding between the person rendering the services and the person for whom they were rendered, that a compensation should be made therefor, the person rendering the services may recover a reasonable compensation.¹⁶ Such under-

¹¹ *Jessup v. Jessup*, 17 Ind. App. 177; 46 N. E. 550.

¹² *Schwab v. Pierro*, 43 Minn. 520; 46 N. W. 71.

¹³ *Johanke v. Schmidt*, 79 Minn. 261; 82 N. W. 582.

¹⁴ *Hudson v. Hudson*, 90 Ga. 581; 16 S. E. 349; s. c., 87 Ga. 678; 27 Am. St. Rep. 270; 13 S. E. 583.

¹⁵ *Walker v. Walker*, 100 Ia. 99; 69 N. W. 517; reversing on rehearing, 63 N. W. 331.

¹⁶ *Murrell v. Studstill*, 104 Ga. 604; 30 S. E. 750; *Neish v. Gannon*, 198 Ill. 219; 64 N. E. 1000; *Warren v. Warren*, 105 Ill. 568; *Morton v. Rainey*, 82 Ill. 215; 25 Am. Rep. 311; *Jones v. Adams*, 81 Ill. App. 183; *Collins v. Williams*, 21 Ind. App. 227; 52 N. E. 92; *Ridler v. Ridler*, 103 Ia. 470; 72 N. W. 671; *Gorrell v. Taylor*, 107 Tenn. 568; 64 S. W. 888; *Westcott v. Westcott*, 69 Vt. 234; 39 Atl. 199;

standing, however, must be clearly proven,¹⁷ or as some courts have held, there must be an express contract or its equivalent.¹⁸ Some courts have gone further than this. They have declared that such a contract can be proven only by direct and positive evidence, and that it is erroneous to charge the jury that such a contract may be proved by clear and satisfactory evidence;¹⁹ or have spoken as if an express contract were indispensable.²⁰ This statement, however, carries the rule too far. The true rule is, that the rendition of such services is not by itself any evidence that there was an agreement between the parties for compensation, and does not of itself impose any liability upon the party for whom they were rendered. No liability exists, unless there is proof of a contract, implied or expressed for compensation; and the rendition of such services is not such evidence. It has even been held not to be necessary to have in fact a mutual understanding that the services rendered between relatives are for compensation in order to create a liability therefor. If the person rendering such services expects to be compensated and the circumstances under which they are rendered are such that the person for whom they are rendered must, as a reasonable man, know that they are rendered for compensation, he is liable therefor even if he did not in fact know of such expectation.²¹ Declarations to third persons, made by the person for whom services are rendered by a member of his family, to the effect that such services are valuable and will be paid for are not sufficient to show the existence of a contract to pay therefor.²²

§785. Extra work.

If A has agreed with B to perform a certain definite and specific contract for B, without giving his entire time to B's

Broderick v. Broderick, 28 W. Va. 385.

¹⁷ Price v. Price, 101 Ky. 28; 39 S. W. 429.

¹⁸ Jackson v. Jackson, 96 Va. 165; 31 S. E. 78.

¹⁹ Bash v. Bash, 9 Pa. St. 260.

²⁰ Murphy v. Murphy, 1 S. D. 316; 9 L. R. A. 820; 47 N. W. 142.

²¹ Spencer v. Spencer, 181 Mass. 471; 63 N. E. 947.

²² Donovan v. Driscoll, 116 Ia. 339; 90 N. W. 60.

employment, A may recover for services rendered by him in addition to those specified in the contract if B either requests A to render such extra services or voluntarily accepts the benefit of them, when B knows, or should know, that A expects compensation therefor.¹ Extra work done while performing a building contract is a common illustration of this principle.² One who performs such extra work at the request of the owner may recover, even though such request is oral and the contract provides that extra work must be done only on a written order; or though such extra work is done on written and oral orders of an authorized agent, while the contract provides that it can be done only on written orders signed by the owner of the building.³ So A, who has an express contract to act as a salesman for B within a specified territory, may recover his necessary expenses and a reasonable compensation for sales made outside of the territory specified, if made at B's request.⁴ So if A has a contract to furnish B with board, A may recover a reasonable compensation for services rendered to B as a nurse during illness.⁵ So where A has contracted to furnish B with power to operate a certain derrick, A may recover for extra power furnished after B has put in a new derrick requiring greater power.⁶ If on the other hand, B has entered into a contract of employment with A, whereby B is to give to A his time, for a compensation fixed by the week, month and the like; the question whether B is entitled to any compensation for extra work depends, in the absence of an agreement for compensation therefor, on whether the extra work done is of the same general character as that for which B was

¹ *Fulton County v. Gibson*, 158 Ind. 471; 63 N. E. 982; *Evans v. McConnell*, 99 Ia. 326; 63 N. W. 570; 68 N. W. 790; *Escott v. White*, 10 Bush. (Ky.) 169; *Norwood v. Lathrop*, 178 Mass. 208; 59 N. E. 650; *Pfeiffer v. Michelsen*, 112 Mich. 614; 71 N. W. 156; *McEwen v. Loucheim*, 115 N. C. 348; 20 S. E. 519; *Trow v. Forsyth*, 70 Vt. 498; 41 Atl. 501; *Isham v. Parker*, 3 Wash. 755; 29 Pac. 835.

² *Fulton County v. Gibson*, 158 Ind. 471; 63 N. E. 982.

³ *Norwood v. Lathrop*, 178 Mass. 208; 59 N. E. 650.

⁴ *McEwen v. Loucheim*, 115 N. C. 348; 20 S. E. 519.

⁵ *Pfeiffer v. Michelsen*, 112 Mich. 614; 71 N. W. 156; *Cates v. Gilmer* (Tenn. Ch. App.), 48 S. W. 280.

⁶ *Trow v. Forsyth*, 70 Vt. 498; 41 Atl. 501.

employed, or not. If it is of the same general character B cannot recover.⁷ So where A employs B to collect rents at two hundred and fifty dollars a month, B cannot recover for extra services in preventing squatters from settling on A's land, in expelling them therefrom and in retaining exclusive possession for A.⁸ So if A hires B as a domestic servant at a certain compensation per week, B cannot recover for extra work because A became sick after B had entered on her employment, and A's work was thereby greatly increased.⁹ Thus if B is to work for A for a certain sum per month, B cannot recover for work done on Sunday,¹⁰ especially if he knew in advance that Sunday work was expected, and if he had received the stipulated wages without objection.¹¹ So if a statute limits the number of hours of a day's work,¹² or provides that in the absence of agreement to the contrary a certain number of hours shall constitute a day's work,¹³ an employee who is hired at a certain sum by the week, month and the like cannot recover for extra work in the absence of express contract or of facts from which an agreement to pay for extra work may be inferred. This is true especially if the employee knows in advance that the work for which he is employed will necessitate some work overtime,¹⁴ or if the employee is notified that if he wishes to keep his position he must do the extra work,¹⁵ especially as before the action here decided he had applied for and received an allowance for extra work. So where A is hired by B to work for him at a certain rate per month, which amount A receives regularly without objection,

⁷ *United States v. Martin*, 94 U. S. 400; *Guthrie v. Merrill*, 4 Kan. 187; *Schurr v. Savigny*, 85 Mich. 144; 48 N. W. 547.

⁸ *Cany v. Halleck*, 9 Cal. 198.

⁹ *Voorhees v. Coombs*, 33 N. J. L. 494.

¹⁰ *Guthrie v. Merrill*, 4 Kan. 187.

¹¹ *Lowe v. Marlowe*, 4 Ill. App. 420.

¹² *United States v. Martin*, 94 U. S. 400; *Grisell v. Feed Co.*, 9

Ind. App. 251; 36 N. E. 452; *McCarthy v. New York*, 96 N. Y. 1; 48 Am. Rep. 601.

¹³ *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314; *Schurr v. Savigny*, 85 Mich. 144; 48 N. W. 547.

¹⁴ *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314; *Lowe v. Marlowe*, 4 Ill. App. 420.

¹⁵ *United States v. Martin*, 94 U. S. 400.

giving a receipt in full therefor, A cannot thereafter claim compensation for extra time.¹⁶ So, even if the statute provides that extra compensation shall be made for extra work unless there is a provision in the contract to the contrary, it has been held that an expert photographer who accepts employment for a year at twenty dollars a week must know that the nature of his work must require some extra work, and therefore it is an implied term of such contract that no compensation is to be made for extra work.¹⁷ Conversely, under a statute providing that ten hours shall constitute a day's work unless there is a provision in the contract to the contrary, an employer cannot insist that his employee who is hired at two dollars and a half a day, must estimate his time where he has worked less than ten hours on some days by counting the number of hours worked and dividing by ten.¹⁸ Some courts have used language intimating that only an express contract to pay for extra work could create liability in such cases,¹⁹ though the same authority concedes that such a proposition, while not containing prejudicial error under the facts of the particular case, is too broad for the statement of the rule in a legal treatise.²⁰ The true rule is that a contract to pay for extra work may be either express, or implied from the surrounding facts,²¹ but that the mere rendition of such extra services with the knowledge of the person for whom they are rendered, or voluntary acceptance by him does not constitute such a contract. Some authorities, however, hold that a request for work, in addition to the number of hours fixed by statute as a day's work, creates an implied liability to pay therefor. Thus, where A had agreed to work for B at eight shillings a day, payable weekly, and the statute provided that ten hours should constitute a day's labor unless there was some provision in the contract to the contrary, it was held that if B

¹⁶ *Forster v. Green*, 111 Mich. 265; 69 N. W. 647.

¹⁷ *Schurr v. Savigny*, 85 Mich. 141; 48 N. W. 547.

¹⁸ *Brooks v. Cotton*, 48 N. H. 50.

¹⁹ *Cany v. Halleck*, 9 Cal. 198.

²⁰ *Cany v. Halleck*, 9 Cal. 198.

²¹ *Luske v. Hotchkiss*, 37 Conn. 219; 9 Am. Rep. 314; *Grisell v. Feed Co.*, 9 Ind. App. 251; 36 N. E. 452; *McCarthy v. New York*, 96 N. Y. 1; 48 Am. Rep. 601.

requested A to work at night, B could recover for the number of hours in excess of ten per day which he had worked. The fact that he received his weekly pay for day labor, was held to be no bar for a subsequent recovery for his work at night, nor was the fact that he waited five years after his employment terminated before making his claim, held to bar him.²²

If the extra work done is of a character different from the general nature of that for which the employee was hired, a previous request by his employer to do such work,²³ or a subsequent voluntary acceptance thereof,²⁴ will of itself create an implied agreement to pay therefor.²⁵ Thus if an agent of the United States to sell lands belonging to the United States is hired to sell other lands belonging to Indians a contract to pay a reasonable compensation is implied.²⁶ So an agent of a corporation at a monthly salary who does extra work in getting subscriptions to the corporation's stock under the offer of the corporation to pay two per cent commission for obtaining such subscriptions can recover such commission.²⁷ So where A who is the mayor of a city and a member of its council is employed by the council to act as attorney for the city in a pending case, he may recover.²⁸ If the adversary party to the contract requests a departure therefrom which necessitates additional labor and material, the contractor may recover a reasonable compensation for such extra labor and material if no express contract is made therefor.²⁹ Thus extra recovery may be had by a railroad contractor for putting in a temporary track in order to enable the company to secure subscriptions which were conditioned on the comple-

²² *Bachelder v. Bickford*, 62 Me. 527.

²³ *United States v. Brindle*, 110 U. S. 688; *Niles v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670.

²⁴ *Cincinnati, etc., R. R. v. Clarkson*, 7 Ind. 595.

²⁵ *Converse v. United States*, 21 How. (U. S.) 463.

²⁶ *United States v. Brindle*, 110 U. S. 688.

²⁷ *Cincinnati, etc., R. R. v. Clarkson*, 7 Ind. 595.

²⁸ *Niles v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670.

²⁹ *Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Smith v. Salt Lake City*, 83 Fed. 784; *Cook County v. Harms*, 108 Ill. 151; *Evans v. McConnell*, 99 Ia. 326; 63 N. W. 570; *Isaacs v. Reeve* (N. J. Eq.), 44 Atl. 1; *Delafield v. West-*

tion of the road by a certain date.³⁰ On the other hand one who does no more than he agreed to do cannot recover more than the contract price because the performance is less profitable than he had anticipated.³¹ No recovery can be had as for extra work for work necessary in the performance of the contract though not specifically mentioned therein,³² as for blasting rock when necessary for the excavation of drains required by the specifications;³³ digging to an extra depth,³⁴ or driving piling³⁵ to obtain a secure foundation required by the contract, or underpinning an adjoining building to make an excavation and put in a foundation required by the contract.³⁶ One who does more work or furnishes more material than is required by the terms of the contract without the consent of the adversary party cannot recover therefor. Thus a contractor who has agreed to rub down brick work cannot recover as for extra work though he uses acid in cleaning the walls.³⁷ So one who has agreed to put in glass for three elevations of a building, and without the knowledge of the owner, and in spite of the fact that the owner has warned him not to put in more than the contract calls for, puts glass in on the fourth elevation also, cannot recover extra compensation.³⁸ No recovery can be had by a contractor for extra work made necessary by the failure of the contractor or his employees to comply with the specifications.³⁹ No recovery can be had for extra work if the party claiming to have done such work knows before he does it that the adversary party claims that such work is required by the provisions of the contract.⁴⁰

field, 77 Hun 124; *Lee v. Brayton*, 18 R. I. 232; 26 Atl. 256; *Rhodes v. Clute*, 17 Utah 137; 53 Pac. 990.

³⁰ *Central Trust Co. v. Condon*, 67 Fed. 84.

³¹ Contracts for excavating under directions of the owner's engineer. *Huckestein v. Inclined Plane Co.*, 173 Pa. St. 169; 33 Atl. 1108.

³² *Brigham v. Martin*, 103 Mich. 150; 61 N. W. 276.

³³ *Lee v. Brayton*, 18 R. I. 232; 26 Atl. 256.

³⁴ *Ruecking v. McMahon*, 81 Mo. App. 422.

³⁵ *Stewart v. Cambridge*, 125 Mass. 102.

³⁶ *Ashley v. Henahan*, 56 O. S. 559; 47 N. E. 573.

³⁷ *Chamberlain v. Hibbard*, 26 Or. 428; 38 Pac. 437.

³⁸ *Pittsburgh Plate Glass Co. v. MacDonald*, 182 Mass. 593; 66 N. E. 415.

³⁹ *O'Brien v. New York*, 139 N. Y. 543; 35 N. E. 323.

⁴⁰ *O'Brien v. New York*, 139 N. Y. 543; 35 N. E. 323.

In such case, if the contractor is willing to take the chances of the correctness of his interpretation of the contract, he should perform the contract as he understands it, and enforce his contract rights against the adversary party.⁴¹ Even if an architect's certificate is by the contract necessary to recovery, he may recover without it if his interpretation of the contract is correct, since it is in such case withheld unreasonably.⁴² If the contract requires a written order from the architect for extra work no recovery can be had for extra work done without such order if the owner or his authorized agent have neither of them waived such provision.⁴³ The architect has no authority in such cases to bind the agent by an oral order, by virtue alone of his employment as architect with power to order alterations in writing. The owner may waive such provision, however, and thus bind himself by oral modifications of the contract.⁴⁴

§786. Work and labor done under a contract void for mistake as to an essential element.

If A and B attempt to make a contract, and by reason of some mistake in the formation no contract is made, A, who has performed work and labor under such supposed contract,¹ may recover a reasonable compensation therefor. Thus A cut timber on B's land and made it into lumber, believing that he had a special contract with B for payment therefor. In fact, owing to a mutual misunderstanding as to the time when payment was to be made there really was no contract between A and B. It was held that A could recover a reasonable compensation for his services.² A superintended the construction of a building for

⁴¹ O'Brien v. New York, 139 N. Y. 543; 35 N. E. 323.

⁴² O'Brien v. New York, 139 N. Y. 543; 35 N. E. 323.

⁴³ O'Keefe v. Church, 59 Conn. 551; 22 Atl. 325; Stewart v. Cambridge, 125 Mass. 102; Ashley v. Henahan, 56 O. S. 559; 47 N. E. 573; Vanderwerker v. R. R., 27 Vt. 130.

⁴⁴ Perry v. Potashinski, 169 Mass. 351; 47 N. E. 1022.

¹ Collins v. Stove Co., 63 Conn. 356; 28 Atl. 534; Rowland v. R. R., 61 Conn. 103; 29 Am. St. Rep. 175; 23 Atl. 755; Russell v. Clough, 71 N. H. 177; 93 Am. St. Rep. 507; 51 Atl. 632; Burton v. Mfg. Co., 132 N. C. 17; 43 S. E. 480.

² Russell v. Clough, 71 N. H. 177;

B, believing that he was working under a special contract. In fact by mistake as to an essential fact there was no meeting of the mind. An instruction to the jury that under such facts, A could recover a reasonable compensation for his services was held proper.³

§787. Work done for one at request of another.

If A requests B to perform services for C, the mere fact of the request does not create an implied contract on the part of A to pay B for such services. The same rule applies to delivering goods.¹ Thus if a bystander calls in a physician to act for an injured person who cannot act for himself,² or a father calls in a physician to attend to an adult child who is sick at his father's house, and for whose support the father is not liable,³ or A requests a physician to care for A's insane brother B, who is not a member of A's family,⁴ the person summoning the physician is not liable to him for his services. A different result was reached where A, who had been brought up in B's family, had gone away to work, but had returned to B and was then living in B's house and doing domestic work without any specific contract for compensation, became sick and B called in X, a physician to attend to A. It was held a question of fact whether the understanding between X and B was that B was personally liable to X for X's services to A.⁵ If A requests B to furnish board and lodging to C and others, employees of A, A is not liable to B unless he has promised to pay therefor.⁶ If, however, A agrees with a hospital that A will pay for the care of

93 Am. St. Rep. 507; 51 Atl. 632.

² Burton v. Mfg. Co., 132 N. C. 17; 43 S. E. 480.

¹ "Furnishing or delivering to a third party, though upon defendant's request, does not as a matter of law imply an undertaking by defendant to pay." Conrad National Bank v. Ry., 24 Mont. 178, 183; 61 Pac. 1.

² Starett v. Miley, 79 Ill. App.

658; Meisenbach v. Cooperage Co., 45 Mo. App. 232.

³ Rankin v. Beale, 68 Mo. App. 325; Boyd v. Sappington, 4 Watts. (Pa.) 247.

⁴ Smith v. Watson, 14 Vt. 332.

⁵ Clark v. Waterman, 7 Vt. 76; 29 Am. Dec. 150.

⁶ Conrad National Bank v. Ry., 24 Mont. 178; 61 Pac. 1.

B till further notice, A cannot end his liability by giving such notice unless B has so far recovered as to be capable of being moved.⁷

§788. Goods sold and delivered.

An action for goods sold and delivered can be maintained wherever goods have been sold and delivered by one person to another under an express agreement which is incomplete in that the contract price had not been fixed.¹ Under some circumstances this action will not lie for goods delivered under a contract void for mistake as to an essential element. A sold and delivered coal to B under what both parties believed to be a special contract. The contract was, however, void for mistake: A understanding that the transaction was a cash sale while B understood that the price of the coal was to be credited on A's account. A did not, on learning of the mistake, demand return of coal; but insisted that B should keep it under the contract as claimed by A. B used it. It was held that B was not liable to A for a reasonable compensation for the coal in the absence of estoppel.² This action also lies where property has been taken by one person with the consent of the owner, the parties intending the title to pass although no express agreement has been made.³ Thus, a mortgagee of chattels, holding under a mortgage which provides that the mortgagor may sell the property in the name of the mortgagee, may recover under common counts in assumpsit against one who has bought such property from the mortgagor;⁴ even though under an ordinary mortgage,

⁷ *St. Barnabas Hospital v. Electric Co.*, 68 Minn. 254; 40 L. R. A. 388; 70 N. W. 1120.

¹ *McEwen v. Morey*, 60 Ill. 32; *James v. Muir*, 33 Mich. 223; *Smith v. Summerfield*, 108 N. C. 284; 12 S. E. 997; *Graff v. Callahan*, 158 Pa. St. 380; 27 Atl. 1009.

² *Concord Coal Co. v. Ferrin*, 71 N. H. 331; 93 Am. St. Rep. 496; 51 Atl. 283.

³ *Carney v. Cook*, 80 Ia. 747; 45 N. W. 919; *Rumford Falls Power Co. v. Paper Co.*, 95 Me. 186; 49 Atl. 876; *Krey v. Hussman*, 21 Mo. App. 343; *Indiana Mfg. Co. v. Hayes*, 155 Pa. St. 160; 26 Atl. 6; *Goodland v. Le Clair*, 78 Wis. 176; 47 N. W. 268.

⁴ *Flood v. Butzbach*, 114 Mich. 613; 68 Am. St. Rep. 501; 72 N. W. 603.

the mortgagee could not recover on the common counts from a third person who bought mortgaged property.⁵ A builder who uses goods and materials belonging to another is liable to such other for their value in this form of action.⁶ Thus, A had a contract to erect a building for B. A got the iron work for such building from X. The contract between A and B provided that no material should be estimated or paid for until used in the permanent construction of the building. X delivered certain beams under his contract with A, but before they were used in the building, A forfeited his contract, B let a new contract to C, and C used this iron. It was held that X could recover from C for such iron.⁷ A, a car-wheel company, shipped to B, the receiver of a railroad, a number of car-wheels in excess of his order. B refused to accept the entire number thus shipped, but A asked B to unload the wheels, and hold them subject to A's order, and to be paid for by B only in case he actually used them. Subsequently, at a receiver's sale, X, who knew all these facts, bought these wheels among other property. X was held liable to A for the value of such wheels in implied contract.⁸ Goods sold and delivered to one person may constitute a liability against another, at whose request and in reliance upon whose promise to pay, such goods were sold and delivered.⁹ Thus, a lumber company drew orders for money upon itself in favor of its employees. A storekeeper, at the request of the lumber company, received these orders in payment of goods sold to such employees. It was held that the storekeeper could recover from the lumber company for the goods sold and delivered.¹⁰ One person is not liable for goods sold to another, though he may have received the proceeds thereof. Thus A, a creditor of B's, agreed that B could continue in business if A's bookkeeper could take charge of the cash and the drawing of checks. A tempo-

⁵ *Tate v. Torcoult*, 100 Mich. 308; 58 N. W. 993; *Warner v. Beebe*, 47 Mich. 435; 11 N. W. 258.

⁶ *Clare v. Johnson* (Ky.), 56 S. W. 5.

⁷ *Bavley v. Anderson*, 71 Wis. 417; 36 N. W. 863.

⁸ *Northwestern. etc., Co. v. Ry.*, 94 Wis. 603; 69 N. W. 371.

⁹ *Cox v. Peltier*, 159 Ind. 355; 65 N. E. 6; *East, etc., Co. v. Barnwell*, 78 Tex. 328; 14 S. W. 782.

¹⁰ *East, etc., Co. v. Barnwell*, 78 Tex. 328; 14 S. W. 782.

rary arrangement of that sort was entered into, which either party could avoid at will. Under such arrangement, A was not liable for goods sold and delivered to B.¹¹ If goods are sold to A upon A's credit, the fact that they are delivered to B, and that B received the benefit of them, does not make B liable therefor.¹² Thus a railroad company is not liable for material furnished to its main contractor for use upon its road,¹³ nor is the owner of property liable for material furnished to the main contractor, and used by such contractor in building a house upon such property.¹⁴ The right of one whose property has been wrongfully taken by the tort of another, to maintain an action in *assumpsit* against such other is discussed elsewhere.

IV. MONEY HAD AND RECEIVED.

§789. General nature of right.

If A receives money which belongs to B, under circumstances which give A no right thereto, but which bind A on principles of justice and fairness to repay such money to B, the Common Law allowed B to sue as on contract, although there was no express contract, and no real implied contract.¹ This principle has survived in our law, and an action as upon contract will lie for money had and received wherever one person has received money which belongs to another, and which in justice and right should be returned.² Since the contract alleged in the plaintiff's com-

¹¹ *Wood-Dryer Grocery Co. v. Bank*, 110 Ala. 311; 20 So. 311.

¹² *Peirce v. Closterhouse*, 96 Mich. 124; 55 N. W. 663.

¹³ *Alabama, etc., Ry. v. Moore*, 109 Ala. 393; 19 So. 804. So with work and labor. *Woodruff v. Rochester, etc., R. R. Co.*, 108 N. Y. 39; 14 N. E. 832.

¹⁴ *Limer v. Traders' Co.*, 44 W. Va. 175; 28 S. E. 730.

¹ "If the defendant be under an obligation from the ties of natural justice to refund, the law implies a

debt and gives this action, founded in the equity of the plaintiff's case as it were upon a contract." *Moses v. Macferlan*, 2 Burr. 1005, 1008; quoted in *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 217; 33 S. E. 175.

² *Gaines v. Miller*, 111 U. S. 395; *Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98; 40 Pac. 29; *Brown v. Woodward*, 75 Conn. 254; 53 Atl. 112; *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212; 33 S. E. 175; *Wilson v. Turner*, 164 Ill. 398;

plaint is often purely fictitious, the plaintiff's right to recover in a contract does not depend upon any principles of privity of contract between the plaintiff and the defendant, and no privity is necessary.³ The plaintiff's right to recover is governed by principles of equity, although the action is one at law.⁴ The plaintiff may, in most cases, recover at law in assumpsit where he could have compelled an accounting for the money received by the defendant, had the action been in equity.⁵ If A has in his posses-

45 N. E. 820; Long v. Straus, 107 Ind. 94; 57 Am. Rep. 87; 6 N. E. 123; 7 N. E. 763; Comer v. Hayworth, 30 Ind. App. 144; 96 Am. St. Rep. 335; 65 N. E. 595; Garrott v. Jaffrey, 10 Bush. (Ky.) 418; Pease v. Bamford, 96 Me. 23; 51 Atl. 234; Spencer v. Towles, 18 Mich. 9; School District v. Thompson, 51 Neb. 857; 71 N. W. 728; Gangwer v. Fry, 17 Pa. St. 491; 55 Am. Dec. 578; Matthies v. Herth, 31 Wash. 665; 72 Pac. 480.

³ Moses v. Macferlan, 2 Burr 1005; Rapalje v. Emory, 2 Dall. (U. S.) 51; Bank of the Metropolis v. Bank, 19 Fed. 301; Levinshon v. Edwards, 79 Ala. 293; Kreutz v. Livingston, 15 Cal. 344; Brown v. Woodward, 75 Conn. 254; 53 Atl. 112; Eagle Bank v. Smith, 5 Conn. 71; 13 Am. Dec. 37; Bates-Farley Savings Bank v. Dismukes, 107 Ga. 212; 33 S. E. 175; Allen v. Stenger, 74 Ill. 119; Glascock v. Lyons, 20 Ind. 1; 83 Am. Dec. 299; Calais v. Whidden, 64 Me. 249; Howe v. Clancey, 53 Me. 130; Lewis v. Sawyer, 44 Me. 332; Mills v. Bailey, 88 Md. 320; 41 Atl. 780; Mason v. Waite, 17 Mass. 560; Walker v. Conant, 65 Mich. 194; 31 N. W. 786. (Decided on demurrer to petition. On hearing on the merits no liability to make compensation was found to exist. Walker v. Conant, 69 Mich. 321; 13 Am. St. Rep. 391;

37 N. W. 292; Richardson v. Drug Co., 92 Mo. App. 515; 69 S. W. 398; Fogg v. Worster, 49 N. H. 503; Roberts v. Ely, 113 N. Y. 128; 20 N. E. 606; Salem v. Marion County, 25 Or. 449; 36 Pac. 163; Madden v. Watts, 59 S. C. 81; 37 S. E. 209; Finch v. Park, 12 S. D. 63; 76 Am. St. Rep. 588; 80 N. W. 155; Siems v. Bank, 7 S. D. 338; 64 N. W. 167; Colgrove v. Fillmore, 1 Aik. (Vt.) 347; Soderberg v. King County, 15 Wash. 194; 55 Am. St. Rep. 878; 33 L. R. A. 670; 45 Pac. 785; Ela v. Express Co., 29 Wis. 611; 9 Am. Rep. 619.

⁴ Rushton v. Davis, 127 Ala. 279; 28 So. 476; Brainard v. Colchester, 31 Conn. 407; Jackson v. Hough, 38 W. Va. 236; 18 S. E. 575. "An action of assumpsit for money had and received is a remedy equitable in its nature existing in favor of one person against another when that other person has received money either from the plaintiff or a third person under such circumstances that in equity and good conscience he ought not to retain the same and which *ex aequo et bono* belongs to plaintiff." Merchants', etc., Bank v. Barnes, 18 Mont. 335, 337; 56 Am. St. Rep. 586; 47 L. R. A. 737; 45 Pac. 218.

⁵ Jackson v. Hough, 38 W. Va. 236; 18 S. E. 575.

sion a fund the equitable title to which is in B, and A's only duty in connection therewith is to pay it over to B, B may sue at law for money had and received.⁶ Two general classes of questions are presented under the topic of money had and received. The first concerns the rights of the parties. It is, whether, under the facts the plaintiff has a right of recovery from the defendant. The second concerns the form of the action. It is, whether an action in contract can be brought if upon the facts the plaintiff has a right to recover in some form of action. The answer to the latter question, however, decides whether the right in question can be classed with contract rights or not. Recovery cannot ordinarily be had in this form of action if there is a special contract between the parties. Thus if a note is given for the loan the right of the lender to recover is on the note alone.⁷ However if X obtains a loan from A through X's agent B, and B's note is given therefor, X may ignore the note and sue A on the contract of loan.

§790. Elements of right to recover in this action.—Money or equivalent must be received.

In order to support an action for money had and received, a person against whom the action is brought must be shown to have received, either money,¹ or something which is taken as the

⁶ *Rushton v. Davis*, 127 Ala. 279; 28 So. 476.

⁷ *Pettyjohn v. Bank*, 101 Va. 111; 43 S. E. 203.

¹ *St. Louis, etc., Co. v. McPeters*, 124 Ala. 451; 27 So. 518; *Palmer v. Scott*, 68 Ala. 380; *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632; *Huganir v. Cotter*, 102 Wis. 323; 72 Am. St. Rep. 884; 78 N. W. 423. "The rule is quite elementary that to enable a person to maintain an action for money had and received it is necessary for him to establish that the

persons sought to be charged have received money belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. The purpose of such action is not to recover damages but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." *Limited Investment Association v. Investment Association*, 99 Wis. 54, 58; 74 N. W. 633; quoted in *Johnson v. Abresch Co.*, 109 Wis. 182; 85 N. W. 348.

equivalent of money,² belonging to the person by whom the action is brought or for his use. On the one hand, an action can not be had for money had and received where it is not shown that the person against whom it was brought, received either the money or property belonging to or for the use of the plaintiff.³ This is simply an application of the general principle, that an action on an implied contract cannot be made the means of enforcing damages for breach of an express contract.⁴ One exception to this principle is the case where the only thing remaining for the party in default to do was to pay the money.⁵ Assumpsit for money had and received cannot be made the means for recovering damages for breach of a contract to erect improvements for plaintiff's use, upon a right of way conveyed by plaintiff to defendant,⁶ nor damages for a bailee's selling lumber consigned to him at less than the price agreed upon.⁷ If B sues one to whom B alleges that insurance money has been paid to the use of B,⁸ B cannot recover if the evidence discloses that no money was had and received, but that B's action is really for a breach of a contract to effect the insurance. Thus an action for money had and received will not lie in favor of B against A where X has done work for A, which should have insured in whole or in part to B.⁹ To allow recovery in this form of action the money paid must have come to the possession of the person against whom the action is brought, or have been paid to his use. B had given his wife, X, some money which she claimed to have invested. Subsequently X forged B's name to a note

² *Snapp v. Stanwood*, 65 Ark. 222; 45 S. W. 546; *Buckeye (Township of) v. Clark*, 90 Mich. 432; 51 N. W. 528; *Matthewson v. Powder Works*, 44 N. H. 289.

³ *St. Louis, etc., Co. v. McPeters*, 124 Ala. 451; 27 So. 518; *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Dec. 632.

⁴ *P. Dougherty Co. v. Gring*, 89 Md. 535; 43 Atl. 912; *Stewart Mfg. Co. v. Mfg. Co.*, 67 N. J. L. 577; 52 Atl. 391; *Bushnell v. Coggeshall*, 10

N. M. 601; 62 Pac. 1101; *Royalton v. Turnpike Co.*, 14 Vt. 311.

⁵ *Stewart Mfg. Co. v. Mfg. Co.*, 67 N. J. L. 577; 52 Atl. 391.

⁶ *Labadie v. Ry.*, 125 Mich. 419; 84 N. W. 622.

⁷ *Anderson v. Corcoran*, 92 Mich. 628; 52 N. W. 1025.

⁸ *Johnston v. Abresch Co.*, 109 Wis. 182; 85 N. W. 348.

⁹ *Craig v. Matheson*, 32 N. S. 452; *Hassard v. Tomkins*, 108 Wis. 186; 84 N. W. 174.

which X discounted. Subsequently an action was brought against B and X on this note. X then forged B's name to another note, which X discounted. A part of the proceeds of this note she applied to paying off the note sued upon in the first action, and part she applied to paying certain bills for which her husband was primarily liable. X told B that the money thus received came from the former investment of B's money. It was held that A, who had furnished the money on the second forged note, could recover from B that part of the money applied to the payment of the bills mentioned, but could not recover that part applied to the payment of the first forged note, since B was not liable thereon, and the money did not come into his hands, nor was it paid for his use.¹⁰ So if an action is brought against a merchant for money had and received, on the ground that goods bought by his agent without his authority were delivered at his store and sold by him, the evidence must show that he sold such goods and received the money therefor.¹¹ A and B agreed to buy land on their joint interest, and A was to negotiate the purchase; B furnished part of the purchase money, and subsequently, on learning that A's representations that the price agreed upon was the lowest possible price and did not include any commissions to A for making the purchase, were false, and that A had an agreement with the vendee whereby A was to receive a certain amount of the last payment to be made as his commission, refused to pay the rest of the purchase price due from him. B was not allowed to recover for money had and received, where A subsequently completed the contract and resold the land at a loss.¹² A had a contract for the performance of certain work and labor, and X was a subcontractor. The man whom X employed boarded with B, and when A paid X's employes A retained in his possession the amount owing by each

¹⁰ *Mechanics' Bank v. Woodward*, 74 Conn. 689; 51 Atl. 1084; and see *Brown v. Woodward*, 75 Conn. 254; 53 Atl. 112.

¹¹ *Leshner v. Loudon*, 85 Mich. 52; 48 N. W. 278.

¹² *Blewitt v. McRae*, 100 Wis. 153; 75 N. W. 1003. The court held that there had been no rescission in this case, and that B's remedy was by action against A for fraud.

for board furnished by B. B had a contract with X to operate a boarding house for the men at certain sum per week, but B had no contract with A binding A to retain the amount due for such board. A paid the men and retained such amounts; but when such men were paid, X owed A for supplies to an amount in excess of the amount so retained by A. It was held that B had no right of action against A for money had and received, since A had received nothing from any person to the use of B.¹³ A, B and C took part in a forgery, by means of which X was induced to pay to A a sum of money. It was held that X might recover from A, B and C for money had and received, if the understanding of the wrongdoers was that A was collecting it for their common interests. X's right of recovery was not affected by the fact that A had appropriated all the frauds of this crime, and that B and C had in fact received no part thereof from A.¹⁴ A, X's agent, forged A's name on certain stock certificates, sold them to B, deposited the money in A's name and then embezzled it. It was held that this was not such receipt by A that B, on being obliged to return the stock certificates, could maintain an action against A for such money had and received.¹⁵ On the other hand, it is not necessary that the person against whom an action for money had and received is brought, should have received money belonging to, or to the use of, the plaintiff. If he has taken something as the equivalent of the money, he is liable in this action.¹⁶ Thus, where he

¹³ *Erickson v. Construction Co.*, 107 Wis. 49; 82 N. W. 694; distinguishing. *Sterling v. Ryan*, 72 Wis. 36; 7 Am. St. Rep. 818; 37 N. W. 572, as a case where A had agreed with B to retain such money.

¹⁴ *National Trust Co. v. Gleason*, 77 N. Y. 400; 33 Am. Rep. 632. "To charge a party in an action of that character the receipt of money by him directly or indirectly must be established. His complicity in the crime is not the cause of action, but only an item of evidence tend-

ing to establish his interest in the proceeds." *National Trust Co. v. Gleason*, 77 N. Y. 400, 408; 33 Am. Rep. 632.

¹⁵ *Fay v. Slaughter*, 194 Ill. 157; 88 Am. St. Rep. 148; 56 L. R. A. 564; 62 N. E. 592; reversing, 94 Ill. App. 111.

¹⁶ *Snapp v. Stanwood*, 65 Ark. 222; 45 S. W. 546. (*Qualifying Hutchinson v. Phillips*, 11 Ark. 270, on this point, the syllabus of which restricts such action to cases where money only has been received.)

takes a note belonging to another as cash, he may be liable to the real owner thereof for money had and received.¹⁷ So, where A, B's agent, accepts from X, from whom he is collecting money for B, a note signed by B and endorsed by X, as part payment of such sum, A is liable to B for money had and received.¹⁸ So when he receives an order as the equivalent of cash, and converts it, or its proceeds, to his own use, he is liable for money had and received.¹⁹ If X, a debtor, conveys to his creditor, A, his stock of goods, and A agrees to pay debts owing by X to B, and other creditors of X, in consideration of such conveyance, A may be liable to B and such other creditors for money had and received, where he takes such goods, treats them as the equivalent of money, and converts them into money.²⁰ If A agrees to pay B a certain sum of money out of the proceeds of the sale of certain agricultural produce, B may, after a reasonable time, maintain an action against A for money had and received for B's use in the absence of a showing by A that he has not yet sold such produce, since, after a reasonable time has elapsed, it will be presumed that such sale has been made.²¹ No recovery can be had in an action for money had and received through mistake, unless either the money or something equivalent thereto has been in fact received.²² Thus A believed that he owed B one hundred and fifty dollars. B knew that the amount was only fifty dollars. In settlement of such claim, A delivered to B a horse which A valued at one hundred and fifty dollars, and

Seavey v. Dana, 61 N. H. 339; *Mathewson v. Powder Works*, 44 N. H. 289. "To maintain assumpsit for money had and received it must appear that the defendant received the money due the plaintiff or something which he had received as and instead of it, or which he had actually or presumptively converted into money before suit." *Peay v. Ringo*, 22 Ark. 68, 71; quoted in *Snapp v. Stanwood*, 65 Ark. 222; 45 S. W. 546.

¹⁷ *Seavey v. Dana*, 61 N. H. 339.

¹⁸ *Snapp v. Stanwood*, 65 Ark. 222; 45 S. W. 546.

¹⁹ *Bavins v. Bank* (1900), 1 Q. B. 270; *Buckeye (Township of) v. Clark*, 90 Mich. 432; 51 N. W. 528; *Bowen v. School District*, 36 Mich. 149.

²⁰ *Potts v. Bank*, 102 Ala. 286; 14 So. 663.

²¹ *Barfield v. McCombs*, 89 Ga. 799; 15 S. E. 666.

²² *Hendricks v. Goodrich*, 15 Wis. 679.

which was worth about that sum. It was held that A could not recover from B one hundred dollars as money had and received by mistake.²³ This case involved the principle that A could not affirm in part and rescind in part. He could not affirm the payment so as to treat his original liability as discharged and yet avoid it as to the terms upon which the payment was made. In the settlement of a claim between A and a village, an illegal assessment imposed by the village was credited on A's account, the village refusing to pay A unless such credit was made. It was held that this did not amount to a payment by A of the illegal assessment, but that it was merely a case of A's failing to collect all that he was entitled to under his original cause of action. Accordingly, limitations ran from the time A's original claim against the village for work accrued, and not from the date when this settlement was made.²⁴ Recovery may be had, however, if something is delivered which is taken as money. Thus, where a payment is made in small notes, which were not money and which were illegally issued, but which were in fact used as money, recovery can be had in such an action.²⁵ So where an agent discharges a principal's debt by applying thereon a debt of the agent's, this is treated as the equivalent of money.²⁶ A, by mistake, gave a negotiable note to B in settlement of an account which had already been paid. It was held that this might be treated as a payment of such account, the note being taken as money, and might justify a recovery.²⁷ A subsequently, after learning the facts, paid the note voluntarily. It was held that he had no right of action to recover the amount thus paid by him, although under proper pleadings he might recover the amount of the note for the over payment made by giving it. This action lies only in favor of the person who is the owner of the money which is the subject of the action. If A receives B's money, X cannot maintain an

²³ *Hendricks v. Goodrich*, 15 Wis. 679. ⁶ *Gill* (Md.) 68; 46 Am. Dec. 655.

²⁶ *Beardsley v. Root*, 11 Johns.

²⁴ *Brundage v. Port Chester*, 102 (N. Y.) 464; 6 Am. Dec. 386.

N. Y. 494; 7 N. E. 398.

²⁷ *Gooding v. Morgan*, 37 Me.

²⁵ *Baltimore, etc., Ry. v. Faunce*, 419.

action against A therefor. Thus, where X drew a draft which was subsequently altered, the amount being raised, and the drawee bank accepted and paid such raised draft, and charged X in its account for the amount of the draft as raised, X cannot recover against A for money had and received, since A has not received any of X's money.²⁸ An action for money had and received cannot be maintained against one who is known to the lender to be merely a surety, receiving none of the money advanced.²⁹

§791. Person receiving money must not be entitled in good conscience to retain it.

The right of one person to recover money which belongs to him, and which is paid to another person, depends not on whether the person to whom such payment was made could have compelled it by law if it had not been made voluntarily, but upon whether the person to whom the money is paid is entitled in equity and good conscience to retain it.¹ Examples of payments which the payee could not have compelled by law, but which when made the payor cannot recover, are to be found in gifts and voluntary payments.² This principle is not limited, however, to cases of payment which are technically voluntary. Where a widow pays the just debt of the estate of her husband out of the assets of such estate which are in her possession, and subsequently she is appointed administratrix, she cannot recover on behalf of the estate the money thus paid by her without authority where there are no other creditors whose rights are interfered with, since the party to whom the money is paid is entitled in good conscience to retain it; and

²⁸ *National Bank v. Bank*, 122 N. Y. 367; 25 N. E. 355.

²⁹ *Arbuckle v. Templeton*, 65 Vt. 205; 25 Atl. 1095.

¹ "However tortiously it (the money) may have come into his hands, the defendant can in this form of action set the plaintiff at

defiance if he has the best right to it." *Goddard v. Seymour*, 30 Conn. 394, 401; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159; 28 Am. Dec. 286; *Le Breton v. Pierce*, 2 All. (Mass.) 8.

² See § 797.

if such payment had not been made, he would have had a right to enforce payment from the administratrix in her official capacity.³ If A received money from X for the use of B, A is liable to B therefor, even if A could not have enforced the payment to himself of such money from X, or if he was not bound to B to receive such money when paid in. Thus, A, a factor, took out insurance on butter which was consigned to him, and received the premiums therefor from his principal, B. Subsequently A claimed that loss was sustained upon B's butter, among other lots of butter; and the insurance money was paid to A, in part upon such loss. A was held liable to B for the amount of such insurance money representing the loss upon B's butter, although such butter was not in fact damaged; and A was not bound by a contract with B to procure such insurance.⁴ An application of this principle is often found in cases of payment by mistake of fact. Thus, A owed B, but B's right of action was barred by the statute of limitations. A subsequently paid B under mistake as to the existence of such defence. It was held that A could not recover.⁵ So where A loaned two hundred eighty dollars to B and by mistake the note was drawn for two hundred thirty dollars, and B repaid two hundred eighty dollars to A, B cannot recover the fifty dollars from A as paid under a mistake of fact.⁶ So where a retired army officer on half pay accepted a position in the diplomatic service, which by statute deprived him of his rank and pay in the army, and after his diplomatic service was ended he performed military duties for which he received pay, the United States cannot recover such pay, since even if he was not an officer *de jure* he was *de facto*, and as such entitled to compensation.⁷ A, a grantee of a mortgagor X, and B, a mortgagee, both believed that certain land owned by A was covered by a mortgage to B. A made a payment to B to procure the

³ Rainwater v. Harris, 51 Ark. 401; 3 L. R. A. 845; 11 S. W. 583.

⁴ Fish v. Seeberger, 154 Ill. 30; 39 N. E. 982.

⁵ Hubbard v. Hickman, 4 Bush. (Ky.) 204.

⁶ Foster v. Kirby. 31 Mo. 496.

⁷ Badeau v. United States, 130 U. S. 439.

release of such land from the lien of such mortgage. Subsequently, in a foreclosure suit between B and X, such payment was credited upon the amount of the mortgage debt. A majority of the court held that inasmuch as B had changed his position in reliance upon such payment, and his rights had been fixed by the decree, and A, who had opened the negotiations, and had asked B to receive the payment, was the more negligent of the two, A could not recover such payment.⁸ Another application of this principle is found in payments made by duress or compulsion of law.⁹ Where A had erected buildings upon the land of B, a minor, under a contract with B's father, whereby A was to erect certain buildings, collecting rents therefrom as payment, it has been held that after A has erected such buildings and collected rents to apply on the cost thereof, he is not liable to the minor for such rents received, as it would not be just to give the minor the benefit of such material and labor without any compensation therefor, even though the contract is unenforceable.¹⁰ Taxes which have been paid, cannot be recovered because of technical irregularity in the proceedings affecting the substantial rights of the parties, even though such irregularity might have been a ground of resisting the payment in the first instance.¹¹ The same principle applies to money paid on street assessments, which are technically, but not substantially, invalid.¹²

§792. Party from whom recovery is sought must be placed in statu quo.

In order to recover in an action for money had and received the person from whom recovery is sought must be placed in *statu quo*, unless he is a wrongdoer. A common illustration of this rule exists when money paid to an agent to be paid over

⁸ Richey v. Clark, 11 Utah 467; 40 Pac. 717.

⁹ See §§ 256, 799 *et seq.*

¹⁰ McKee v. Preston, 66 Cal. 522; 6 Pac. 379.

¹¹ Goddard v. Seymour, 30 Conn.

394; Wiesmann v. Brighton, 83 Wis. 550; 53 N. W. 911.

¹² Newcomb v. Davenport, 86 Ia.

291; 53 N. W. 232; Hopkins v. Butte, 16 Mont. 103; 40 Pac. 171.

to his principal and by him so paid over is sought to be recovered from the agent. If B pays money to A as agent for X, and A pays that money over to X, B cannot recover such money from A if A's agency was disclosed when the payment was made, and A himself has committed no wrongful act in inducing or compelling B to pay him the money.¹ Thus, where a purchase price of a ward's land was paid to the guardian, and the guardian remitted the money to his ward, the guardian is not liable in an action for money had and received, to a broker suing for commissions for the sale of such property.² So, selectmen of a town, who in good faith determine the value of a pauper's support furnished him by the town, which amount under the law he must refund to the town before he is put on the voting list, are not liable to him for money had and received, where in good faith they fix an excessive amount which he pays them and they pay into the town treasury.³ Where property is sold for a sidewalk assessment, and the proceeds of such sale are by law to be paid over to the contractor entitled thereto, a purchaser at such sale cannot recover from the city to which the money is paid, and he pays it over to the contractor though the assessment proves to be illegal, and the purchaser takes nothing by reason of his purchase.⁴ If, however, the fact of agency is not disclosed to the person making the payment, at the time of such payment, the person making the payment may recover from the agent of whom he pays the money, if the facts are such that he could have recovered from the principal had the payment been made direct to the principal. Thus, where A, an investment company, made a loan for its principal, C, to B, and B supposed that she was dealing with A alone, and B

¹ Elliott v. Swartwout, 10 Pet. (U. S.) 137; Wilson v. Wold, 21 Wash. 398; 75 Am. St. Rep. 846; 58 Pac. 223.

² Hudson v. Scott, 125 Ala. 172; 20 So. 91.

³ Brown v. Marden, 61 N. H. 15; distinguishing, Ford v. Holden, 39

N. H. 143, where the selectmen were liable for taxes, the payment of which had been wrongfully exacted as a condition precedent to allowing the person so paying them to vote.

⁴ Richardson v. Denver, 17 Colo. 398; 30 Pac. 333.

makes over-payments to A, by way of usury, which B is permitted to recover, B may recover from A, though A has forwarded such payments to C.⁵ If payment is made under protest, this is sufficient notice to the person receiving it to make him liable therefor if, under the circumstances, he would have been liable to refund a payment for his own benefit, even if he has paid over to his principal the money thus received.⁶

§793. Action does not enlarge substantive rights.

In allowing an action for money had and received, the law intended to allow a simple remedy for a recognized right, and did not intend to create a right where there was none already. B had been dealing with X, a stock-broker, and the result of the transaction showed a balance in B's favor. B requested A, X's agent, for a settlement of that balance, and asked A to pay it. A finally made such payment, expecting X to remit the amount to him at once. X was insolvent, and such amount was never remitted. It was held, that A could not recover such amount from B.¹ A, the publisher of a newspaper, made a subscription to a fund for the relief of the families of certain firemen who had lost their lives in the discharge of their duty, and published an appeal in his newspaper for other subscriptions. A number of subscriptions were made, and the money was paid to A. It was held that the only child and heir of one of the firemen had no right of action against A to recover his part of the money so paid in as money had and received, since, under the terms of A's request the disposition of the fund thus paid in was left to his discretion and judgment.² While it did not affect the legal rights of the parties, the dispute arose in this way: plaintiff was a minor, the only son and heir of one of the firemen for the benefit of whose families the money was collected. A consulted a legal adviser, and decided to

⁵ *Thompson v. Investment Co.*, 114 Ia. 481; 87 N. W. 438.

⁶ *Elliott v. Swartwout*, 10 Pet. (U. S.) 137.

¹ *Clippinger v. Starr*, 130 Mich. 463; 90 N. W. 280.

² *Hallinan v. Hearst* (Cal.), 62 Pac 1063.

deposit the plaintiff's share of the fund with a trust company until the plaintiff came of age. The lower court made certain orders as to the disposition of the income of that fund for the benefit of the plaintiff during his minority, and to which orders A did not except. In the Supreme Court, the plaintiff was the party complaining of error in the proceedings of the court below, in refusing to turn over the entire fund to himself or his guardian. Where an officer is holding over as *de facto* treasurer, his successor, not having been elected legally, a school district cannot compel him to pay over funds lawfully in his possession by an action for money had and received.³ If A obtains money from B, under circumstances which make him liable to refund, and uses the money in whole or in part to discharge a valid debt which A owes X, and X takes without collusion or fraud, B cannot recover in an action against X for money had and received.⁴ Thus, where A borrowed money of X, and to secure the same he gave a forged note and mortgage apparently signed by third persons, and subsequently A borrows money from B and gives another forged mortgage, and with a part of the money thus borrowed pays the first mortgage to X, B cannot recover from X.⁵ So, where A gets money from B by giving a note to which A signs the name of his principal without authority, and A uses the money thus obtained to pay debts of his principal, which A should have paid out of those of X, which should have been in A's hands but which A in fact had embezzled, it was held that B could not recover from X for the money thus used.⁶ So, where B, a vendee of land, has a right to rescind the sale, he cannot recover in an action for money had and received from one who has received no part of the purchase price, except what was paid to him by the vendor, A, as commission for bringing about the

³ School District v. Smith, 67 Vt. 566; 32 Atl. 484. Am. St. Rep. 391; 37 N. W. 292.

⁵ Walker v. Conant, 69 Mich. 321;

⁴ Craft v. R. R., 150 Mass. 207;

13 Am. St. Rep. 391; 37 N. W. 292.

5 L. R. A. 641; 22 N. E. 920;

⁶ Craft v. R. R., 150 Mass. 207;

Walker v. Conant, 69 Mich. 321; 13

5 L. R. A. 641; 22 N. E. 920.

sale.⁷ So, where A gets money from B by a forged draft, and with part of the proceeds thereof he discharges a debt which he owes X, who knows nothing of the forgery, and who surrenders to A a note endorsed by a third person, B cannot recover from X.⁸ So, where A, who is shipping hogs under an arrangement with B, a firm of commission brokers, whereby he agreed to consign the hogs to B, and draw upon B with each consignment, and to use the money thus obtained in paying for the hogs, it was held that where A took part of this money and paid a debt owing by him to a bank, X, B cannot recover such money from X, although X knew of the arrangement under which the money was received, since the relation of A to B was that of mere debtor and creditor.⁹ So, where X, the cashier of a bank, who was also county treasurer, owes certain taxes to the state as county treasurer, and draws a draft which he signs as cashier of his bank, on another bank in which his bank has deposited funds, and forwards such draft to the state in payment of the taxes due him, which draft is accepted and paid, the bank of which X is cashier cannot recover from the state, although the cashier never paid the bank for such draft.¹⁰ The court held that the fact that the cashier had signed the draft, was no notice to the state that he was using the bank's funds for his individual debt.¹¹ If facts exist which discharge the plaintiff's right of action upon an express contract, the same facts will prevent him from waiving the express contract, and suing on an implied contract.¹² Thus, where A, had deposited money with B to invest, and subsequently A and B had an

⁷ Limited Investment Association v. Investment Association, 99 Wis. 54; 74 N. W. 633.

⁸ Alabama National Bank v. Rivers, 116 Ala. 1; 67 Am. St. Rep. 95; 22 So. 580.

⁹ Hurlburt v. Palmer, 39 Neb. 158; 57 N. W. 1019.

¹⁰ Goshen National Bank v. State, 141 N. Y. 379; 36 N. E. 316.

¹¹ Distinguishing, Claflin v. Bank,

25 N. Y. 293, where one who took the president's individual check certified to by him as president was charged with notice that the president had no authority to accept his individual check on behalf of the bank.

¹² Hammer v. Downing, 39 Or. 504; 64 Pac. 651; 65 Pac. 17, 990; 67 Pac. 30.

accounting and made a settlement, this accounting will not only bar an action upon the express contract between A and B, but also will bar an action for money had and received.¹³ If A has paid money to B under such circumstances that he cannot recover it from B, and such payment has discharged a debt due from C to B, A's right to recover from C cannot be litigated in an action brought by A against B, even if C is made a party thereto.¹⁴

§794. Classes of rights.—Receipt of money from third person.

In determining the right of one whose money has been placed in the hands of another to recover the same, we must distinguish between two general classes of cases. In the first class, the party who receives the money of another, receives it from a third person in whose hands it is, without the consent of the real owner thereof. In the second class of cases, the person receiving the money receives it from the real owner, or from a third person, with the consent of the real owner. The chief distinction in legal effect, between these two classes of cases, is this: In the first class, we are not embarrassed by the question whether the payment was a voluntary one. In the second class, in addition to the question of ownership of the original fund and the right to recover the same, presented in the first class, we have the further complicating question whether the payment was not a voluntary one, since if the payment was voluntary no recovery can be had although all the other facts might be such as to entitle the original owner to recover. If A receives money from X which belongs to B, without B's consent, the general rule is, that in the absence of special circumstances B may recover such money from A.¹ A public officer, as a sheriff who has retained money which he claims to be due him as

¹³ *Hammer v. Downing*, 39 Or. 504; 64 Pac. 651; 65 Pac. 17, 990; 67 Pac. 30.

¹⁴ *Holt v. Thomas*, 105 Cal. 273; 38 Pac. 891; *Langevin v. St. Paul*, 49 Minn. 189; 51 N. W. 817.

¹ *United States v. Bank*, 96 U. S. 30; *Bayne v. United States*, 93 U. S. 642; *Brand v. Williams*, 29 Minn. 238; 13 N. W. 42; *Knapp v. Hobbs*, 50 N. H. 476; *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589; 15

commissions, but which belongs to a board of education, is liable in an action for money had and received.² A public *quasi* corporation, as a county which receives taxes and applies them all to its own use when it should pay bonds issued by a town out of such taxes, is liable to such town therefor.³ So, if a county receives money belonging to other persons without authority, it must refund to such persons.⁴ Thus, where taxes are paid in to a county by a sheriff, when they should have been paid to a city, the city may recover.⁵ So, where a county is divided, and the original county is legally entitled to taxes which were due when the division was made, but which had not then been paid, but the state officials through whose hands such taxes passed, pay a part thereof to the new county, the original county may recover such taxes from the new county.⁶ A stockholder who receives dividends when the corporation is insolvent, and the dividends are paid out of the capital of the corporation, knowing of such condition, may be compelled to repay such dividends in an action brought by the receiver of the company.⁷ Where a school trustee expends money for the actual use and benefit of township schools, which by law he is required to pay over to another school corporation, such township is liable to such corporation for the amount of money thus expended.⁸ If a wife has taken money belonging to her husband and paid premiums on an insurance policy, taken out by her upon his life without his authority, the husband may recover the premiums, thus paid from the insurance company.⁹

L. R. A. 588; 30 N. E. 963; State v. St. Johnsbury, 59 Vt. 332; 10 Atl. 531.

² Socorro Board of Education v. Robinson, 7 N. M. 231; 34 Pac. 205.

³ Strough v. Jefferson County, 119 N. Y. 212; 23 N. E. 552.

⁴ Chapman v. County of Douglass, 107 U. S. 348.

⁵ Salem v. Marion County, 25 Or. 449; 36 Pac. 163.

⁶ Colusa County v. Glenn County, 117 Cal. 434; 49 Pac. 457.

⁷ Warren v. King, 108 U. S. 389; Davenport v. Lines, 72 Conn. 118; 44 Atl. 17.

⁸ Center School Township v. School Commissioners, 150 Ind. 168; 49 N. E. 961 (citing Argenti v. San Francisco, 16 Cal. 255; Merrill v. Marshall County, 74 Ia. 24; 36 N. W. 778).

⁹ Metropolitan Life Ins. Co. v. Trende (Ky.), 53 S. W. 412.

Where the statute provided that property to the value of one thousand dollars is exempt from administration for the benefit of the widow and minor children, and such property is delivered to the widow, a minor child may recover its share from the widow in an action for money had and received, where the widow refuses to pay to such child its share of such amount.¹⁰ A village incorporated under an unconstitutional act, borrowed money from the state for school purposes. The county, as the agent of the state, collected from the village, and the township in which it was situated, the entire amount thus borrowed, and paid it to the state, and then collected another and additional sum as a part of such loan. It was held that the township could collect from the county the amount thus collected by the county in excess of the actual loan, the county having retained such excess of amount, and not having paid it over to the state.¹¹ If X is indebted to B, and A collects from X the amount of this indebtedness under such circumstances that X is still liable to B, and cannot plead the payment to A as discharge of his liability to B, the question is presented whether B can recover from A for money had and received. Where A gave B a note, which B indorses before maturity to C, and X brought suit against B and garnisheed A, and A disclosed his indebtedness to B, and paid the amount of the indebtedness to the sheriff, who forwarded it to X, it has been held that C has no right of action against X on the theory that he had no claim to the specific fund, his right of action being against A.¹² If X is indebted to B under circumstances which give B a property right in a specific fund, and A collects that fund from X under circumstances which leave X still liable to B, it has been held that B has an election to sue A or X at his option. If he sues A, A cannot defend on the theory that B has a right of action against X.¹³ On the

¹⁰ Lanford v. Lee, 119 Ala. 248;
72 Am. St. Rep. 914; 24 So. 578.

¹¹ Milwaukee v. Milwaukee Coun-
ty, 114 Wis. 374; 90 N. W. 447.

¹² Corey v. Webber, 96 Mich. 357;

55 N. W. 982; Merchants', etc.,
Bank v. Barnes, 18 Mont. 335; 56
Am. St. Rep. 586; 47 L. R. A. 737;
45 Pac. 218.

¹³ Bates-Farley Savings Bank v.

other hand, it has been held that if B sues X, and obtains a judgment, this amounts to an election, and B cannot afterwards maintain an action against A.¹⁴ Thus, where A had deposited money in a savings bank, in trust for his wife, B, and the bank had given a pass-book for such money, and after the death of A and B, B's executor had demanded payment, but had been refused because he did not have the pass-book, and A's executor produced the pass-book and was paid by the bank, and B's executor sued A's executor and obtained a judgment, execution upon which was returned because no property could be found, and B's executor then sued the bank, it was held that the first action and judgment amounted to an election, and operated as a bar to the second action.¹⁵ If B has in some way obtained a lien upon a fund or property belonging to X, and this fund or property is delivered to A, he takes with full knowledge of B's lien, B can enforce the amount of his lien in an action against A for money had and received. Thus, where B seizes a certain property belonging to X on a judgment, and A with knowledge of the judgment induces the sheriff to sell the attached property and pay the proceeds to him, X can maintain an action against A for money had and received.¹⁶ So, where the sheriff wrongfully pays to A money in his hands which he should have paid to B, B has an election to sue the sheriff or A.¹⁷ So, where B

Dismukes, 107 Ga. 212; 33 S. E. 175. "He chose the latter alternative; he saw fit to ratify the unauthorized collection by the defendant and the unauthorized payment by the association, and it does not now lie in the mouth of the defendant to say, when called upon to pay over to him the money which it unlawfully collected upon his and his assignor's claims against the building and loan association that his only remedy is against the association. . . . Under such circumstances the law implies a promise on the part of the defendant to pay the money over to the one who

was entitled to receive it." *Bates-Farley Savings Bank v. Dismukes*, 107 Ga. 212, 218; 33 S. E. 175.

¹⁴ *Fowler v. Savings Bank*, 113 N. Y. 450; 10 Am. St. Rep. 479; 4 L. R. A. 145; 21 N. E. 172.

¹⁵ *Fowler v. Savings Bank*, 113 N. Y. 450; 10 Am. St. Rep. 479; 4 L. R. A. 145; 21 N. E. 172. The court said that a different result would have been reached had this been a special deposit.

¹⁶ *Finch v. Park*, 12 S. D. 63; 76 Am. St. Rep. 588; 80 N. W. 155.

¹⁷ *Brand v. Williams*, 29 Minn. 238; 13 N. W. 42.

obtained a judgment in an action against X, and A claiming a lien on the property, intervenes, and has the attachment vacated, and A then induces the sheriff to pay him the money made on such attachment, and on appeal the attachment is held valid, and B takes judgment against X, and shows an execution which is returned unsatisfied, X can maintain an action against A for money had and received.¹⁸ Where a *de facto* officer receives his fees and retains them the liability of the public corporation to the officer *de jure* is discharged; but the *de jure* officer may recover such fees from the *de facto* officer as money had and received.¹⁹ A legal right to a definite sum must be shown to enable the plaintiff to recover. A and B, each owning stock in a corporation, agreed jointly to sell their interests to X. By a secret agreement between X and A, A was to receive additional compensation. B sued A to recover his share of such amount. It was held that whatever B's rights might be in an action of deceit, or in a suit in equity for an accounting, he could not maintain this action.²⁰ If A holds money in his hands which is claimed by B and X, and A voluntarily pays such money over to X, A is liable to B for money had and received if B proves to be the real owner thereof.²¹ Thus, where X stole B's money and deposited it with A, who took it in good faith, but before payment A was notified that the money was really that of B, A is liable to B for money had and received if after such notice he pays it to X on X's order.²² Since compensation fixed by law for members of a board is not to be dis-

¹⁸ *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589; 15 L. R. A. 588; 30 N. E. 963. The court said that such action could be maintained by "those who would have been entitled to the money on the reversal of the order, provided it had not been paid to the defendants."

¹⁹ *Coughlin v. McElroy*, 74 Conn. 397; 92 Am. St. Rep. 224; 50 Atl. 1025.

²⁰ *Cummings v. Synnott*, 120 Fed.

84. This case impliedly holds that a right to money in equity does not always give a right to this action at law.

²¹ *McDuffee v. Collins*, 117 Ala. 487; 23 So. 45; *Osborn v. Bell*, 5 Den. (N. Y.) 370; 49 Am. Dec. 275; *Hindmarch v. Hoffman*, 127 Pa. St. 284; 14 Am. St. Rep. 842; 4 L. R. A. 368; 18 Atl. 14.

²² *Hindmarch v. Hoffman*, 127 Pa. St. 284; 14 Am. St. Rep. 842; 4 L. R. A. 368; 18 Atl. 14.

tributed among them in proportion to the work actually done by each, one member may recover from another for money had and received where such member has collected the salary due the board but retained a disproportionate amount under the claim that he had performed more work than the other member.²³ Where, contrary to law, attorneys' fees are included in the amount for which property is advertised on foreclosure of a mortgage, and the amount of the mortgage and such attorneys' fees is bid therefor, the mortgagor may recover from the party to whom such excess amount is paid.²⁴ Thus, if the mortgagee bids in the property for the amount of the mortgage debt, costs, and such fees, the mortgagor may recover such surplus from him.²⁵ If costs are included by the sheriff, which he has no right to include, as where the mortgagee buys the land in, and such costs are paid over by the sheriff to the county, the mortgagor may recover such amount from the county.²⁶ If an excessive judgment is rendered, and the judgment creditor bids in the land for the full amount of such judgment and costs, and such judgment is subsequently corrected, the judgment debtor may recover such difference as surplus from the judgment creditor.²⁷ If a check payable to B is forwarded to him, but stolen by X before B receives it, and X deposits such check with a bank, A, which collects the check and pays the proceeds to X, B may recover from such bank in an action for money had and received.²⁸

§795. Receipt of money to discharge specific obligation due another.

If X is in some way liable to B, and places money in A's hands with which A is to pay B's debt, B may enforce such

²³ *Stone v. Towne*, 67 N. H. 113;
29 Atl. 637.

²⁴ *Wilkinson v. Baxter's Estate*,
97 Mich. 536; 56 N. W. 931.

²⁵ *Eliason v. Sidle*, 61 Minn. 285;
63 N. W. 730.

²⁶ *Soderberg v. King County*, 15

Wash. 194; 55 Am. St. Rep. 878;
33 L. R. A. 670; 45 Pac. 785.

²⁷ *Mitchell v. Weaver*, 118 Ind.
55; 10 Am. St. Rep. 104; 20 N. E.
525.

²⁸ *Buckley v. Bank*, 35 N. J. L.
400; 10 Am. Rep. 249; *Shaffer v.*

liability against A if A is not holding such money solely as X's agent.¹ Thus, if X puts in A's hands money to pay A's debt to B for goods furnished, B may recover from A.² An arrangement was made between A, B and X, by which it was agreed that A was to discount a certain note which X owned, and out of the proceeds was to pay to B one thousand dollars; in reliance upon which arrangement, B was to extend credit to X in the sum of one thousand dollars. B extended such credit, and A refused to perform the contract on his part, but discounted the note for his own benefit. A was held liable to B for money had and received.³ B held a mortgage on certain personal property belonging to X. X agreed to cause the proceeds of such property to be paid to B if B would refrain from foreclosure proceedings. X made an arrangement whereby the purchase price was paid to A under a contract whereby A was to pay X's debt to B out of such funds. It was held that B could recover from A.⁴ If A holds money as X's agent, under instructions to pay B, A is not liable to B as where he subsequently delivers such money to X on X's demand.⁵ Where an agent has made an unauthorized contract on behalf of his principal, the fact that the agent turns over personal property other than money to his principal, and reimburses him for any possible loss by reason of such contract, does not make the principal liable to the adversary contracting party in an action for money had and received. Thus, B held a bill of lading issued by X, an agent of A, a steam-ship company, without any authority, and before the goods were received. X subsequently transferred his property to A, to protect A against any loss on account of such bill of lading. B could not recover from A in an action for money had and received.⁶ If money is

McKee, 19 O. S. 526; Farmer v. Bank, 100 Tenn. 187; 47 S. W. 234.

¹ Logan v. Talbott, 59 Cal. 652.

² Benner v. Weeks, 159 Pa. St. 504; 28 Atl. 355.

³ Ehrman v. Rosenthal, 117 Cal. 491; 49 Pac. 460.

⁴ Coppage v. Gregg, 127 Ind. 359; 26 N. E. 903.

⁵ Lewis v. Sawyer, 44 Me. 332.

⁶ Lazard v. Transportation Co., 78 Md. 1; 26 Atl. 897.

delivered to A by B for a specific purpose, and he refuses to perform the agreement under which it is received, but undertakes to apply the money to a liability owing to him by B, A is liable for such money in an action for money had and received to the person for whose benefit it was so deposited. Thus, where A received from C, the agent of B, money, to be applied upon the purchase price of stock bought by C for B, and such money was furnished by B, A cannot apply such money to a debt due to him from C, even if A does not know when the money is received that it is B's money.⁷ B, as sheriff, had incurred certain expenses in caring for a property seized by him in his official capacity, and such expenses were included in a bill of costs, and were collected as a part of the judgment. The entire amount of the judgment was paid to A, the attorney for C, the successful party. A credited the entire amount upon his account with C. It was held that B could maintain an action against A for such expenses, even if B could not prove that A had received this money under an express agreement to pay B out of such proceeds.⁸ If money belonging to B, or on which B has a lien, is paid by X to A, A cannot retain such money and apply it to the discharge of the debt due to him from X.⁹ Thus, where X owns certain cattle, upon which he had given a lien to a bank, B, of which John D. Myers was president, and X's agent, under an arrangement with B, was to sell the cattle and forward the money to a bank, A, of which John Q. Myers was president, the bank A could not retain the money and apply it to an indebtedness from that bank to X, but was liable over to B for such amount.¹⁰ B held certain receivership certificates which, by an arrangement between him-

⁷ *Bearce v. Fahrnow*, 109 Mich. 315; 67 N. W. 318.

⁸ *Knott v. Kirby*, 10 S. D. 30; 71 N. W. 138.

⁹ *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *Central National Bank v. Ins. Co.*, 104 U. S. 54; *Burnett v. Bank*, 38 Mich. 630; *Alter v. Bank*, 53 Neb. 223;

73 N. W. 667; *Cady v. Bank*, 46 Neb. 756; 65 N. W. 906; *Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Rock Springs Nat. Bank v. Luman*, 6 Wyom. 123, 167; 42 Pac. 874; 43 Pac. 514; reversing, 5 Wyom. 159; 38 Pac. 678.

¹⁰ *People's National Bank v. Myers*, 65 Kan. 122; 69 Pac. 164.

self and A, were to have priority over those held by A. It was held that if A received payment of his certificates to the exclusion of B, B could maintain an action against A therefor.¹¹ So where B, a beneficiary of a life insurance policy taken out by A, had agreed with A to pay a debt owing by A to X out of such policy, it has been held that B's executor may maintain an action against A for the amount of such debt.¹²

§796. Payment by one not beneficial owner.

If one person who has in his hands money of which another person is the beneficial owner, a payment by the holder of such money to a third person is not such a voluntary payment by the real owner thereof as to prevent him from recovering it if it is made without his authority and if not in payment of a claim justly due from him. The principle of voluntary payments does not apply where the recovery is sought by one having a beneficial interest in the money paid, and the payment was not made by him but by some one acting as his trustee, agent, and the like, and the person receiving the money knew that the person paying it was acting in such capacity. Thus, where an assignee for the benefit of creditors pays debts out of priority, the creditor who receives the money and notes out of the trust estate, is liable to the creditors to whom such money should have been paid.¹ Money of a principal, paid by his agent without authority, may be recovered by his principal from the person to whom it was paid.² Thus if a bank cashier pays his own debt by entering the amount thereof as a credit on the pass-book of his creditor, and such creditor draws checks against such credits and the checks are paid, the bank may recover the amount of such checks from such creditor;³ so if the cashier of a bank gives the draft of the bank in payment of his

¹¹ *Fletcher v. Waring*, 137 Ind. 159; 36 N. E. 896.

¹² *Maybury v. Berkery*, 102 Mich. 126; 60 N. W. 699.

¹ *Dickie v. Northup*, 24 N. S. 121.

² *Rogers v. Batchelor*, 12 Pet. (U.

S.) 221; *Dob v. Halsey*, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293; *Mt. Verd Mills Co. v. McElwee* (Tenn. Ch. App.), 42 S. W. 465.

³ *Hier v. Miller*. — Kan. —; 63 L. R. A. 952; 75 Pac. 77.

own debt, the receiver of the bank may recover from such creditor.⁴ Accordingly, payments of public money form an exception to the ordinary rules as to voluntary payments and payments under mistake of law, since the payments are always made by public officers, and not by the public, which is really beneficially interested in such money. Thus, money which is paid out by public officers in violation of the law, may be recovered from the person to whom it is paid.⁵ The fact that the payment was voluntary on the part of the officer, does not prevent the public from recovering.⁶ A government may recover money paid by a public officer under an erroneous construction of the law, and without any legal authority therefor.⁷ So if money is paid out by a public officer upon a contract, which the corporation represented by him had no power whatever to make,⁸ or upon a claim which the corporation had no power under any circumstances to allow,⁹ such payment may be recovered. Accordingly, if a public officer draws money from the public treasury,¹⁰ as his compensation,¹¹ such as his salary,¹²

⁴ *Campbell v. Bank*, 67 N. J. L. 301; 91 Am. St. Rep. 438; 51 Atl. 497.

⁵ *Weeks v. Texarkana*, 50 Ark. 81; 6 S. W. 504; *McLean v. Montgomery County*, 32 Ill. App. 131; *Snelson v. State*, 16 Ind. 29; *Heath v. Albrook*, — Ia. —; 98 N. W. 619; *Adams v. Power Co.*, 78 Miss. 887; 30 So. 58; *Demarest v. New Barbadoes*, 40 N. J. L. 604; *People v. Fields*, 58 N. Y. 491; (*Board, etc., of*) *Richmond County v. Ellis*, 59 N. Y. 620; *Commonwealth v. Field*, 84 Va. 26; 3 S. E. 882; *Tacoma v. Lillis*, 4 Wash. 797; 18 L. R. A. 372; 31 Pac. 321; *Frederick v. Douglas County*, 96 Wis. 411; 71 N. W. 798.

⁶ *Ft. Edward v. Fish*, 156 N. Y. 363; 50 N. E. 973.

⁷ *Wisconsin, etc., R. R. v. United States*, 164 U. S. 190; *McElrath v.*

United States, 102 U. S. 426; *United States v. Bank*, 15 Pet. (U. S.) 377.

⁸ *Griffin v. Shakopee*, 53 Minn. 528; 55 N. W. 738; *Chaska v. Hedman*, 53 Minn. 525; 55 N. W. 737.

⁹ *Ward v. Barnum*, 10 Colo. App. 496; 52 Pac. 412.

¹⁰ *Ada County v. Gess*, 4 Ida. 611; 43 Pac. 71; *Huntington County v. Heaston*, 144 Ind. 583; 55 Am. St. Rep. 192; 41 N. E. 457; 43 N. E. 651; *St. Croix County v. Webster*, 111 Wis. 270; 87 N. W. 302.

¹¹ *Weeks v. Texarkana*, 50 Ark. 81; 6 S. W. 504; *Council Bluffs v. Waterman*, 86 Ia. 688; 53 N. W. 289; *Union County v. Hyde*, 26 Or. 24; 37 Pac. 76.

¹² *Ellis v. Board, etc.*, 107 Mich. 528; 65 N. W. 577; *Allegheny County v. Grier*, 179 Pa. St. 639;

or fees collected by him from the public treasury without authority of law,¹³ such payments may be recovered in an action for money had and received. The fact that money paid to a state officer as compensation for services was paid upon the advice of the attorney general, does not prevent the recovery thereof, if unauthorized by law;¹⁴ nor does the fact that the payment was made voluntarily, with full knowledge of the facts and without fraud,¹⁵ or under a mistake of law,¹⁶ even if such mistake is shared by the officer to whom payment is made, who takes in good faith.¹⁷ The right to recover public money is especially clear where the officers who have ordered payment of the claim, have done so fraudulently, and in order to convert the money to their own benefit,¹⁸ or have otherwise acted fraudulently.¹⁹ Even an order of court authorizing the payment of such illegal fees is no defense to an action to recover them if made in a proceeding to which the public corporation is not a party.²⁰ If a public officer renders services to the corporation which he represents, outside of those appropriate to his official position, and which could have been rendered as well by a private individual, money paid him for such services cannot be recovered in the absence of a statute, provided the transaction is free from fraud.²¹ The right to recover public money is especially clear in cases where payment is made under a mistake of fact.²² Thus, where an excessive bill is presented for public printing, and printers appointed pursuant to the statute to examine the account, certify to its correctness under a mistake

36 Atl. 353; *Tacoma v. Lillis*, 4 Wash. 797; 18 L. R. A. 372; 31 Pac. 321.

¹³ *Camden v. Varney*, 63 N. J. L. 325; 43 Atl. 889; *Union County v. Hyde*, 26 Or. 24; 37 Pac. 76.

¹⁴ *Commonwealth v. Norman* (Ky.), 50 S. W. 225.

¹⁵ *Camden v. Varney*, 63 N. J. L. 325; 43 Atl. 889.

¹⁶ *Ellis v. Board, etc.*, 107 Mich. 528; 65 N. W. 577.

¹⁷ *Allegheny County v. Grier*, 179 Pa. St. 639; 36 Atl. 353.

¹⁸ *Land, etc., Co. v. McIntyre*, 100 Wis. 245; 69 Am. St. Rep. 915; 75 N. W. 964.

¹⁹ *Frederick v. Douglas County*, 96 Wis. 411; 71 N. W. 798.

²⁰ *Union County v. Hyde*, 26 Or. 24; 37 Pac. 76.

²¹ *Tacoma v. Lillis*, 4 Wash. 797; 18 L. R. A. 372; 31 Pac. 321.

²² *Haralson County v. Golden*, 104 Ga. 19; 30 S. E. 380.

of fact, such payment may be recovered.²³ Public money, however, can be recovered only from one to whom it was paid, or for whose benefit it was paid. Thus, a county cannot recover from one who holds county bonds which constitute an over-issue, interest paid upon such bonds to a prior holder thereof.²⁴ So where town officers acting for the public at large and not for the town alone, collected school taxes and paid them disproportionately the school district which was entitled to a part of such taxes cannot maintain assumpsit against the town.²⁵ In some jurisdictions, however, it is held that payments of public money to public officers made under a mutual mistake of law cannot be recovered.²⁶

§797. Receipt of money from real owner.—Voluntary payments.

If A, a person of full legal capacity, pays money to B with the intent that it should become B's property, and no operative facts such as mistake, misrepresentation, fraud, non-disclosure, duress, or undue influence exist, which might make the transaction voidable, A cannot recover such payment from B. Another and more common form of stating the same principle is that a voluntary payment made with full knowledge of the facts cannot be recovered.¹ The same principle applies where

²³ *Worth v. Stewart*, 122 N. C. 258; 29 S. E. 579.

²⁴ *Taylor v. Daviess County (Ky.)*, 32 S. W. 416.

²⁵ *Weybridge School District v. Bridgeport*, 63 Vt. 383; 22 Atl. 570. 570.

²⁶ *Painter v. Polk County*, 81 Ia. 242; 25 Am. St. Rep. 489; 47 N. W. 65. A similar view seems to be guardedly entertained in *Lasalle County v. Milligan*, 34 Ill. App. 346, decided partly on a question of fact and partly with the expectation of review by the Supreme Court.

¹ *United States v. Edmondston*, 181 U. S. 500; *Little v. Bowers*, 134 U. S. 547; *The Agathe*, 71 Fed.

528; *The Nicanor*, 40 Fed. 361; *Prichard v. Sweeney*, 109 Ala. 651; 19 So. 730; *Crenshaw v. Collier*, 70 Ark. 5; 65 S. W. 709; *Harralson v. Barrett*, 99 Cal. 607; 34 Pac. 342; *Bucknall v. Story*, 46 Cal. 589; 13 Am. Rep. 220; *Skelly v. Bank*, 63 Conn. 83; 38 Am. St. Rep. 340; 19 L. R. A. 599; 26 Atl. 474; *Jefferson County v. Hawkins*, 23 Fla. 223; 2 So. 362; *Macon County v. Foster*, 23 N. E. 615; *Burlock v. Cook*, 20 Ill. App. 154; *Connecticut, etc., Ins. Co. v. Stewart*, 95 Ind. 588; *Manning v. Poling*, 114 Ia. 20; 83 N. W. 895; 86 N. W. 30; *Bailey v. Paullina*, 69 Ia. 463; 29 N. W. 418; *Cumming Harvester Co. v. Sigerson*,

money is paid by X to B for A, and in A's presence.² The fact that a formal protest is made when the payment is made does not prevent it from being voluntary.³ If A, with full knowledge of all the facts, pays excessive assessments to an insurance company, he cannot recover such assessments.⁴ An insurance company which pays the amount of insurance after loss with full knowledge of all the material facts, cannot recover the money thus paid, as on the ground that the loss was on property not covered by the policy;⁵ nor can they

63 Kan. 340; 65 Pac. 639; Williams v. Shelbourne, 102 Ky. 579; 42 S. W. 110; Tyler v. Smith, 18 B. Mon. (Ky.) 793; New Orleans, etc., Co. v. Improvement Co., 109 La. 13; 94 Am. St. Rep. 395; 33 So. 51; Regan v. Baldwin, 126 Mass. 485; 30 Am. Rep. 689; Francis v. Hurd, 113 Mich. 250; 71 N. W. 582; Tompkins v. Hollister, 60 Mich. 485; 34 N. W. 551; Carson v. Cochran, 52 Minn. 67; 53 N. W. 1130; Morley v. Carlson, 27 Mo. App. 5; Nebraska, etc., Ins. Co. v. Segard, 29 Neb. 354; 45 N. W. 681; Redmond v. New York, 125 N. Y. 632; 26 N. E. 727; Flynn v. Hurd, 118 N. Y. 19; 22 N. E. 1109; Howard v. Life Association, 125 N. C. 49; 45 L. R. A. 853; 34 S. E. 199; Brumbaugh v. Chapman, 45 O. S. 368; 13 N. E. 584; Oil Well Supply Co. v. Bank, 131 Pa. St. 100; 18 Atl. 935; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Ladd v. Mfg. Co., 53 Tex. 172; Gibson v. Bingham, 43 Vt. 410; 5 Am. Rep. 289; Beard v. Beard, 25 W. Va. 486; 52 Am. Rep. 219; Gage v. Allen, 89 Wis. 98; 61 N. W. 361. "The ultimate fact to be reached in this case is the state of mind under which the payments were made. If they were made voluntarily, with a full knowledge of all the facts and

without fraud or imposition, they are beyond reclamation. If, on the other hand, the money was extorted from the appellee . . . or if fraud or imposition was practiced upon him, he is entitled to recover his money back for the plain reason that the payment was involuntary." Ligonier (Town of) v. Ackerman, 46 Ind. 552, 558; 15 Am. Rep. 323; quoted, Hollingsworth v. Stone, 90 Ind. 244.

² Rogers v. Garland, 8 Mackey (D. C.) 24.

³ Little v. Bowers, 134 U. S. 547; McMillan v. Richards, 9 Cal. 365; 70 Am. Dec. 655; Patterson v. Cox, 25 Ind. 261; Anderson v. Cameron, — Ia.—; 97 N. W. 1085; (Commissioners of) Wabaunsee County v. Walker, 8 Kan. 431; Detroit v. Martin, 34 Mich. 170; 22 Am. Rep. 512; McBride v. Lathrop, 24 Neb. 93; 38 N. W. 32; Wessel v. Mortgage Co., 3 N. D. 160; 44 Am. St. Rep. 529; 54 N. W. 922; Marietta v. Slocumb, 6 O. S. 471; De La Cuesta v. Ins. Co., 136 Pa. St. 62, 658; 9 L. R. A. 631; 20 Atl. 505.

⁴ Howard v. Ins. Association, 125 N. C. 49; 45 L. R. A. 853; 34 S. E. 199.

⁵ Nebraska, etc., Ins. Co. v. Segard, 29 Neb. 354; 45 N. W. 681.

maintain an action against a vessel on which the cargo insured was carried, for damages, on the theory that the loss was due to the negligence of those in charge, after paying the amount apportioned as the insurance company's share due for salvage.⁶ A was a stockholder in a corporation which was about to increase its capital stock, and had a legal right to subscribe for a certain amount of such new stock at par. The corporation refused to receive his subscription unless he paid a bonus for the right to subscribe. It was held that he could not recover the amount thus paid in, since he had an adequate remedy.⁷ He could have tendered the true value of the stock, and on refusal of the corporation to deliver the stock to him, he could maintain the action against the corporation for the difference between the par value and the market value of such stock. Where the statute provides for arbitration to estimate the value of improvements made upon realty, to be paid for by one who is redeeming the land from an execution sale, the voluntary payment of an excessive amount of improvements by such redemptioner without arbitration, cannot be recovered.⁸ If a wife pays a debt of her husband's after his death out of money which she receives on an insurance policy on his life, payable to her, she cannot recover such payment.⁹ An inmate of a Soldiers' and Sailors' Home, who agrees to pay over a part of his pension to such home, and does pay it over, cannot subsequently recover, though the Home could not have compelled such payment.¹⁰ A owes B a note on which the interest is payable in advance, and A pays such interest in advance; and subsequently A voluntarily pays the note before maturity. A cannot recover the proportionate part of such interest paid by him.¹¹ So where B has executed a mortgage which contains a provision that the

⁶ *The Nicanor*, 40 Fed. 361.

⁷ *De La Cuesta v. Ins. Co.*, 136 Pa. St. 62, 658; 9 L. R. A. 631; 20 Atl. 505.

⁸ *Prichard v. Sweeney*, 109 Ala. 651; 19 So. 730.

⁹ *Tompkins v. Hollister*, 60 Mich. 485; 34 N. W. 551.

¹⁰ *Brooks v. Hastings*, 192 Pa. St. 378; 43 Atl. 1075; *Bryson v. Home, etc.*, 168 Pa. St. 352; 31 Atl. 1008.

¹¹ *Skelly v. Bank*, 63 Conn. 83; 38 Am. St. Rep. 340; 19 L. R. A. 599; 26 Atl. 474.

mortgagor shall pay the tax on the mortgage debt, and under the law he is thereby relieved from liability to pay interest upon such mortgage debt he cannot recover the amount of interest from the mortgagee after paying it voluntarily.¹² If taxes unlawfully assessed are paid with full knowledge of the facts, and without duress, or legal compulsion, the money thus paid cannot be recovered,¹³ unless there is a statutory provision therefor.¹⁴ If a public officer voluntarily pays over to the public treasurer, fees which he has a legal right to retain for his personal benefit, he can not recover such payments.¹⁵ If A is the agent of B to sell stock, and A as such agent makes a sale to X, and takes the check of X in payment, and sends B his personal check, A cannot recover from B, although the check which A receives from X proves to be worthless.¹⁶

§798. Payments not voluntary.

The general doctrine forbidding recovery of voluntary payments has of course no application to payments which are not voluntary. The general rule is, that if A receives money belonging to B, which is not paid voluntarily by B, A is bound in law to repay it.¹ Thus, where A was arrested upon a charge of stealing, and brought before B, a trial justice, and B took from A the money which A had upon his person and which was alleged to be the stolen money, and A is discharged upon a preliminary hearing, A can recover such money from B.² So, if an agent of an express company induces a bank to send money by express to a fictitious firm, which money the agent receives as agent for the express company, and which he embezzles, the

¹² *Harralson v. Barrett*, 99 Cal. 607; 34 Pac. 342.

¹³ *Indianapolis v. Vajen*, 111 Ind. 240; 12 N. E. 311; *Durham v. Board*, 95 Ind. 182.

¹⁴ *Donch v. Lake County*, 4 Ind. App. 374; 30 N. E. 204.

¹⁵ *Selby v. United States*, 47 Fed. 800.

¹⁶ *Pepperday v. Bank*, 183 Pa.

St. 519; 63 Am. St. Rep. 769; 39 L. R. A. 529; 38 Atl. 1030.

¹ *Pemberton v. Williams*, 87 Ill. 15; *Carter v. Riggs*, 112 Ia. 245; 83 N. W. 905; *Mason v. Prendergast*, 120 N. Y. 536; 24 N. E. 806; *Motz v. Mitchell*, 91 Pa. St. 114.

² *Welch v. Gleason*, 28 S. C. 247; 5 S. E. 599.

bank can recover from the express company in an action for money had and received.³ The classes of payments which are not voluntary may for the most part be grouped under two general heads: payment by mistake, and payment by duress or compulsion of law. These topics will be discussed in the following sections.

V. PAYMENT UNDER DURESS AND COMPULSION.

§799. Payment under duress and undue influence.

The nature of duress as affecting the validity of contracts entered into by reason thereof has already been discussed.¹ The nature of duress as determining the right of a party making payments to recover them is largely governed by the same rules as those by which the right to avoid contracts is determined. If payments are made under what the law regards as duress, they are not within the doctrine of voluntary payments, and may be recovered in the absence of special circumstances.² In some respects, however, as we shall see later, the right to recover payments was broader at Common Law than the right to avoid contracts and by some authorities the right to recover payments made under compulsion of law has been treated as a ground of recovery distinct from any form of duress. They will be discussed together here as applications of the same

³ *Southern Express Co. v. Bank*, 108 Ala. 517; 54 Am. St. Rep. 191; 18 So. 664. In order to recover, it is not necessary that the bank surrender a draft which purports to be signed by such fictitious and non-existent firm with a bill of lading attached thereto.

¹ See Ch. XIII.

² *Swift Co. v. United States*, 111 U. S. 22; *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202; 17 Pac. 21; *Stanley v. Dunn*, 143 Ind. 495; 42 N. E. 908; *Anderson v. Cameron*, — Ia. —; 97 N. W. 1085; *Carter v. Riggs*, 112 Ia. 245; 83 N. W. 905;

Silsbee v. Webber, 171 Mass. 378; 50 N. E. 555; *Sweet v. Kimball*, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243; *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587; *Joannin v. Ogilvie*, 49 Minn. 564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217; *Briggs v. Boyd*, 56 N. Y. 289; *Adams v. Reeves*, 68 N. C. 134; 12 Am. Rep. 627; *Reinhard v. Columbus*, 49 O. S. 257; 31 N. E. 35; *Fillman v. Ryon*, 168 Pa. St. 484; 32 Atl. 89; *Guetzkow Bros. v. Breese*, 96 Wis. 591; 65 Am. St. Rep. 83; 72 N. W. 45.

general doctrines. No single definition of duress which entitles a party making payments by reason thereof to recover, can be given in such form as to include all cases in which the doctrine is applied, and to exclude those in which the doctrine is not applied. But to constitute duress there must in general be at least apparent liability of person or property to seizure,³ and in the absence thereof mere protest against paying cannot make it payment under duress.⁴ A payment made under undue influence may be recovered,⁵ even though the circumstances fall short of technical duress or compulsion. Thus payment made under threat of a civil action may be recovered where the person making the payment is aged, illiterate and weak-minded, and his mind is in fact overpowered by such threats.⁶ The special classes of cases involving the question of what is and what is not such duress as to permit of recovery of payments will be discussed in the following sections.

§800. Payment extorted by imprisonment.

The elements of duress of imprisonment are substantially the same for purposes of recovering payments as for avoiding contracts.¹ Money unlawfully extorted by imprisonment, used as a means of extortion whether such imprisonment² was law-

³ Lamson v. Boyden, 57 Ill. App. 232; Minneapolis, etc., Co. v. Cunningham, 59 Minn. 325; 61 N. W. 329; De la Cuesta v. Ins. Co., 136 Pa. St. 62, 658; 9 L. R. A. 631; 20 Atl. 505.

⁴ See § 812.

⁵ Ingalls v. Miller, 121 Ind. 188; 22 N. E. 995.

⁶ Ingalls v. Miller, 121 Ind. 188; 22 N. E. 995.

¹ See Ch. XIII.

² Schommer v. Farwell, 56 Ill. 542; Voiers v. Stout, 4 Bush. (Ky.) 572; Richardson v. Duncan, 3 N. H. 508; Reinhard v. Columbus, 49 O. S.

257; 31 N. E. 35; Fillman v. Ryon, 168 Pa. St. 484; 32 Atl. 89; Heckman v. Swartz, 64 Wis. 48; 24 N. W. 473. And see Houtz v. Uinta County, — Wyom. —; 70 Pac. 840; where the right to recover a fine imposed by a justice who had no final jurisdiction was held to depend on that question whether such payment was made to procure release from imprisonment it could be recovered; but if merely to avoid inconvenience in the district court to which an appeal had been allowed, it could not.

ful or not, or by threats of immediate imprisonment,³ may be recovered. Thus money paid by one wrongfully arrested to secure his release,⁴ or where an officer without authority of law takes a cash deposit to secure the appearance of a prisoner,⁵ may be recovered. So property surrendered by one under threat of imprisonment if such property is not surrendered may be recovered.⁶ Even if the arrest or threatened arrest is itself lawful, money paid thereunder may be recovered if such arrest was used as a means of extorting such payment.⁷ If, however, the imprisonment is lawful and is not made the means of extortion, it does not of itself constitute duress, and does not afford a basis for recovery of payments.⁸ A threat of imprisonment not immediate is ordinarily not duress;⁹ and money paid thereunder cannot ordinarily be recovered as paid under duress;¹⁰ but under special circumstances, as where the person to whom the threat is made and against whom it is directed is old, weak and infirm, a payment extorted by such threats may be recovered.¹¹ Since duress may exist where the arrest of a third person in certain relations to the promisor or payor is made or threatened,¹² such payment may be recovered.¹³ Thus, money extorted from a wife by a threatened imprisonment of her husband, as under circumstances which would in-

³ *Baldwin v. Hutchison*, 8 Ind. App. 454; 35 N. E. 711; *Foss v. Whitehouse*, 94 Me. 491; 48 Atl. 109; *Deshong v. New York*, 176 N. Y. 475; 68 N. E. 880.

⁴ *Sweet v. Kimball*, 166 Mass. 332; 55 Am. St. Rep. 406; 44 N. E. 243.

⁵ *Reinhard v. Columbus*, 49 O. S. 257; 31 N. E. 35.

⁶ *Pryor v. Morgan*, 170 Pa. St. 568; 33 Atl. 98.

⁷ *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; *Richardson v. Duncan*, 3 N. H. 508; *Heckman v. Swartz*, 64 Wis. 48; 24 N. W. 473.

⁸ *Fillman v. Ryon*, 168 Pa. St. 484; 32 Atl. 89; *Meachem v. Newport*, 70 Vt. 67; 39 Atl. 631.

⁹ See § 251.

¹⁰ *St. Louis, etc., R. R. v. Thomas*, 85 Ill. 464; *Hines v. Board, etc.*, 93 Ind. 266; *Hilborn v. Bucknam*, 78 Me. 482; 57 Am. Rep. 816; 7 Atl. 272; *Claffin v. McDonough*, 33 Mo. 412; 84 Am. Dec. 54.

¹¹ *Cribbs v. Sowle*, 87 Mich. 340; 24 Am. St. Rep. 166; 49 N. W. 587.

¹² See § 259.

¹³ *Gorringe v. Reed*, 23 Utah 120; 90 Am. St. Rep. 692; 63 Pac. 902; *Schultz v. Culbertson*, 49 Wis. 122; 4 N. W. 1070; 46 Wis. 313; 1 N. W. 19.

jure his health,¹⁴ may be recovered. Thus where a husband was threatened with lawful arrest when in broken health and about to go to Europe with his wife in the hope of regaining health, and arrest and detention would produce a serious effect upon his physical condition, a payment made by his wife to prevent such arrest is made under duress and may be recovered.¹⁵ The mere fear of future imprisonment without any threat thereof is not such duress as to enable the party who has made the payment to recover it.¹⁶

§801. Payment extorted by wrongful detention of goods.

The original Common Law rules of duress did not allow a contract to be avoided if the person entering into it was induced to do so by a wrongful detention of goods.¹ It was more just in allowing recovery of payments extorted by such detention. If A's personal property is unlawfully detained by B, a payment made by A to obtain possession of such property is not a voluntary payment and may be recovered.² Thus where goods are illegally seized under apparent authority of a writ of sequestration,³ or logs are seized under an illegal claim for toll,⁴ or a ship is detained for an illegal demand for tonnage,⁵ or a cargo is detained for an illegal demand for demurrage,⁶ or payment

¹⁴ *Adams v. Bank*, 116 N. Y. 606;
¹⁵ *Am. St. Rep.* 447; 6 L. R. A. 491; 23 N. E. 7.

¹⁵ *Adams v. Bank*, 116 N. Y. 606;
¹⁵ *Am. St. Rep.* 447; 6 L. R. A. 491; 23 N. E. 7.

¹⁶ *Felton v. Gregory*, 130 Mass. 176.

¹ See § 248.

² *Atlee v. Backhouse*, 3 M. & W. 633; *Maxwell v. Griswold*, 10 How. (U. S.) 242; *Lafayette, etc., Ry. v. Pattison*, 41 Ind. 312; *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506; *Weber v. Kirkendall*, 44 Neb. 766; 63 N. W. 35; *Scholey v.*

Mumford, 60 N. Y. 498; *Briggs v. Boyd*, 56 N. Y. 289; *Riggs v. Wilson*, 30 S. C. 172; 8 S. E. 848; *Taylor v. Hall*, 71 Tex. 213; 9 S. W. 141; *Buford v. Lonergan*, 6 Utah 301; 22 Pac. 164; affirmed in 148 U. S. 581.

³ *Clark v. Pearce*, 80 Tex. 146; 15 S. W. 787.

⁴ *Carson, etc., Co. v. Patterson*, 33 Cal. 334; *Chase v. Dwinal*, 7 Greenl. (Me.) 134; 20 Am. Dec. 352.

⁵ *Ripley v. Gelston*, 9 Johns. (N. Y.) 201; 6 Am. Dec. 271.

⁶ *Fergusson v. Winslow*, 34 Minn. 384; 25 N. W. 942.

illegally exacted as tariff is paid to get possession of goods imported into this country,⁷ as where the customs officials threaten to add a penalty if the tariff demanded is not paid,⁸ or goods are seized on an unfounded claim and a lien is asserted thereon,⁹ payments made to obtain possession of such goods may be recovered. Such a payment is made under "moral compulsion."¹⁰ So where A has delivered a printing press to B under a contract of sale by the terms of which it is to remain A's property until B pays the entire purchase price, and B's landlord X takes possession thereof, a payment by A to X to get possession of such machine may be recovered.¹¹ In some opinions, especial stress is laid on the fact that great hardship or serious inconvenience will result to the person whose property is detained unless he can get possession of it, and his right to recover payments made by him to get possession of such goods.¹² Thus where property perishable in its nature and liable to deterioration is withheld, payment to obtain possession thereof and to avoid damage has been held to be made under duress, as where cattle are withheld from the owner,¹³ or where oysters have been taken on a writ of attachment wrongfully obtained.¹⁴ So where A, an officer had attached B's bank notes and refused to redeliver them unless B allowed him to keep some as an alleged reward, and X, another officer, was about to attach them, and B allows A to keep some of them as he had demanded, B may recover such amount from A as paid under duress.¹⁵ So where a cargo of grain is withheld on an unjust claim for demurrage, and the consignee will be put to serious inconvenience if the cargo is not delivered, a payment of such demurrage

⁷ *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Erhardt v. Winter*, 92 Fed. 918.

⁸ *Robertson v. Frank Bros. Co.*, 132 U. S. 17.

⁹ *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506.

¹⁰ *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506.

¹¹ *Whitlock Machine Co. v. Holway*, 92 Me. 414; 42 Atl. 799.

¹² *Fergusson v. Winslow*, 34 Minn. 384; 25 N. W. 942.

¹³ *Buford v. Lonergan*, 6 Utah 301; 22 Pac. 164; affirmed in 148 U. S. 581.

¹⁴ *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10.

¹⁵ *Lovejoy v. Lee*, 35 Vt. 430.

may be recovered;¹⁶ on similar grounds the right to recover money paid to liberate one's tools of trade has been placed.¹⁷ Elimination of these cases, however, leaves a respectable number of authorities in support of the proposition that money paid to regain possession of goods which have been unlawfully taken from the owner, without his having opportunity to be heard in court, may be recovered.

§802. Payments extorted by threatened wrongful detention of goods.

The weight of authority is that payments made to prevent a threatened wrongful seizure of personalty are made under duress and may be recovered.¹ Thus, if a justice renders a void judgment, the case not being within his jurisdiction, and subsequently execution issues and the judgment debtor, being sick and in mental distress on account of the recent death of members of her family, paid such execution to avoid a threatened levy, it was held that she might recover from the judgment creditor who received the money.² So money paid to avoid a threatened wrongful dstraint of personalty may be recovered.³ So where a sheriff holding an execution threatened to levy unless an excessive amount were paid by the debtor, and the debtor paid the amount demanded, he may recover such excess from the sheriff.⁴ Duress by threatened seizure of goods has been limited very sharply by some authorities to cases where the danger of seizure was imminent. In case of payments to an officer the test of the right to recover them if not justly due has been held to be whether or not the officer has apparent power to seize or levy on the property which he is threatening to

¹⁶ *Fergusson v. Winslow*, 34 Minn. 384; 25 N. W. 942.

¹⁷ *Cobb v. Charter*, 32 Conn. 358; 87 Am. Dec. 178.

¹ *Hills v. Street*, 5 Bing. 37; *Cox v. Welcher*, 68 Mich. 263; 13 Am. St. Rep. 339; 36 N. W. 69; *Taylor v. Hall*, 71 Tex. 213; 9 S. W. 141.

² *Hollingsworth v. Stone*, 90 Ind. 244.

³ *Hills v. Street*, 5 Bing. 37. *Contra*, *Colwell v. Peden*, 3 Watts (Pa.) 327, where a *bona fide* distress was held not to be duress.

⁴ *Snell v. State*, 43 Ind. 359.

take.⁵ To constitute duress of goods, something more than a possible deprivation of property in the future is necessary, where this limitation on the doctrine of duress of goods prevails. Thus where a chattel mortgage with power of sale had been given to secure payment of the price of corn sold by the mortgagee to the mortgagor, a payment of the full amount of the purchase price, though some of the corn is never delivered, cannot be recovered, though made because of a threat of the mortgagee to sell the mortgaged property under the power of sale.⁶

§803. Payment to remove cloud from title to realty.

Duress of property need not always involve detention of personality, however. If the unlawful acts of one person cast a cloud on the title of another to realty, a payment made to remove such cloud may be made under duress.¹ Thus a payment made to prevent a threatened sale for taxes which would cast a cloud on the title to realty,² or a payment made to clear title to realty from a pretended mechanic's lien, so as to raise a new loan to take up an overdue mortgage and other pressing claims,³ where the party making such payment had no other means of raising money than by mortgaging such realty, or payment extorted by threatening to sell realty under a power of sale contained in a mortgage,⁴ or payment of an amount over and above the true amount of a mortgage debt,⁵ or an unlawful payment of attorney fees exacted as a condition precedent to redemption,⁶

⁵ Taylor v. Hall, 71 Tex. 213; 9 S. W. 141.

⁶ Vick v. Shinn, 49 Ark. 70; 4 Am. St. Rep. 26; 4 S. W. 60.

¹ American Baptist Missionary Union v. Hastings, 67 Minn. 303; 69 N. W. 1078; Joannin v. Ogilvie, 49 Minn. 564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217; Shane v. St. Paul, 26 Minn. 543; 6 N. W. 349; Poth v. New York, 151 N. Y. 16; 45 N. E. 372; Bowns v. May, 120 N. Y. 357; 24 N. E. 947; Mont-

gomery v. Cowlitz, 14 Wash. 230; 44 Pac. 259.

² See § 811.

³ Joannin v. Ogilvie, 49 Minn. 564; 32 Am. St. Rep. 581; 16 L. R. A. 376; 52 N. W. 217.

⁴ Close v. Phipps, 7 Man. & G. 586; McMurtrie v. Keenan, 109 Mass. 185.

⁵ Cazenove v. Cutler, 4 Met. (Mass.) 246.

⁶ Klein v. Bayer, 81 Mich. 233; 45 N. W. 991. *Contra*, where the

may be recovered. But payment of a judgment while proceedings in error were pending because the judgment was a lien on the realty of the judgment debtor, who was in financial distress and could not raise money except by a loan on such realty and such loan could be obtained only by paying such judgment has been held to be a voluntary payment.⁷ So where A gave B a mortgage in the form of a deed to secure his debt to B and B then refused to recognize A's rights or consent to A's selling his rights in such realty unless paid a large sum of money over and above A's indebtedness to B, and threatened prolonged litigation if A did not make such payment, and A had no other way of paying his debt except by the sale of such realty, it was held that A paid such additional sum under duress and could recover it.⁸ In all these cases no opportunity for a judicial hearing was given before the title was apparently encumbered. Wrongful acts which do not cast a cloud on the title to realty do not amount to duress of realty.⁹ Thus a threatened sale for illegal taxes, where the purchaser has the burden of proving every step necessary to make out a valid sale,¹⁰ or a threatened sale of the land of one person on an execution issued against another,¹¹ do not cast a cloud on the title and hence payment by reason thereof is not made under duress.

§804. Lawful act not duress.

Outside of questions of abuse of legal process in seizing person or property, a lawful act does not amount to duress, although by such act a person is induced to make a payment which he is not willing to make. Thus to constitute duress of goods the detention must be unlawful. The party making pay-

mortgage had been discharged by a tender of the full amount of the mortgage debt. *Wessel v. Mortgage Co.*, 3 N. D. 160; 44 Am. St. Rep. 529; 54 N. W. 922.

⁷ *Hipp v. Crenshaw*, 64 Ia. 401; 20 N. W. 492. (Hence the proceedings in error were dismissed.)

⁸ *First National Bank v. Sargeant*, 65 Neb. 594; 91 N. W. 595.

⁹ *Stover v. Bowman*, 45 Ill. 213; *Davies v. Galveston*, 16 Tex. Civ. App. 13; 41 S. W. 145.

¹⁰ *Davies v. Galveston*, 16 Tex. Civ. App. 13; 41 S. W. 145.

¹¹ *Stover v. Mitchell*, 45 Ill. 213.

ment must do everything necessary to entitle him to the property detained if he wishes to recover excess payments. This principle has been carried so far that a payment of excessive freight charges to obtain possession of goods cannot be recovered where the consignee did not tender the amount actually due, which amount he knew, and demand the property.¹ In this case payment was made to an agent on his statement that the company would refund any excessive charges. Such agent did not, however, have authority to bind his principal by a contract to refund. Thus where A moved his office to B's stockyards, as tenant at will, B agreeing to charge no rent, and B then charged rent, which A paid because all the offices at such yards belonged to B, no duress exists.²

§805. Threat of civil action.

The principle that a lawful act does not constitute duress in the absence of special circumstances find illustration in the commencement of a civil action. The mere threat of a civil action is not duress or legal compulsion; and a payment made by reason of such threat cannot be recovered.¹ The same principle applies where a civil action has been instituted;² accordingly payment of money on service of summons is not payment

¹ *Gulf City Construction Co. v. Ry.*, 121 Ala. 621; 25 So. 579.

² *Minneapolis, etc., Co. v. Cunningham*, 59 Minn. 325; 61 N. W. 329. (Ending such tenancy at will was "nothing more than defendant would have had a legal right to do.")

¹ *Burke v. Gould*, 105 Cal. 277; 38 Pac. 733; *Ligonier (Town of) v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *Muscatine v. Packet Co.*, 45 Ia. 185; *New Orleans, etc., R. R. v. Improvement Co.*, 109 La. 13; 94 Am. St. Rep. 395; 33 So. 51; *Parker v. Lancaster*, 84 Me. 512; 24 Atl. 952; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Benson v. Monroe*,

7 Cush. (Mass.) 125; 54 Am. Dec. 716; *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525; *Peebles v. Pittsburgh*, 101 Pa. St. 304; 47 Am. Rep. 714. "To pursue or threaten to pursue the usual legal steps for the collection of a debt in the manner provided by law does not constitute duress of property." *Burke v. Gould*, 105 Cal. 277, 283; 38 Pac. 733.

² *Dawson v. Mann*, 49 Ia. 596; *Benson v. Monroe*, 7 Cush. (Mass.) 125; 54 Am. Dec. 716; *Brummitt v. McGuire*, 107 N. C. 351; 12 S. E. 191; *Beard v. Beard*, 25 W. Va. 486; 52 Am. Rep. 219.

under duress and cannot be recovered.³ Indeed if any defense to such cause of action exists, the threatened action is the very means provided for by law for determining its validity. Thus if an action in replevin,⁴ or attachment,⁵ or a seizure in admiralty for non-payment of an alleged claim for wharfage,⁶ or an action against a corporation for the appointment of a receiver,⁷ or an action by a receiver to enforce a stock liability,⁸ or a foreclosure suit,⁹ is either begun or threatened it does not of itself amount to duress. Thus where an overdue note given by A to B bore interest at ten per cent, but B had agreed in writing that it should bear only eight per cent after maturity, and B subsequently sues in foreclosure and demands ten per cent interest, A should set up such agreement as a defense. If he pays the full amount, including interest at ten per cent, he cannot recover the difference.¹⁰

§806. Payment compelled by legal process.

If the property of one is seized on legal process procured by another in good faith and "in pursuit of the ordinary remedy afforded by law"¹ a payment made to procure the release of such property is not made under duress and cannot be recovered if the right of recovery rests on that ground alone.² Thus if a

³ *Hamlet v. Richardson*, 9 Bing. 644; *Marriot v. Hampton*, 7 T. R. 269. "Money paid under pressure of legal process cannot be recovered." *Moore v. Fulham* (1895), 1 Q. B. 399.

⁴ *Brunnmitt v. McGuire*, 107 N. C. 351; 12 S. E. 191.

⁵ *Benson v. Monroe*, 7 Cush. (Mass.) 125; 54 Am. Dec. 716.

⁶ *New Orleans, etc., R. R. v. Improvement Co.*, 109 La. 13; 94 Am. St. Rep. 395; 33 So. 51. The wharfage fees were held legal in *New Orleans, etc., R. R. v. Improvement Co.*, 75 Fed. 309; 21 C. C. A. 364.

⁷ *Dustin v. Farrelly*, 81 Mo. App. 380.

⁸ *Holt v. Thomas*, 105 Cal. 273; 38 Pac. 891.

⁹ *Burke v. Gould*, 105 Cal. 277; 38 Pac. 733; *Savannah Savings Bank v. Logan*, 99 Ga. 291; 25 S. E. 692; *Vereycken v. Vanden-Brooks*, 102 Mich. 119; 60 N. W. 687; *Shuck v. Loan Association*, 63 S. C. 134; 41 S. E. 28.

¹⁰ *Vereycken v. Vanden-Brooks*, 102 Mich. 119; 60 N. W. 687.

¹ *Kohler v. Wells*, 26 Cal. 606.

² "It will not do to hold that a payment secured by none but the means provided by the law itself is

resides in one State and his property is duly attached by B in another on a claim which B in good faith believes to be a just one, a payment by A to B to settle such claim and to procure the release of such attachment cannot be recovered.³ So if property is taken in good faith upon an attachment which is not issued simply to hold the property until another attachment can be levied, but is intended as a regular means of securing a just debt, and the first attachment is dismissed because the defendant is misnamed, and a second attachment issues under which the officer continues to hold the attached property, he is not liable in assumpsit because he did not return the attached property to the owner before levying the second attachment.* A fraudulent use of legal process may amount to duress, however.^b Thus if an attachment is levied not in good faith, but on a claim known to be unfounded for the purpose of extorting a payment, such payment if made to procure the release of such goods is "by compulsion"² and may be recovered, especially if made by one who is unable with reasonable diligence to learn the facts.⁷

§807. Breach of contract as duress.

A payment made to induce the adversary party to perform his contract is not made under duress and cannot be recovered. Thus excessive payments made to induce an irrigation company to continue to furnish water;¹ or payments made to induce a vendor to deliver future installments of coal according to his contract, the payments being the contract price for the coal already delivered which was held not to be of the quality re-

a compulsory or coerced one, there being no element of fraud or other ingredient of oppression in the case." *Dickerman v. Lord*, 21 Ia. 338, 343; 89 Am. Dec. 579.

³ *Kohler v. Wells*, 26 Cal. 606; *Dickerman v. Lord*, 21 Ia. 338; 89 Am. Dec. 579.

⁴ *Brady v. Royce*, 180 Mass. 553; 62 N. E. 960.

⁵ *Pitt v. Coomes*, 2 Ad. & El. 459; *Cadaval (Duke of) v. Collins*, 4 Ad. & El. 858; *Colwell v. Peden*, 3 Watts (Pa.) 327.

⁶ *Chandler v. Sanger*, 114 Mass. 364; 19 Am. Rep. 367.

⁷ *Adams v. Reeves*, 68 N. C. 134; 12 Am. Rep. 627.

¹ *Steck v. Irrigation Co.*, 4 Colo. App. 323; 35 Pac. 919.

quired by the contract;² or payments made to an agent of what he claimed to be the balance due him from his principal to induce him to deliver butter which was not the principal's until it was delivered,³ can none of them be recovered. So a contractor cannot recover a payment made by him as due on a forfeiture for failure to complete the work in accordance with the terms of the contract on the theory that it was made under duress, although the board of public works, to whom it was made, would not notify the council that the work had been accepted until this payment had been made, and until such notice the council would not appropriate the amount due the contractor.⁴ Under some circumstances, however, a refusal to perform a contract may have so disastrous an effect upon the business of the adversary party, that a payment made by him to induce performance of such contract, may be held to be made under compulsion. Thus, where a theatrical performance had been advertised, and a short time before it was to begin the actor refused to go unless he was paid the full amount of an item in dispute between himself and the manager, it was held that a payment of such amount by the manager was made under "a species of constraint," and could be recovered.⁵ B, a building contractor, who was constructing a church in Boston, sent some stone to New York to be cut. For this he was fined five hundred dollars by an association of stone masons. B refused to make such payment, and the association threatened to cause a strike among B's workmen unless such amount was paid. On B's continued refusal, the association caused a strike, which lasted for some time. B was unable to procure laborers competent to complete such job, and he finally paid this amount in order to have the strike declared off. Subsequently, he brought suit against the association and those who had handled the check by

² *Armstrong v. Latimer*, 165 Pa. St. 398; 30 Atl. 990.

³ *Hubbard v. Mills*, 46 Vt. 243.

⁴ *Laidlaw v. Detroit*, 110 Mich. 1; 67 N. W. 967. But similar facts in the formation of a contract have

been held to constitute duress. See § 255.

⁵ *Dana v. Kemble*, 17 Pick. (Mass.) 545. In this case the judgment in favor of the manager was reversed on the ground of failure

which such payment was made and received the money therefor. The lower court held that B had no right of action. For this, the Supreme Court reversed the judgment of the lower court, holding that B had a right of action, although they were undecided whether it was in tort or in *assumpsit*.⁶ So payment of illegal charges for water,⁷ or gas,⁸ made under threat of cutting off the supply if such illegal charge is not paid, or payment of an illegal water license charge,⁹ or an illegal charge for rent of a gas meter¹⁰ made under like circumstances may be recovered.

§808. Other forms of duress.

Duress or legal compulsion is not invariably confined to duress of person or property although these are the common cases. Thus payment made by force of a statute afterward held unconstitutional, requiring a certain payment as a condition precedent to the jurisdiction of the Probate Court in administering an estate,¹ may be recovered.

§809. Dilemma not duress.

The mere fact that one makes a payment when in doubt as to his legal rights and afraid of imperiling them if he refuses payment does not constitute duress.¹ This is merely an illustration of a mistake of law. The party paying does not know whether he is bound by law to pay or not, and to save his rights he makes payment. In such case, if he was not bound by law to

of proof, and a new trial ordered.

⁶ *Carew v. Rutherford*, 106 Mass. 1; 8 Am. Rep. 287. This case was subsequently settled, and was not tried a second time.

⁷ *Panton v. Duluth, etc., Co.*, 50 Minn. 175; 36 Am. St. Rep. 635; 52 N. W. 527; *St. Louis Brewing Association v. St. Louis (Mo.)*, 37 S. W. 525.

⁸ *Indiana, etc., Co. v. Anthony*, 26 Ind. App. 307; 58 N. E. 868.

⁹ *Westlake v. St. Louis*, 77 Mo. 47; 46 Am. Rep. 4.

¹⁰ *Capital, etc., Co. v. Gaines (Ky.)*, 49 S. W. 462.

¹ *Mearkle v. Hennepin Co.*, 44 Minn. 546; 47 N. W. 165.

¹ *De La Cuesta v. Ins. Co.*, 136 Pa. St. 62, 658; 9 L. R. A. 631; 20 Atl. 505.

pay, he has paid under a mistake of law, and cannot recover. If he was bound by law to pay, he has done only what he should have done and cannot recover.

§810. Unfair advantage as duress.

Payments made by one who is not on terms of practical equality with the person to whom such payments are made are looked upon, not as voluntary payments but as payments made under compulsion. Where A demands from B payment of tolls which are not legally due under threat of drawing off water from a dam used by B, a step which would interfere with B's business seriously, and to avoid such action B pays such tolls he may recover such payment.¹ A, a section foreman of a railroad, extorted money from B, one of the section hands, by showing B a written order from A's superior, X, directing A to discharge every man who would not pay over ten dollars. In order to keep from being discharged, B paid such amount. It was held that B could recover from A.² The fact that A had transmitted such money to X, did not relieve him from the liability to account to B therefor. A pension attorney who charges and collects a fee in excess of that fixed by Federal Statute for obtaining a pension is liable for such excess to the person by whom such payment is made.³ Where insurance was effected in the names of lessor and lessee jointly and on loss, proof of loss must be made by both, and the lessor takes advantage of the financial necessities of the lessee to exact a payment out of the lessee's share of the insurance of an amount which is not due to the lessee, such payment may be recovered as made under duress.⁴ A refusal of a vendee to accept a deed unless revenue stamps are affixed thereto is not duress; and the vendor who buys such stamps from the revenue collector without protest and without notifying him of their intended use cannot

¹ Lehigh, etc., Co. v. Brown, 100 Pa. St. 338.

² Bocchino v. Cook, 67 N. J. L. 467; 51 Atl. 487.

³ Hall v. Kimmer, 61 Mich. 269; 1 Am. St. Rep. 575; 28 N. W. 96.

⁴ Guetzkow Bros. Co. v. Breese, 96 Wis. 591; 65 Am. St. Rep. 83; 72 N. W. 45.

recover from him.⁵ In some jurisdictions, it is held that payments of usurious interest are necessarily made under compulsion, and hence may be recovered, even though the contract has been fully performed, and there is no statute specifically providing for recovery.⁶ A common carrier and a shipper do not stand upon terms of equality. The shipper is usually under a practical compulsion to have his property transported at once. He does not know, and he has no means of communicating with the officers of the road whose business it is to fix the charges for transportation. Accordingly, payment by a shipper of an unreasonable charge, or one in excess of the amount fixed by law is not looked upon as one of voluntary payment, and the shipper may recover,⁷ even if no protest is made at the time of the over-payment.⁸ Thus where by law charges must be uniform, a shipper who has been obliged to pay regular rates while other shippers have received rebates may recover the difference between the rates paid by him and what he would have been obliged to pay had he received the same rebate.⁹ So if the carrier has paid to one shipper a proportion of the freight charges paid by another shipper, a competitor of the former, the latter may recover such amount from the former.¹⁰ But it has been held that under a statute permitting the refunding of excessive charges for freight an action cannot be brought to compel such refunding.¹¹ A private individual and a public officer do not ordinarily stand upon an equal footing.¹² Accordingly,

⁵ *Chesebrough v. United States*, 192 U. S. 253.

⁶ *Bexar, etc., Co. v. Robinson*, 78 Tex. 163; 22 Am. St. Rep. 36; 9 L. R. A. 292; 14 S. W. 227. See § 521.

⁷ *Mobile, etc., Ry. v. Steiner*, 61 Ala. 559; *Chicago, etc., R. R. v. Coal Co.*, 79 Ill. 121; *Chicago, etc., Ry. v. Wolcott*, 141 Ind. 267; 50 Am. St. Rep. 320; 39 N. E. 451; *Lafayette, etc., R. R. v. Pattison*, 41 Ind. 312; *Peters v. R. R.*, 42 O. S. 275; 51 Am. Rep. 814; *Beckwith v.*

Frisbie, 32 Vt. 559; *West Virginia, etc., Co. v. Sweetzer*, 25 W. Va. 434.

⁸ *Louisville, etc., Ry. v. Wilson*, 132 Ind. 517; 18 L. R. A. 105; 32 N. E. 311.

⁹ *Cook v. Ry.*, 81 Ia. 551; 25 Am. St. Rep. 512; 9 L. R. A. 764; 46 N. W. 1080.

¹⁰ *Brundred v. Rice*, 49 O. S. 640; 34 Am. St. Rep. 589; 32 N. E. 169.

¹¹ *Randle v. Abeel*, 88 Fed. 719.

¹² *American Steamship Co. v. Young*, 89 Pa. St. 186; 33 Am. Rep. 748; *Marcotte v. Allen*, 91 Me.

a payment demanded and received of a public officer, under color of office, may be recovered by the private person making such payment, even if he makes it under a mistake of law. Thus where A lived in a county attached for certain purposes to another at the time that certain taxes were levied, but subsequently reorganized as a separate county before such taxes were paid, and A pays his taxes to the treasurer of such other county, A may recover such taxes from such county.¹³ So a postmaster who exacts an unauthorized fee for delivering letters may be made to refund such payment in an action for money had and received.¹⁴ If the public officer receives fees to which he is not entitled, and he knows that the person paying them is ignorant of the law and makes such payments because he thinks he is bound by law to pay them, his act in receiving such payment without informing the other person of his rights, is looked upon as a fraud, and the party making such payments may recover them.¹⁵ Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party and especially if the parties are not on an equal footing, an action to recover it back is maintainable.¹⁶ Payment made to a public officer by a private citizen, for services which the officer was not required to render as a part of his public duty, cannot be recovered. Thus, if an auditor makes a special charge for services in preparing a bond which he is not required by his office to do, a payment therefor cannot be recovered.¹⁷ The legislature has power to change the Common Law rule that money paid under mistake of law cannot be recovered, and may give a right of action against a public officer who collects, from a private person, fees to which he is not entitled by law.¹⁸ If legal and illegal charges are so blended by the officer

74; 40 L. R. A. 185; 39 Atl. 346.

¹³ *Fremont, etc., Ry. v. Holt County*, 28 Neb. 742; 45 N. W. 163.

¹⁴ *Barnes v. Foley*, 5 Burr. 2711.

¹⁵ *Marcotte v. Allen*, 91 Me. 74;
40 L. R. A. 185; 39 Atl. 346.

¹⁶ *Marcotte v. Allen*, 91 Me. 74;

40 L. R. A. 185; 39 Atl. 346; *Bank v. Daniel*, 12 Pet. (U. S.) 32.

¹⁷ *Eley v. Miller*, 7 Ind. App. 529; 34 N. E. 836.

¹⁸ *Benson v. Christian*, 129 Ind. 535; 29 N. E. 26.

making them, that the legal cannot be separated from the illegal, he may be liable to pay all fees thus received.¹⁹ A borrowed money from a school fund. The county auditor made an illegal demand for a payment as a penalty as delinquent interest. A paid such amount into the county treasury. The county attorney was paid for his services in obtaining such payment out of the county revenue funds. It was held that A could not recover from any of these officers; since the auditor, who had demanded the payment, did not receive it, the treasurer who received it did not exact it; and the county attorney was not paid out of such funds.²⁰

§811. Application of foregoing principles to taxes.

Payments unlawfully coerced as taxes may be recovered.¹ On the other hand, if a tax is paid voluntarily its illegality is no ground for an action to recover it.² While there is practical unanimity of opinion upon these general propositions, there is a decided lack of harmony in the adjudications upon the question of what degree of compulsion amounts to a coercion so that the tax may be recovered if it proves to be illegal. This lack of harmony is in part due to a difference in the powers granted by the various states to their taxing officers in making summary collection of taxes. After eliminating these reasons for divergence, however, there remains a clear conflict of authority as to what amounts to coercion of payment of taxes. Payment of taxes has been held to be made under duress where

¹⁹ *Benson v. Christian*, 129 Ind. 535; 29 N. E. 26.

²⁰ *Coleman v. Goben*, 16 Ind. App. 346; 45 N. E. 194.

¹ *Eyerly v. Jasper County*, 72 Ia. 149; 33 N. W. 609; *Connelly v. Board*, 64 Kan. 168; 67 Pac. 453; *Newport v. Ringo*, 87 Ky. 635; 10 S. W. 2; *National Bank v. New Bedford*, 155 Mass. 313; 29 N. E. 532; *Wheeler v. Board, etc.*, 87 Minn. 243; 91 N. W. 890; *Benton*

v. Goodale, 66 N. H. 424; 30 Atl. 1121; *Raleigh v. Salt Lake City*, 17 Utah 130; 53 Pac. 974; *Wyckoff v. King County*, 18 Wash. 256; 51 Pac. 379.

² *Dear v. Varnum*, 80 Cal. 86; 22 Pac. 76; *Board, etc., v. Springs Co.*, 15 Colo. App. 274; 62 Pac. 336; *Johnson v. Atkins*, — Fla. —; 32 So. 879; *Jeem v. Ellijay*, 89 Ga. 154; 15 S. E. 33; *Odendahl v. Rich*, 112 Ia. 182; 83 N. W. 886; *Monti-*

arrest was threatened;³ or criminal proceedings;⁴ or where the omission to pay an excise tax was made a crime;⁵ or where property is withheld;⁶ or seizure⁷ or sale thereof is threatened;⁸ such as will cast a cloud upon the owner's title,⁹ or terminate the owner's rights;¹⁰ as where the collector threatens to sell lands on a tax warrant, or the holder of a tax title threatens to claim a tax deed unless the land is redeemed.¹¹ If a tax sale casts a cloud on the title, money paid to redeem property from such sale is not paid voluntarily and may be recovered.¹² Thus, while as a general rule, a mortgagor or one claiming under him who buys at a tax sale, cannot assert any claim by reason thereof as against a mortgagee, yet if the purchaser at a tax sale is the equitable owner holding under an assignee of a second mortgagee and his interest does not appear of

cello, etc., *Co. v. Baltimore*, 90 Md. 416; 45 Atl. 210; *Foley v. Haverhill*, 144 Mass. 352; 11 N. E. 554; *Falvey v. Board, etc.*, 76 Minn. 257; 79 N. W. 302; *State v. R. R.*, 165 Mo. 597; 65 S. W. 989; *Hopkins v. Butte*, 16 Mont. 103; 40 Pac. 171; *Baker v. Fairbury*, 33 Neb. 674; 50 N. W. 950; *Bates v. York County*, 15 Neb. 284; 18 N. W. 81; *Foster v. Pierce County*, 15 Neb. 48; 17 N. W. 261; *State v. Commissioners*, 56 O. S. 718; *sub nomine*, *State v. Bader*, 47 N. E. 564; *Sowles v. Soule*, 59 Vt. 131; 7 Atl. 715; *Babcock v. Fond du Lac*, 58 Wis. 230; 16 N. W. 625.

³ *Swift Co. v. United States*, 111 U. S. 22; *Douglas v. Kansas City*, 147 Mo. 428; 48 S. W. 851.

⁴ *Hoesling v. San Antonio*, 85 Tex. 228; 16 L. R. A. 608; 20 S. W. 85.

⁵ *Ratterman v. Express Co.*, 49 O. S. 608; 32 N. E. 754. So an internal revenue tax paid under protest may be recovered. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

⁶ *Erhardt v. Winter*, 92 Fed. 918.

⁷ *Hennel v. Board, etc.*, 132 Ind. 32; 31 N. E. 462; *Minor Lumber Co. v. Alpena*, 97 Mich. 499; 56 N. W. 926; *St. Anthony, etc., Co. v. Bottineau*, 9 N. D. 346; 50 L. R. A. 262; 83 N. W. 212.

⁸ Sale of realty. *Thompson v. Detroit*, 114 Mich. 502; 72 N. W. 320; *Whitney v. Port Huron*, 89 Mich. 268; 26 Am. St. Rep. 291; 50 N. W. 316; *Bowns v. May*, 120 N. Y. 357; 24 N. E. 947; *Stephan v. Daniels*, 27 O. S. 527; *Whittaker v. Deadwood*, 12 S. D. 608; 82 N. W. 202. Personalty. *Hennel v. Board*, 132 Ind. 32; 31 N. E. 462; *Lyon v. Receiver, etc.*, 52 Mich. 271; 17 N. W. 839; *Kelley v. Rhoads*, 7 Wyo. 237; 75 Am. St. Rep. 904; 39 L. R. A. 594; 51 Pac. 593.

⁹ *Montgomery v. Cowlitz County*, 14 Wash. 230; 44 Pac. 259.

¹⁰ *Gill v. Oakland*, 124 Cal. 335; 57 Pac. 150.

¹¹ *Bowns v. May*, 120 N. Y. 357; 24 N. E. 947.

¹² *American, etc., Union v. Hastings*, 67 Minn. 303; 69 N. W. 1078.

record, money paid to redeem from such sale may be recovered.¹³ So if a levy on property¹⁴ or seizure of property is threatened,¹⁵ or by statute the tax is made a lien upon specific personalty, such as bank stock,¹⁶ payment is held to be made under compulsion. So where land cannot be conveyed until the tax is paid,¹⁷ or redemption from a tax sale is necessary,¹⁸ recovery has been allowed. Where the tax collecting officers have power to collect a tax by summary process without giving to the alleged delinquent a right to be heard in court upon the question of the illegality of the tax, he should not be obliged in order to protect his rights to wait until his property has been actually seized before making payment. When the circumstances are such that unless he pays, his property is liable to summary process in the ordinary routine of collection there is, in justice, no reason for further delay to protect his rights. Accordingly it has been held that under such circumstances payment is under compulsion,¹⁹ even if a considerable time must elapse before the collectors are bound to collect sum-

¹³ *American, etc., Union v. Hastings*, 67 Minn. 303; 69 N. W. 1078.

¹⁴ *Cox v. Welcher*, 68 Mich. 263; 13 Am. St. Rep. 339; 36 N. W. 69; *Lindsay v. Allen*, 19 R. I. 721; 36 Atl. 840.

¹⁵ *Powder River Cattle Co. v. Custer County*, 45 Fed. 323; *Heunel v. Vanderburgh Co.*, 132 Ind. 32; 31 N. E. 462; *Atchison, etc., Ry. Co. v. Atchison County*, 47 Kan. 722; 28 Pac. 999; *Kelley v. Rhoads*, 7 Wyom. 237; 75 Am. St. Rep. 904; 39 L. R. A. 594; 51 Pac. 593.

¹⁶ *Aetna Ins. Co. v. New York*, 153 N. Y. 331; 47 N. E. 593.

¹⁷ *State v. Nelson*, 41 Minn. 25; 4 L. R. A. 300; 42 N. W. 548. A contrary view is taken in *Weston v. Luce County*, 102 Mich. 528; 61 N. W. 15, but subsequently in view of the Michigan statute allowing re-

covery of taxes illegally exacted if paid under protest, recovery of such a payment was allowed in *Gage v. Saginaw*, 128 Mich. 682; 87 N. W. 1027. Hence the treasurer cannot be compelled by mandamus to issue a receipt, illegal taxes being unpaid, as the owner may pay them under protest to get his deed and recover them. *State v. Nelson*, 41 Minn. 25; 4 L. R. A. 300; 42 N. W. 548.

¹⁸ *Keehn v. McGillicuddy*, 19 Ind. App. 427; 49 N. E. 609; *American Baptist Missionary Union v. Hastings*, 67 Minn. 303; 69 N. W. 1078.

¹⁹ *Howard v. Augusta*, 74 Me. 79; *Vaughn v. Port Chester*, 135 N. Y. 460; 32 N. E. 137; *Grim v. School District*, 57 Pa. St. 433; 98 Am. Dec. 237; *Allen v. Burlington*, 45 Vt. 202.

marily,²⁰ and even if the warrant has not yet issued.²¹ In some jurisdictions the courts are far less liberal in allowing recovery of payment of taxes. Payment of customs without objection or protest is held to be voluntary.²² Payment of illegal taxes under protest, before the collector has made any demand therefor,²³ or before any process has issued for its collection,²⁴ or before any legal steps have been taken to compel payment,²⁵ or before the collector has any power to collect taxes by legal proceedings or summary process²⁶ is voluntary. Publication of a delinquent tax-list, under the method of collecting taxes in force in some states does not constitute compulsion.²⁷ Where such publication is one of the steps leading up to a sale, this rule could not apply except where the sale itself would be held not to amount to compulsion. Payment to avoid a money penalty for non-payment is held to be voluntary,²⁸ though in some jurisdictions such payment is held to be voluntary.²⁹ The *reductio ad absurdum* of the former view is found in those decisions which hold that payment made to prevent the sale of realty for a void tax is voluntary and cannot be recovered.³⁰ This holding is based on the theory that the owner's method of testing the validity of the tax is to allow the sale to proceed and then to attack it whenever the attempt is made to deprive of his realty under it. A jurisprudence which can devise no fairer means than this of attacking the validity of a

²⁰ Rumford Chemical Works v. Ray, 19 R. I. 456; 34 Atl. 814.

²¹ Board, etc., v. R. R., 4 Kan. App. 772; 46 Pac. 1013.

²² Flint, etc., Co. v. Bidwell, 123 Fed. 200.

²³ Conkling v. Springfield, 132 Ill. 420; 24 N. E. 67.

²⁴ Decker v. Perry (Cal.), 35 Pac. 1017; Wilson v. Pelton, 40 O. S. 306; Houston v. Feeser, 76 Tex. 365; 13 S. W. 266.

²⁵ Conkling v. Springfield, 132 Ill. 420; 24 N. E. 67; Gould v. Board, etc., 76 Minn. 279; 79 N. W. 303, 530; Dunnell Mfg. Co. v.

Newell, 15 R. I. 233; 2 Atl. 766.

²⁶ Peninsular Iron Co. v. Crystal Falls, 60 Mich. 79; 26 N. W. 840.

²⁷ Dear v. Varum, 80 Cal. 86; 22 Pac. 76.

²⁸ Decker v. Perry (Cal.), 35 Pac. 1017; Peninsular Iron Co. v. Crystal Falls, 60 Mich. 79; 26 N. W. 840; Bowman v. Boyd, 21 Nev. 281; 30 Pac. 823.

²⁹ Stowe v. Stowe, 70 Vt. 609; 41 Atl. 1024.

³⁰ Phelan v. San Francisco, 120 Cal. 1; 52 Pac. 38; Otis v. People, 196 Ill. 542; 63 N. E. 1053.

tax, and which has grown up in a country where not all taxes are valid by divine right, is indeed inadequate. One who pays for revenue stamps without notifying the collector of their intended use and without making protest cannot recover such payment.³¹ It is always possible for the government to do justice and to order voluntarily the payment of taxes illegally exacted.³² Statutes authorizing repayment of illegal taxes are for the benefit of the parties making such payments, and hence even if permissive in their terms are construed as mandatory.³³ Moved by the injustice of the rules in force in many jurisdictions, some legislatures have made more or less liberal provision for the recovery of payments of illegal taxes.³⁴ The effect of such statutes often is to eliminate the question of duress entirely, and to allow recovery of payments of illegal taxes even if made voluntarily.³⁵ Thus a statute may provide for recovery of illegal taxes paid voluntarily, if a proper ground of objection to such tax is contained in the protest made at the time of such payment.³⁶ The provisions of such statute must be complied to enable recovery thereunder. If the statute requires a specific protest, voluntary payment under a general protest cannot be recovered.³⁷ A payment extorted by compulsion may, however, be recovered without complying with these statutes.³⁸

The general rules as to recovering taxes paid under duress are always subject to this qualification. If the legislature has

³¹ *Chesebrough v. United States*, 192 U. S. 253.

³² *Farmers', etc., Bank v. Vandalia*, 57 Ill. App. 681; *Lange v. Soffell*, 33 Ill. App. 624.

³³ *De Pauw Plate-Glass Co. v. Alexandria*, 152 Ind. 443; 52 N. E. 608.

³⁴ *White v. Smith*, 117 Ala. 232; 23 So. 525; *Topeka, etc., Co. v. Board, etc.*, 63 Kan. 351; 65 Pac. 660; *Western Ranches v. Custer County*, 28 Mont. 278; 72 Pac. 659;

Day v. Pelican, 94 Wis. 503; 69 N. W. 368.

³⁵ *Pacific Coast Co. v. Wells*, 134 Cal. 471; 66 Pac. 657; *Matter of Adams v. Board, etc.*, 154 N. Y. 619; 49 N. E. 144; *Centennial, etc., Co. v. Juab County*, 22 Utah 395; 62 Pac. 1024.

³⁶ *White v. Millbrook Township*, 60 Mich. 532; 27 N. W. 674.

³⁷ *Peninsular Iron Co. v. Crystal Falls*, 60 Mich. 79; 26 N. W. 840.

³⁸ *Pere Marquette R. R. v. Ludington*, — Mich. —; 95 N. W. 417.

provided means for testing the legality of a tax, without risking loss of property, imprisonment, and the like, such method must be resorted to. Payment made without seeking such remedy will be deemed voluntary.³⁹ Thus where an application for abatement may be made, payment under protest without making such application cannot be recovered.⁴⁰ If an injunction to restrain the collection of an illegal tax is granted, and subsequently the treasurer threatens a sale of property for such tax the remedy of the property owners is by proceedings in contempt of court. Subsequent payment of such tax under such threat is voluntary and cannot be recovered.⁴¹ However, recovery has been allowed where in addition the treasurer makes the false statement that such tax has been held by the Supreme Court to be lawful.⁴²

§812. Local assessments.

Payment of illegal local assessments, made under duress, may be recovered.¹ If such payment is made voluntarily it cannot be recovered.² As in the case of taxes, the conflict of authority appears when we attempt to pass from such general statements to a discussion of what constitutes payment under duress. The difference between payment of assessments and payment of

³⁹ *De Graff v. Ramsey County*, 46 Minn. 319; 48 N. W. 1135; *Bradley v. Laconia*, 66 N. H. 269; 20 Atl. 331; *Jamaica, etc., Road Co. v. Brooklyn*, 123 N. Y. 375; 25 N. E. 476; *Pooley v. Buffalo*, 122 N. Y. 592; 26 N. E. 16, 624.

⁴⁰ *All Saints Parish v. Brookline*, 178 Mass. 404; 52 L. R. A. 778; 59 N. E. 1003.

⁴¹ *Trustees v. Thoman*, 51 O. S. 285; 37 N. E. 523.

⁴² *Greenbaum v. King*, 4 Kan. 332; 96 Am. Dec. 172.

¹ *Magnolia (Town of) v. Sharmann*, 46 Ark. 358; *Gill v. Oakland*, 124 Cal. 335; 57 Pac. 150; *McConville v. St. Paul*, 75 Minn. 383; 74

Am. St. Rep. 508; 43 L. R. A. 584; 77 N. W. 993; *Poth v. New York*, 151 N. Y. 16; 45 N. E. 372.

² *Richardson v. Denver*, 17 Colo. 398; 30 Pac. 333; *Hoke v. Atlanta*, 107 Ga. 416; 33 S. E. 412; *Newcomb v. Davenport*, 86 Ia. 291; 53 N. W. 232; *Louisville v. Anderson*, 79 Ky. 334; 42 Am. Rep. 220; *Hopkins v. Butte*, 16 Mont. 103; 40 Pac. 171; *Fuller v. Elizabeth*, 42 N. J. L. 427; *United States Trust Co. v. New York*, 141 N. Y. 488; 39 N. E. 383; *Redmond v. New York*, 125 N. Y. 632; 26 N. E. 727; *Whitbeck v. Minch*, 48 O. S. 210; 31 N. E. 743; *Bank v. Memphis*, 107 Tenn. 66; 64 S. W. 13.

taxes is that while the tax is usually a personal debt enforceable out of property generally and sometimes against the person, an assessment rarely is a personal debt. Payment of assessments has been held to be under duress where realty subject to the lien thereof has been³ or is about to be sold⁴ in proceedings to enforce the lien of such assessments. Thus where proper authorities have begun active proceedings to collect such assessments⁵ or have ordered that such proceedings be begun,⁶ payment thereof is not voluntary. On the other hand, payment to avoid the addition of interest⁷ or of a penalty in money⁸ is not made under duress. Even the sale for a void assessment, if it is void and casts no cloud on the title,⁹ as where the purchaser at the sale has the burden of proving the validity of the sale,¹⁰ has been held not to be compulsion; and a payment compelled by threat of such a sale is in the law a voluntary payment. As in the case of taxes it must be observed that a method of testing the validity of a tax which requires a sale of property thereunder is most unfair and inadequate. Payment under protest is not necessarily under duress.¹¹ If a means is given by law for testing the validity of the assessment without awaiting the seizure and sale of one's property,¹² as by an injunction suit,¹³ or if the levy may be resisted as illegal,¹⁴ such means must be resorted to: and a failure so to do shows that in law the payment is voluntary. It has been held that

³ *Keehn v. McGillicuddy*, 19 Ind. App. 427; 45 N. E. 609.

⁴ *Poth v. New York*, 151 N. Y. 16; 45 N. E. 372; *Vaughn v. Port Chester*, 135 N. Y. 460; 32 N. E. 137.

⁵ *Poth v. New York*, 151 N. Y. 16; 45 N. E. 372.

⁶ *Vaughn v. Port Chester*, 135 N. Y. 460; 32 N. E. 137.

⁷ *Vanderbeck v. Rochester*, 122 N. Y. 285; 25 N. E. 408.

⁸ *Decker v. Perry (Cal.)*, 35 Pac. 1017.

⁹ *Phelan v. San Francisco*, 120 Cal. 1; 52 Pac. 38.

¹⁰ *Davies v. Galveston*, 16 Tex. Civ. App. 13; 41 S. W. 145.

¹¹ *First National Bank v. Americus*, 68 Ga. 119; 45 Am. Rep. 476; *Hawkeye, etc., Co. v. Marion*, 110 Ia. 468; 81 N. W. 718; *Whitbeck v. Minch*, 48 O. S. 210; 31 N. E. 743; *Peebles v. Pittsburgh*, 101 Pa. St. 304; 47 Am. Rep. 714.

¹² *Hoke v. Atlanta*, 107 Ga. 416; 33 S. E. 412.

¹³ *Whitbeck v. Minch*, 48 O. S. 210; 31 N. E. 743.

¹⁴ *Union Pacific Ry. v. (Commissioners of) Dodge County*, 98 U. S. 541; *Hoke v. Atlanta*, 107 Ga. 416; 33 S. E. 412.

money paid on an assessment, illegal but not void on its face, cannot be recovered until the assessment has been set aside in a proceeding brought for that purpose.¹⁵

§813. License fees.

Payment of an illegal license fee made under duress may be recovered.¹ A voluntary payment of an illegal license fee cannot be recovered.² Here again under harmony in general propositions we find marked divergence of authority in applying these general propositions to specific cases. Where arrest is threatened for conducting a business and the like without paying such license fee,³ or according to some authorities, where the statute or ordinance imposing such license makes non-payment a crime, though no immediate arrest is threatened,⁴ or where non-payment will result in exclusion from the right to do business in the state and no mode of redress or opportu-

¹⁵ *State v. Elizabeth*, 51 N. J. L. 485; 18 Atl. 302; *Fuller v. Elizabeth*, 42 N. J. L. 427; *Elizabeth v. Hill*, 39 N. J. L. 555; *Trimmer v. Rochester*, 130 N. Y. 401; 29 N. E. 746. *Contra*, that it is not necessary that such assessment be first set aside if valid on its face, but levied by assessors who had no jurisdiction to make such levy. *Bruecher v. Port Chester*, 101 N. Y. 240; 4 N. E. 272.

¹ *Walsh v. Denver*, 11 Colo. App. 523; 53 Pac. 458; *Harrodsburg v. Renfro* (Ky.), 51 L. R. A. 897; 58 S. W. 795; *Bruner v. Clay City*, 100 Ky. 567; 38 S. W. 1062; *Catoir v. Watterson*, 38 O. S. 319; *Marshall v. Snediker*, 25 Tex. 460; 78 Am. Dec. 534; *Newmann v. La Crosse*, 94 Wis. 103; 68 N. W. 654.

² *Helena v. Dwyer*, 65 Ark. 155; 45 S. W. 349; *Maxwell v. San Luis Obispo*, 71 Cal. 466; 12 Pac. 484; *Wilmington v. Wicks*, 2 Marv. (Del.) 297; 43 Atl. 173; *Tatum v.*

Trenton, 85 Ga. 468; 11 S. E. 705; (*Town of*) *Ligonier v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *Providence v. Shackelford*, 106 Ky. 378; 50 S. W. 542; *Maysville v. Melton*, 102 Ky. 72; 42 S. W. 754; *Fuselier v. St. Landry Parish*, 107 La. 221; 31 So. 678; *Baker v. Fairbury*, 33 Neb. 674; 50 N. W. 950; *People v. Wilmerding*, 136 N. Y. 363; 32 N. E. 1099; *Shelton v. Silverfield*, 104 Tenn. 67; 56 S. W. 1023; *Noyes v. State*, 46 Wis. 250; 32 Am. Rep. 710; 1 N. W. 1; *Van Buren v. Downing*, 41 Wis. 122.

³ *Toledo v. Buechle*, 21 Ohio C. C. 429; *Douglas v. Kansas City*, 147 Mo. 428; 48 S. W. 851; *Newmann v. La Crosse*, 94 Wis. 103; 68 N. W. 654.

⁴ *Chicago v. Sperbeck*, 69 Ill. App. 562. *Contra*, *Helena v. Dwyer*, 65 Ark. 155; 45 S. W. 349; *Betts v. Reading*, 93 Mich. 77; 52 N. W. 940.

ity for a hearing is given,⁵ such payment is held to be made under duress. So the expense of abating a nuisance on demand of health authorities may be recovered by a property owner where the duty of abating such nuisance really rests on the sanitary authorities and a refusal to comply with the demand would render the property owner *prima facie* liable to a penalty.⁶ In some of the cases denying the right to recover, the voluntary character of the payment is quite clear. Thus payment of a license voluntarily made to a board which has no legal authority to issue such licenses cannot be recovered.⁷ So a voluntary payment of a license fee by one who subsequently abandons the business because he is unable or unwilling to file a bond as required by law cannot be recovered.⁸ In other cases a right to recover is denied under circumstances which seem to show what to the ordinary mind looks very like compulsion. Thus payment made on receipt of a circular threatening to enforce the law,⁹ or under threat of criminal prosecution,¹⁰ has been held not to be made under duress.

§814. Recovery of payments made on judgments.—Judgment unreversed.

The question whether payments made on a judgment can be recovered depends in the first instance upon the further question whether such judgment has been reversed, set aside, and the like, or whether it has not. If the judgment is not reversed, set aside, or modified in a proper proceeding for that purpose directly attacking the judgment, it is binding between the parties if rendered by a court having jurisdiction of the parties and

⁵ *Scottish, etc., Ins. Co. v. Herriott*, 109 Ia. 606; 77 Am. St. Rep. 548; 80 N. W. 665; *Douglas v. Kansas City*, 147 Mo. 428; 48 S. W. 851; *Western Union Telegraph Co. v. Mayer*, 28 O. S. 521. *Contra*, *Jackson v. Newman*, 59 Miss. 385; 42 Am. Rep. 367; *Austin v. Vir-ogua*, 67 Wis. 314; 30 N. W. 515.

⁶ *Andrew v. St. Olave's, etc.* (1898), 1 Q. B. 775.

⁷ *Tatum v. Trenton*, 85 Ga. 468; 11 S. E. 705.

⁸ *Curry v. Tawas Township*, 81 Mich. 355; 45 N. W. 831.

⁹ *Yates v. Ins. Co.*, 200 Ill. 202; 65 N. E. 726.

¹⁰ *Betts v. Reading*, 93 Mich. 77; 52 N. W. 940.

the subject-matter. Since matters concluded by such judgment cannot be relitigated it follows that money paid by reason of such judgment cannot be recovered, even if the judgment is erroneous, or should have been rendered for the defeated party on the real merits of the case. The enforcement of such judgment is clearly a resort to the means provided by law for enforcing liabilities, and such payments cannot be said to be made under duress.¹ Thus, if money forfeited as bail has been decreed by order of court to the county in which the cause of action was brought, instead of to the county to which the trial was transferred, the latter county, the party who has been prejudiced by such order should appeal from the order: and cannot sue the former county for the money thus paid in, while the order stands unmodified.² Thus in a condemnation suit, A the owner of an undivided interest in realty was awarded a certain sum of money as damages for his interest in the realty appropriated. A partition suit was then pending between A and the other co-owners. Subsequently the tract out of which the land had been appropriated was awarded to another co-owner, B. It was held that the county which had made the payment in the condemnation proceedings could not recover from A.³ Thus where A, who had at one time been a commissioner of insolvents, assumed to act as such, and required B to give bond with sureties, which B did, and after the bond was forfeited A sued B and such surety, and obtained a judgment which was paid by one of the sureties, such surety cannot recover from A.⁴ So, after a judgment which includes usurious interest, recovery of such usury can

¹ *Carter v. Society*, 3 Conn. 455; *Warren County v. Polk County*, 89 Ia. 44; 56 N. W. 281; *Williams v. Shelbourne*, 102 Ky. 579; 44 S. W. 110; *Footman v. Stetson*, 32 Me. 17; 52 Am. Dec. 634; *New Madrid County v. Phillips*, 125 Mo. 61; 28 S. W. 321; *Gerecke v. Campbell*, 24 Neb. 306; 38 N. W. 847; *Kirk-*

lan v. Brown, 4 Humph. (Tenn.) 174; 40 Am. Dec. 635.

² *Warren County v. Polk County*, 89 Ia. 44; 56 N. W. 281.

³ *New Madrid County v. Phillips*, 125 Mo. 61; 28 S. W. 321. In this case A was B's guardian. No fraud, however, was found to exist.

⁴ *Job v. Collier*, 11 Ohio 422.

not be had while the judgment is unreversed.⁵ So where A was sued as surety on a bail bond, and judgment rendered, and after such judgment he filed a remission of the penalty executed by the governor of the state, but such judgment was not set aside or modified, it was held that A could not recover the amount paid in by him on such judgment.⁶ Equity has allowed recovery of money paid upon a Common Law judgment which was obtained by fraud, though such judgment is not reversed, set aside or modified.⁷ Thus A held a note signed by the firm B and C, per C. A represented to B that the money for which this note was given was loaned to the firm, and B allowed A to take a judgment on such note. Subsequently B enjoined the collection of such judgment on the ground that it was not a firm debt; but on A's answer that it was a firm debt, and that the judgment was not obtained by fraud, the injunction was dissolved. B paid such judgment. After payment B found evidence that the money was loaned to C, and used by him to discharge an individual debt. It was held that on these facts B could recover from A in equity.⁸ At law, however, payments on a judgment obtained by fraud cannot be recovered until such judgment is reversed or set aside.⁹ A judgment is not conclusive as to matters arising after its rendition. Thus, if A is compelled by judicial proceedings to pay assessments for a street improvement and such improvement is thereafter abandoned, A can recover the money thus paid in.¹⁰

§815. Judgment reversed.

A different question arises where the judgment has been reversed, set aside, modified, and the like. In such cases a

⁵ Footman v. Stetson, 32 Me. 17; 52 Am. Dec. 634; Thatcher v. Gammon, 12 Mass. 268.

⁶ Williams v. Shelbourne, 102 Ky. 579; 44 S. W. 110.

⁷ West v. Kerby, 4 J. J. Mar. (Ky.) 55.

⁸ Ellis v. Kelly, 8 Bush. (Ky.) 621.

⁹ Ogle v. Baker, 137 Pa. St. 378; 21 Am. St. Rep. 886; 20 Atl. 998. (Where the judgment was entered on a warrant of attorney contained in a forged note.)

¹⁰ McConville v. St. Paul, 75 Minn. 383; 74 Am. St. Rep. 508; 43 L. R. A. 584; 77 N. W. 993.

payment made upon such judgment can be recovered (1) if made under duress and not voluntarily, and if the judgment is reversed upon the merits, or (2) if the judgment of reversal contains an order of restitution.¹ If the property of the judgment-debtor is seized and sold on execution and the proceeds paid over to the judgment-creditor, the judgment-debtor may recover such amount from the judgment-creditor.² The same principle applies where money in the hands of an officer of the court is distributed by such officer under an erroneous order or decree. Upon reversal, the party who was entitled to such fund may recover from the person to whom it is paid.³ If the law permits execution to issue on a judgment while appeal or proceedings in error are pending, money paid by reason of such execution may be recovered if the judgment is reversed thereafter.⁴ Thus if the execution is levied, and payment is made to stop the sale,⁵ or if an execution has issued but has not been levied and payment is made to prevent a levy,⁶ such payment is under compulsion and may be recovered. So recovery has been allowed where the execution was forwarded by mail to the debtor, and the amount for which it issued was paid in by him.⁷ On the same principle a payment made after a creditor's bill has been filed in equity to enforce the lien of the judgment on certain realty may be recovered after reversal, the court finding as a fact that such payment was compelled by the action, and was not made voluntarily in settlement of the claim.⁸ The same relief has been given, though in another

¹ *Green v. Stone*, 1 Har. & J. (Md.) 405.

² *Crane v. Runey*, 26 Fed. 15; *Field v. Anderson*, 103 Ill. 403; *Smith v. Zent*, 83 Ind. 86; 43 Am. Rep. 61; *Sturm v. Fleming*, 31 W. Va. 701; 8 S. E. 263.

³ *Metzner v. Bauer*, 98 Ind. 425; *In re Home Provident, etc., Association*, 129 N. Y. 288; 29 N. E. 323.

⁴ *United States Bank v. Bank*, 6 Pet. (U. S.) 8; *Wright v. Nostrand*, 100 N. Y. 616; 3 N. E. 78; *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

⁵ *Stevens v. Fitch*, 11 Met. (Mass.) 248. *Contra*, *Gould v. McFall*, 118 Pa. St. 455; 4 Am. St. Rep. 606; 12 Atl. 336. (In this case the judgment was reversed for technical reasons.)

⁶ *Lewis v. Hull*, 39 Conn. 116; *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

⁷ *United States Bank v. Bank*, 6 Pet. (U. S.) 8.

⁸ *Chapman v. Sutton*, 68 Wis. 657; 32 N. W. 683.

form, where payments have been made upon a decree in equity, which fixes the amount of the debt and orders a sale of the realty. Where such decree has been reversed because the amount of the debt was ascertained erroneously by the trial court, payments on the original decree should be credited upon the subsequent decree.⁹ In some cases the court does not think it necessary to indicate more than that money was paid on a writ of execution without indicating whether a levy was made or not, on the ground that in either case payment was made by duress.¹⁰ If execution has not issued, but may issue at the option of the judgment-creditor, there is some conflict of authority on the question whether payment of the judgment is voluntary. In some jurisdictions it is held that if the judgment-debtor pays such judgment before execution issues he does not do so voluntarily.¹¹ Where this view obtains, such payments may be recovered,¹² even if the surety who pays the judgment against himself and his principal takes a formal assignment of the judgment to keep it alive against the principal.¹³ Relief is also given in such cases on a rule by the court to which such cause is sent on reversal to show cause why restitution should not be made.¹⁴ In other jurisdictions payment of a judgment on which execution has not issued is not under duress,¹⁵ even if execution is threatened,¹⁶ and such pay-

⁹ *Effinger v. Kenney*, 92 Va. 245; 23 S. E. 742.

¹⁰ As where the return "money made: paid by John Heath," left it in doubt whether a levy had been made or not. *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

¹¹ "He may as well pay the amount at one time as at another and save the expense of delay." *Peyser v. Mayor*, 70 N. Y. 497, 501; 26 Am. Rep. 624; quoted in *Chapman v. Sutton*, 68 Wis. 657; 32 N. W. 683.

¹² *Scholey v. Halsey*, 72 N. Y. 578. "It is not necessary in order to maintain the action that the pay-

ment should have been coerced by execution." *Scholey v. Halsey*, 72 N. Y. 578.

¹³ *Gates v. Brinkley*, 4 Lea (Tenn.) 710.

¹⁴ *Gregory v. Litsey*, 9 B. Mon. (Ky.) 43; 48 Am. Dec. 415.

¹⁵ *Groves v. Sentell*, 66 Fed. 179; *Cohen v. Laundry Co.*, 99 Ga. 289; 25 S. E. 689; *Estes v. Thompson*, 90 Ga. 698; 17 S. E. 98; *Lewis v. Brewing Co.*, 63 Ill. App. 345; *Gould v. McFall*, 118 Pa. St. 455; 4 Am. St. Rep. 606; 12 Atl. 336.

¹⁶ *Perryman v. Pope*, 94 Ga. 672; 21 S. E. 715.

ment, therefore, cannot be recovered. Hence a payment of a judgment in which excessive attorney's fees have been awarded, made in order to clear the title to realty so that a new loan could be effected, cannot be recovered.¹⁷ So if a judgment is paid voluntarily while appeal or error proceedings are pending, such payment cannot be recovered even though the decree appealed from is modified or reversed.¹⁸ When *Kalmbach v. Foote* first came before the Supreme Court¹⁹ it was held that a payment under a threatened levy made to the attorney of the plaintiff and retained by him for his own use could be recovered from him. The judgment below was reversed and the cause remanded. When it came before the Supreme Court a second time the evidence showed that no threat of levy was made, that the party making the payment, a surety of the principal debtor made the payment voluntarily and took an assignment of the judgment against his principal, which was afterwards reversed, and that the attorney who collected the money paid it over to his client, not even retaining his fees. It was then held that such payment could not be recovered.²⁰ Thus, where A's land is sold as the property of B, and while an appeal is pending A voluntarily pays the amount necessary to redeem such realty, A cannot recover such payment when the decree under which the realty was sold is reversed.²¹ But where no opportunity to make a defense is given to the judgment-debtor, as where a cognovit judgment is taken, payment or giving a new security may be considered as made under duress.²² Where the officer who is about to serve the execution has an agreement with the judgment-creditor to receive half the proceeds collected, and such agreements are illegal, it has been held that because of such interest, a payment or security given

¹⁷ *Estes v. Thompson*, 90 Ga. 698;
¹⁸ 17 S. E. 98.

¹⁸ *Weaver v. Stacy*, 93 Ia. 683; 62
 N. W. 22; *Kalmbach v. Foote*, 86
 Mich. 240; 49 N. W. 132; *Ditman v.*
Raule, 134 Pa. St. 480; 19 Atl.
 676.

¹⁹ 79 Mich. 236; 44 N. W. 603.

²⁰ *Kalmbach v. Foote*, 86 Mich.
 240; 49 N. W. 132.

²¹ *Weaver v. Stacy*, 93 Ia. 683; 62
 N. W. 22.

²² *Knox County Bank v. Doty*, 9
 O. S. 506; 75 Am. Dec. 479.

to avoid such unlawful levy is given under duress.²³ Whether the judgment-debtor's right of action for involuntary payments always accrues on reversal is a question on which there is a divergence of authority. In some cases the right of the debtor to recover is denied if the money belongs in good conscience to the creditor.²⁴ Money which is paid in satisfaction of a judgment cannot be recovered where the judgment is reversed, not upon the merits, but upon mere technicalities, as where the judgment was reversed because the judgment-creditor who took a default judgment had omitted to make proof in proper form,²⁵ or because it was held that the judgment creditor had technically waived his right to recover.²⁶ On reversal of a judgment in foreclosure, as being excessive in amount,²⁷ the trial court attempted to evade the reversal by the Supreme Court, by reducing and modifying its original judgment *nunc pro tunc*; while this innovation in procedure was held erroneous,²⁸ it was held that the defendant could not recover from the plaintiff for the rents during the time that plaintiff was in possession as purchaser under the erroneous order of sale, since "his only remedy is to have them applied on the mortgage debt."²⁹ In other cases the court has ordered restitution as a matter of course, and has declined to prejudge the result of a new trial following reversal in a proceeding to recover.³⁰ A suit in assumpsit has been held to lie where an action by an insurance company against its agent for premiums collected by him had

²³ Van Dusen v. King, 106 Mich. 133; 64 N. W. 9. This is "fraud and coercion." It is "not so much a question of individual right as of public policy."

²⁴ Cowdery v. Bank, 139 Cal. 298; 96 Am. St. Rep. 115; 73 Pac. 196; Teasdale v. Stoller, 133 Mo. 645; 54 Am. St. Rep. 703; 34 S. W. 873.

²⁵ Gould v. McFall, 118 Pa. St. 455; 4 Am. St. Rep. 606; 12 Atl. 336.

²⁶ Teasdale v. Stoller, 133 Mo. 645; 54 Am. St. Rep. 703; 34 S.

W. 873. In these cases, however, the payment is looked upon as, to some extent, a voluntary payment.

²⁷ For judgment of reversal see London, etc., Bank v. Bandmann, 120 Cal. 220; 65 Am. St. Rep. 179; 52 Pac. 583.

²⁸ Cowdery v. Bank, 139 Cal. 298; 96 Am. St. Rep. 115; 73 Pac. 196.

²⁹ Cowdery v. Bank, *supra* (quotation: 139 Cal. 309; 96 Am. St. Rep. 124; 73 Pac. 196).

³⁰ *Ex parte* Walter, 89 Ala. 237; 18 Am. St. Rep. 103; 7 So. 400. (In this case the trial court was

resulted in judgment which he had been compelled to pay: and this judgment had subsequently been reversed, not because the premiums did not belong to the company, but because the company, not having complied with the statute authorizing it to do business in that state, was not allowed to enforce rights growing out of such business.³¹ Under the former practice recovery of what a judgment-debtor had lost by reason of the judgment was effected by a writ of restitution, if the record disclosed what he had lost or by an action in *scire facias* if it did not.³² Under modern practice the reversing court may order restitution,³³ even if the judgment is reversed because the trial court lacked jurisdiction.³⁴ Even where a judgment has been reversed on the ground that the trial court had no jurisdiction,³⁵ the trial court may retain the case for the purpose of enforcing restitution.³⁶ If the judgment of reversal contains an order of restitution the judgment-debtor may recover independent of any question whether payment by him was voluntary or involuntary.³⁷ Such question of voluntary payment should be raised as a ground for refusing to reverse. The judgment of reversal and restitution "establishes beyond further question the right of plaintiff in error to be restored to all things which he has lost by reason of the erroneous judgment. Its justice cannot be rejudged in any collateral proceeding."³⁸

compelled by mandamus to order restitution after reversal without reference to the probable result of a new trial.) *Murray v. Berdell*, 98 N. Y. 480.

³¹ *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

³² Anonymous, 2 Salk. 588; *United States Bank v. Bank*, 6 Pet. (U. S.) 8.

³³ *Ex parte Morris*, 9 Wall. (U. S.) 605; *Morris's Cotton*, 8 Wall. (U. S.) 507; *Market National Bank v. Bank*, 102 N. Y. 464; 7 N. E. 302.

³⁴ *O'Reilly v. Henson*, 97 Mo. App. 491; 71 S. W. 109.

³⁵ *Brock v. Fuel Co.*, 139 U. S. 216. (Since, except in case of negotiable instruments and the like, an assignee could not bring an action in the United States courts on the ground of being a citizen of another state from that in which the defendant was domiciled unless his assignor could have so brought an action.)

³⁶ *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

³⁷ *Hiler v. Hiler*, 35 O. S. 645; *Breeding v. Blocher*, 29 Pa. St. 347.

³⁸ *Breeding v. Blocher*, 29 Pa. St. 347, 349; quoted in *Hiler v. Hiler*, 35 O. S. 645.

An action in *scire facias* or a writ of restitution are neither indispensable at modern practice. A direct action for money had and received may be maintained.³⁹ This right, however, has been limited in some states to cases where no order of restitution was made on reversal.⁴⁰ The fact that restitution is asked and refused in the proceedings which result in reversal does not prevent a separate action in *assumpsit*.⁴¹ The statutory method of restitution is not exclusive and does not prevent an action in *assumpsit*.⁴² Trespass, however, will not lie if the judgment upon which the execution issued under which the judgment debtor's property was taken and sold was merely erroneous and not void. The debtor's remedy is in *assumpsit*.⁴³ The right of action for money paid exists in favor of the real party in interest whose money has been paid to the judgment creditor, even if he is not a party of record.⁴⁴ It lies against the judgment creditor to whom or on whose behalf money has been paid. Thus if money of a judgment debtor is applied to paying witness fees which should have been paid by the judgment creditor, the debtor's action on reversal is against the sheriff and he cannot recover from the witness.⁴⁵ In an action for money had the debtor may recover the amount of the proceeds of his property, if it has been sold on execution, paid over to or on behalf of the judgment creditor.⁴⁶ If the property sells for less than its value, or its seizure has caused other damage to the judgment debtor, it is evident that this right of recovery is inadequate. Accordingly in some jurisdictions the

³⁹ *Raun v. Reynolds*, 18 Cal. 275; *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589; 15 L. R. A. 588; 30 N. E. 963; *Clark v. Pinney*, 6 Cow. (N. Y.) 298.
⁴⁰ *Duncan v. Kirkpatrick*, 13 S. & R. (Pa.) 292.

⁴¹ *Travelers' Ins. Co. v. Heath*, 95 Pa. St. 333.

⁴² *Haebler v. Myers*, 132 N. Y. 363; 28 Am. St. Rep. 589; 15 L. R. A. 588; 30 N. E. 963.

⁴³ *Field v. Anderson*, 103 Ill. 403.

⁴⁴ *Stevens v. Fitch*, 11 Met. (Mass.) 248.

⁴⁵ *Gray v. Alexander*, 7 Humph. (Tenn.) 16.

⁴⁶ *Thompson v. Reasoner*, 122 Ind. 454; 7 L. R. A. 495; 24 N. E. 223; *Martin v. Woodruff*, 2 Ind. 237; *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665; 30 N. W. 759; *Lewis v. Ry.*, 97 Wis. 368; 72 N. W. 976.

judgment debtor is not limited to this measure of damages, but may recover the value of his property so seized on execution.⁴⁷

VI. PAYMENT OBTAINED BY FRAUD.

§816. Payment obtained by fraud.

As has already been stated¹ one who has been induced to enter into a contract by the fraud of the adversary party, has an election of remedies, one of which is to avoid the contract and recover what he has parted with or a reasonable compensation therefor. Where fraud exists, we have few of the complications that limit recovery of payments made by mistake. The chief question that makes this branch of the subject difficult is the extent of the right to waive tort and sue in contract. If money has been paid under such contract, the right of the party defrauded to waive the tort and recover such payment on the theory of an implied contract, in general assumpsit, is very generally recognized.² Thus one who pays money, deceived by fraudulent representations of the adversary party with reference to the mortgage which the latter is selling to the former, may recover such payment in assumpsit.³ So if a vendor is induced by fraudulent representations to accept securities in payment for his goods, he may credit the value of such securities on the purchase price of such goods and sue in assumpsit to recover the difference.⁴ So money paid by drawee on a draft accepted

⁴⁷ Reynolds v. Hosmer, 45 Cal. 616; Gould v. Sternberg, 128 Ill. 510; 15 Am. St. Rep. 138; 21 N. E. 628; McJilton v. Love, 13 Ill. 486; Smith v. Zent, 83 Ind. 86; 43 Am. Rep. 61.

¹ See § 131.

² Hanrahan v. Provident Association, 67 N. J. L. 526; 51 Atl. 480; affirming 66 N. J. L. 80; 48 Atl. 517; Jackson v. Hough, 38 W. Va. 236; 18 S. E. 575; Weis v. Ahrenbeck, 5 Tex. Civ. App. 542; 24 S. W. 356; Robinson v. Welty, 40 W.

Va. 385; 22 S. E. 73; Burke v. Ry., 83 Wis. 410; 53 N. W. 692.

³ Cornell v. Crane, 113 Mich. 460; 71 N. W. 878; Robinson v. Welty, 40 W. Va. 385; 22 S. E. 73. So of a purchase of a bond. Ripley v. Chase, 78 Mich. 126; 18 Am. St. Rep. 428; 43 N. W. 1097.

⁴ Blalock v. Phillips, 38 Ga. 216; Hidey v. Swan, 111 Mich. 161; 69 N. W. 225; Willson v. Foree, 6 Johns. (N. Y.) 110; 5 Am. Dec. 195.

“against indorsed bills of lading” attached to the draft, may be recovered when these bills of lading were in fact fictitious.⁵ Money paid by shippers to a carrier of goods in excess of charges made to other shippers of similar goods by such carrier, induced by the statement of such carrier that it gave no lower rates, may be recovered.⁶ Recovery exists in cases of fraud though the party guilty of fraud is thus securing from the party who seeks recovery, the payment of a debt due from a third party. Thus A had embezzled money from a railway company B. B’s agent represented to X that payment of a certain sum would make good such shortage and enable A to retain his position. In fact the shortage was much greater, and A was discharged. It was held that X could recover such payment from B.⁷ Money paid for realty, under a contract voidable for fraud may be recovered if a reconveyance is tendered.⁸ If payment is obtained by fraudulent representation of fact as to the existence of liability, such payment may be recovered, even though no contract existed between the parties.⁹ Thus, if an agent obtains money as commissions from his principal by fraudulently representing that certain parties to whom he had sold on credit were solvent, such payment may be recovered.¹⁰ So if A obtains money from B under a contract to use it in making a joint purchase, which contract A has no intention of performing;¹¹ or if A obtains money from B by falsely claiming to be the holder of B’s note, which he has in fact transferred, and on which he then declines to pay such money,¹² such payments may be recovered. A volunteer cannot recover on this

⁵ Guaranty Trust Co. v. Grotrian, 114 Fed. 433; 57 L. R. A. 689; 52 C. C. A. 235.

⁶ Cook v. Ry., 81 Ia. 551; 25 Am. St. Rep. 512; 9 L. R. A. 764; 46 N. W. 1080.

⁷ Burke v. Ry., 83 Wis. 410; 53 N. W. 692.

⁸ McKinnon v. Vollmar, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800.

⁹ People v. Foster, 133 Ill. 496;

23 N. E. 615; Ingalls v. Miller, 121 Ind. 188; 22 N. E. 995; Frick v. Larned, 50 Kan. 776; 32 Pac. 383; Holland v. Bishop, 60 Minn. 23; 61 N. W. 681; Gillespie v. Evans, 10 S. D. 234; 72 N. W. 576.

¹⁰ Frick v. Larned, 50 Kan. 776; 32 Pac. 383.

¹¹ Holland v. Bishop, 60 Minn. 23; 61 N. W. 681.

¹² Gillespie v. Evans, 10 S. D. 234; 72 N. W. 576.

theory, however. The right of recovery is limited to the party making the payment or his legal representatives. A obtained a loan of money from B through B's agent X, by fraud. B was thereafter dissatisfied, and X, being under no legal liability, repaid him the amount advanced and took A's security. It was held that X could not recover from A in *quasi-contract*.¹³ This right of recovery cannot be made a means of collecting damages in tort. Only the person who receives the payment is liable. Thus A, agent of X, by fraudulent representations, induced B to enter into a contract with X and to pay money thereunder to X. B cannot recover from A for money had and received.¹⁴ By statute in some states assumpsit may be brought against the person guilty of deceit, even if no money was paid to him or for his benefit under such transaction.¹⁵ Recovery may be had where payments are induced by constructive fraud.¹⁶ Thus where bonds of a corporation are in effect, though under a disguise in outward form, sold to its directors at a discount, the amount of such discount may be recovered from such purchasers.¹⁷ If goods are sold under a contract induced by fraud, we have, by reason of the divergent theories concerning the right to waive tort and sue in assumpsit,¹⁸ two views: one that the vendor may waive the tort and sue in assumpsit,¹⁹ and one that he cannot sue in assumpsit, but must sue either in replevin or trover.²⁰ A constructed for B an apparatus for making gas. Soon afterwards it was destroyed by fire. On B's fraudulent statement that this was the fault of the gas apparatus, A agreed to do certain repairing, without charge. After making such repairs, A learned of B's fraud and brought suit in assumpsit for a reasonable compensation.

¹³ *Steiner v. Clisby*, 103 Ala. 181;
¹⁵ So. 612.

¹⁴ *Minor v. Baldrige*, 123 Cal.
 187; 55 Pac. 783.

¹⁵ *Hallett v. Gordon*, 122 Mich.
 573; 82 N. W. 827; modifying on
 rehearing 122 Mich. 567; 81 N. W.
 556.

¹⁶ See Ch. XI.

¹⁷ *Fitzgerald v. Construction Co.*,
 41 Neb. 374; 59 N. W. 838.

¹⁸ See § 840 *et seq.*

¹⁹ Where credit is obtained by
 fraud the vendor may sue in as-
 sumpsit at once. *Crown Cycle Co.*
v. Brown, 39 Or. 285; 64 Pac. 451.

²⁰ *Jones v. Brown*, 167 Pa. St.
 395; 31 Atl. 647.

It was held that he could recover.²¹ The right to recover in *assumpsit* assumes that on discovering the fraud the party defrauded elects to disaffirm the express contract. If he elects to affirm, he cannot sue in general *assumpsit*. Thus a defrauded vendor who affirms the contract, cannot thereafter sue the vendee for the amount realized by him on a resale.²²

VII. PAYMENT BY MISREPRESENTATION.

§817. Payment by misrepresentation.

Payment made under misrepresentation presents fewer difficulties than payment by mistake. In cases of mistake both parties are innocent, though one may be negligent. In payment by misrepresentation, the party receiving the payment has by his false statement caused such payment to be made. Though he is innocent of intentional wrong-doing, and is not guilty of a tort, such payment may be recovered.¹ Thus, where A induced B to pay money a second time, by stating that B had not delivered it the first time,² or if a creditor induces an illiterate debtor to make an overpayment by stating that an amount was due on a debt on which part payments had been made larger than was in fact due;³ or if A induces B to pay him a thousand dollars by claiming an interest in B's land, when in fact A had none;⁴ or if A obtains money from B for certain realty by an innocent misrepresentation as to the identity of such realty;⁵ or if an administrator obtains payment of

²¹ *Citizens', etc., Co. v. Granger*, 118 Ill. 266; 8 N. E. 770.

²² *Bedier v. Fuller*, 116 Mich. 126; 74 N. W. 506.

¹ *Putnam v. Dungan*, 89 Cal. 231; 26 Pac. 904; *Blue v. Smith*, 46 Ill. App. 166; *Fisher v. During*, 53 Mo. App. 548; *Montgomery County v. Fry*, 127 N. C. 258; 37 S. E. 259.

² *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139. B was acting as express messenger and had charge of a package of five hundred

dollars for A, which A claimed not to have received.

³ *Steere v. Oakley*, 186 Pa. St. 582; 40 Atl. 815.

⁴ *Putnam v. Dungan*, 89 Cal. 231; 26 Pac. 904.

⁵ *Thwing v. Lumber Co.*, 40 Minn. 184; 41 N. W. 815; *Buckley v. Paterson*, 39 Minn. 250; 39 N. W. 490; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; 6 L. R. A. 121; 43 N. W. 800.

excessive fees by misrepresenting the amount thereof;⁶ such payments may be recovered even though no fraud is found to exist. If fraud exists, the right to recover in some form of action is still clearer. As fraud is a tort, however, the question becomes one of the right to waive a tort and sue in *quasi-contract*.⁷

VIII. PAYMENT UNDER MISTAKE OF FACT.

§818. Payment under mistake of fact.

A person who, under a mistake of material fact, makes a payment which he is not under legal liability to make, can recover the money thus paid, if the other elements necessary in an action to recover payments are present.¹ In other words,

⁶ *Blue v. Smith*, 46 Ill. App. 166.

⁷ See § 840 *et seq.*

¹ *Kelly v. Solari*, 9 M. & W. 54; *Adams v. Henderson*, 168 U. S. 573; *United States v. Barlow*, 132 U. S. 271; *Espy v. Bank*, 18 Wall. (U. S.) 604; *Hardigree v. Mitchum*, 51 Ala. 151; *Lutz v. Rothschild* (Cal.); 38 Pac. 360; *Putnam v. Dungan*, 89 Cal. 231; 26 Pac. 904; *Corson v. Berson*, 86 Cal. 433; 25 Pac. 7; *Hogben v. Ins. Co.*, 69 Conn. 503; 61 Am. St. Rep. 53; 38 Atl. 214; *Mansfield v. Lynch*, 59 Conn. 320; 12 L. R. A. 285; 22 Atl. 313; *People v. Foster*, 133 Ill. 496; 23 N. E. 615; *Tuller v. Fox*, 46 Ill. App. 97; *Blue v. Smith*, 46 Ill. App. 166; *Stotsenburg v. Fordice*, 142 Ind. 490; 41 N. E. 313, 810; *Stokes v. Goodykoontz*, 126 Ind. 535; 26 N. E. 391; *Cross v. Herr*, 96 Ind. 96; *Tarplee v. Capp*, 25 Ind. App. 56; 56 N. E. 270; *Chickasaw, etc., Ins. Co. v. Weller*, 98 Ia. 731; 68 N. W. 443; *Cook v. Ry.*, 81 Ia. 551; 25 Am. St. Rep. 512; 9 L. R. A. 764; 46 N. W. 1080; *Rhodes v. Lambert* (Ky.), 58 S. W. 608; *Lyon v. Mason, etc., Co.*, 102 Ky. 594; 44 S.

W. 135; *Gould v. Emerson*, 160 Mass. 438; 39 Am. St. Rep. 501; 35 N. E. 1065; *Garland v. Bank*, 9 Mass. 408; 6 Am. Dec. 86; *Connell v. Hudson*, 53 Mo. App. 418; *Jordan v. Harrison*, 46 Mo. App. 172; *Wood v. Sheldon*, 42 N. J. L. 421; 36 Am. Rep. 523; *Martin v. Bank*, 160 N. Y. 190; 54 N. E. 717; *Sharkey v. Mansfield*, 90 N. Y. 227; 43 Am. Rep. 161; *Kingston Bank v. Eltinge*, 40 N. Y. 391; 100 Am. Dec. 516; *Ward v. Ward*, 12 Ohio C. D. 59; *McKibben v. Doyle*, 173 Pa. St. 579; 51 Am. St. Rep. 785; 34 Atl. 455; *Boaz v. Updegrove*, 5 Pa. St. 516; 47 Am. Dec. 425; *Phetteplace v. Bucklin*, 18 K. I. 297; 27 Atl. 211; *Glenn v. Shannon*, 12 S. C. 570; *Caldwell v. Maxfield*, 7 S. D. 361; 64 N. W. 166; *Dickens v. Jones*, 6 Yerg. (Tenn.) 483; 27 Am. Dec. 488; *Guild v. Baldrige*, 2 Swan (Tenn.) 295; *Neal v. Read*, 7 Baxt. (Tenn.) 333; *Cleveland School Furniture Co. v. Hotchkiss*, 89 Tex. 117; 33 S. W. 855; *Alston v. Richardson*, 51 Tex. 1; *Peterson v. Bank*, 78 Wis. 113; 47 N. W. 368; *Buffalo v. O'Malley*,

such payments are not looked on as voluntary payments.² The right of recovering payments made under a mistake of fact is especially clear where government funds have thus been expended,³ though the right to recover such funds does not rest solely on the ground of mistake.⁴

§819. Illustrations of mistake of fact.

The term "mistake of fact" has been held in cases involving the right to recover payments to include mistakes as to the title to realty,¹ the existence of a lien thereon,² the solvency of an estate,³ as where such insolvency is produced by the subsequent presentation and allowance of claims whose existence was not known to the executor when he overpaid the legatee from whom he is now seeking to recover the excess;⁴ the amount of the assets of a firm,⁵ the release of an indorser by omission of the holder of a check to present it for payment,⁶ and the validity of

61 Wis. 255; 50 Am. Rep. 137; 20 N. W. 913. "Where money is paid upon the supposition that a specific fact, which it is supposed would entitle the other to maintain an action, is true, which fact is not true, an action will lie to recover the money back, 'upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid had no right either to receive or retain, and which, had the true state of facts been present in his mind, at the time, he would not have paid.'" *Ingalls v. Miller*, 121 Ind. 188, 190; 22 N. E. 995; quoted in *Stotsenburg v. Fordice*, 142 Ind. 490, 494; 41 N. E. 313, 810.

² See § 798.

³ *Kelly v. Solari*, 9 Mees. & W. 54; *United States v. Barlow*, 132 U. S. 271.

⁴ See § 796.

¹ *Adams v. Henderson*, 168 U. S.

573; *Shaw v. Mussey*, 48 Me. 247.

² *Hardigree v. Mitchum*, 51 Ala. 151, *Rhodes v. Lambert* (Ky.), 68 S. W. 608.

³ *Mansfield v. Lynch*, 59 Conn. 320; 12 L. R. A. 285; 22 Atl. 313; *Wolf v. Beaird*, 123 Ill. 585; 5 Am. St. Rep. 565; 15 N. E. 161; *Blue v. Smith*, 46 Ill. App. 166; *Tarplee v. Capp*, 25 Ind. App. 56; 56 N. E. 270; *Bliss v. Lee*, 17 Pick. (Mass.) 83; *Rogers v. Weaver*, 5 Ohio 536. But such payment cannot be recovered until after a judicial determination that the estate is insolvent. *Union, etc., Bank v. Jefferson*, 101 Wis. 452; 77 N. W. 889.

⁴ *Wolf v. Beaird*, 123 Ill. 585; 5 Am. St. Rep. 565; 15 N. E. 161.

⁵ *Stokes v. Goodykoontz*, 126 Ind. 535; 26 N. E. 391.

⁶ *Martin v. Bank*, 160 N. Y. 190; 54 N. E. 717.

sales of furniture on which commissions were paid under the belief that such sales were valid.⁷ Payment of illegal street assessments made in ignorance of the facts making them illegal may be recovered.⁸ If A pays money to B, in performance of a contract between them, under the mistaken belief on A's part that B has performed such contract fully, A may recover such payment.⁹ Thus, where B had agreed to plaster a house for A, and A paid him, believing that such work had been done, he may recover the money thus paid, where the contract is of such inferior quality as to be valueless.¹⁰ A agreed to sell fish for B, at ten per cent commission, and to guarantee the purchase price on sales made by him. Before making such contract with A, B had sold some of the fish to X. Memoranda of the amounts delivered to the different vendees were turned in to A, and A paid to B the amount due thereon, less his ten per cent commission. In this way A paid B for the fish which B had sold to X. On X's refusal to pay A, A sued B for such amount. It was held that A could recover.¹¹ X's will provided that A should have control of X's estate until B reached the age of eighteen, when A was to pay B a certain part of the estate; and if B died before reaching such age, the entire estate was to fall to A. A voluntarily paid B B's share before B reached the age of eighteen. Subsequently B died before reaching such age of eighteen. A was allowed to recover on the ground that the payment was made under a mistake of fact, in that B did not know that A would die before the age of eighteen.¹² Where a city engineer by mistake estimated the area paved at about three thousand square yards more than it really was, and in reliance upon such estimate, the city paid the con-

⁷ Cleveland, etc., Co. v. Hotchkiss, 89 Tex. 117; 33 S. W. 855.

⁸ Mutual Life Ins. Co. v. New York, 144 N. Y. 491; 39 N. E. 386; Tripler v. New York, 139 N. Y. 1; 34 N. E. 729; same case, 125 N. Y. 617; 26 N. E. 721; Redmond v. New York, 125 N. Y. 632; 26 N. E. 727.

⁹ Nollman v. Evenson, 5 N. D. 344; 65 N. W. 686.

¹⁰ Nollman v. Evenson, 5 N. D. 344; 65 N. W. 686.

¹¹ Blanchard v. Low, 164 Mass. 118; 41 N. E. 118.

¹² Semmig v. Merrihew, 67 Vt. 38; 30 Atl. 691.

tractor for the entire amount of the engineer's estimate, at the rate of one dollar a square yard, it was held that the city could recover from the contractor on learning of the mistake.¹³ So if A pays a note to B under the mistaken belief that A has executed such note, A may recover.¹⁴

§820. Mistakes in computation.

A mistake as to the amount due on a debt,¹ even where the facts as to the amount of principal and payments are known, but the amount due can be ascertained only by a long arithmetical calculation,² is a mistake of fact, and a payment made by reason thereof may be recovered. Thus, where the parties make a mistake in computing the price to be paid for property, in accordance with a contract of sale,³ or make a mistake in computing the amount due on a mortgage,⁴ or by mistake compute at eight per cent interest on a note which by its terms bears interest at six per cent,⁵ or otherwise erroneously compute the interest due;⁶ or where a principal and agent make a mistake in computing their mutual accounts;⁷ or where by mistake the same item is paid twice;⁸ or where a payment is made under mistake in computing the weight of the articles sold, on which weight the payment is based,⁹ money paid under such mistakes may be recovered. A and B, tenants in common in land, were arranging a voluntary partition, and A was to take that half of the land upon which improvements were

¹³ *Duluth v. McDonnell*, 61 Minn. 288; 63 N. W. 727.

¹⁴ *Lewellen v. Garrett*, 58 Ind. 442; 26 Am. Rep. 74.

¹ *Gould v. Emerson*, 160 Mass. 438; 39 Am. St. Rep. 501; 35 N. E. 1065; *Peterson v. Bank*, 78 Wis. 113; 47 N. W. 368.

² *Worley v. Moore*, 97 Ind. 15; *Montgomery County v. Fry*, 127 N. C. 258; 37 S. E. 259; *Steere v. Oakley*, 186 Pa. St. 582; 40 Atl. 815.

³ *Norton v. Bohart*, 105 Mo. 615; 16 S. W. 598.

⁴ *Klein v. Bayer*, 81 Mich. 233; 45 N. W. 991.

⁵ *Stotsenburg v. Fordice*, 142 Ind. 490; 41 N. E. 313, 810.

⁶ *Montgomery County v. Fry*, 127 N. C. 258; 37 S. E. 259.

⁷ *Spencer v. Goddard*, 62 N. H. 702.

⁸ *Johnson v. Saum*, — Ia. —: 3 N. W. 599.

⁹ *McRae, etc., Co. v. Stone*, 119 Ga. 516; 46 S. E. 668.

erected, and pay to B the amount necessary to equalize his share. By a mistake in the computation, A paid to B the entire value of the buildings upon this tract, instead of one-half their value. It was held that A could recover the amount thus paid in by him in excess of the amount necessary to equalize his share with B's.¹⁰

§821. Recovery of payment on forged instrument.

Whether recovery of payment on a forged instrument can be had from one who has taken such instrument for value and in good faith is a question which arises not infrequently, and on which there is an unfortunate conflict of authority. Under one theory a bank is bound to know the signatures of its depositors; and if it pays a forged check, signed by the name of a depositor it cannot recover the money thus paid, if the payee has acted with reasonable prudence and in good faith.¹ Thus, where A indorsed a forged check of which he was the innocent holder, to B, and B presented it at the bank and received payment, and the bank on discovering the fact of the forgery demanded repayment of B, and B complied with the demand, it was held that B had made such payment voluntarily and that he could not recover from A.² This rule is not always placed on the ground that the bank was negligent. Sometimes

¹⁰ Reed v. Horn, 143 Pa. St. 323; 22 Atl. 877.

¹ United States Bank v. Bank, 10 Wheat. (U. S.) 333; Levy v. Bank, 4 Dall. (Pa.) 234; s. c., 1 Binn. (Pa.) 27; Chicago First National Bank v. Bank, 152 Ill. 296; 43 Am. St. Rep. 247; 26 L. R. A. 289; 38 N. E. 739; First National Bank v. Bank, 107 Ia. 327; 44 L. R. A. 131; 77 N. W. 1045; Deposit Bank v. Bank, 90 Ky. 10; 7 L. R. A. 849; 13 S. W. 339; Commercial, etc., Bank v. Bank, 30 Md. 11; 96 Am. Dec. 554; Neal v. Coburn, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl.

348; First National Bank v. Bank, 151 Mass. 280; 21 Am. St. Rep. 450; 24 N. E. 44; Germania Bank v. Boutell, 60 Minn. 189; 51 Am. St. Rep. 519; 27 L. R. A. 635; 62 N. W. 327; Bank v. Bank, 58 O. S. 207; 65 Am. St. Rep. 748; 41 L. R. A. 584; 50 N. E. 723. (Distinguishing Ellis v. Trust Co., 4 O. S. 628; 64 Am. Dec. 610, as decided under a local custom.) Moody v. Bank, 19 Tex. Civ. App. 278; 46 S. W. 660; Bank v. Bank, 10 Vt. 141; 33 Am. Dec. 188.

² Neal v. Coburn, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl. 348.

the reason assigned is that between two equally innocent parties the loss must lie where it falls. Another line of cases holds that if the drawee bank is free from all negligence except that of paying the check in reliance on the indorsement of the holder, it may recover such payment.³ The right to recover is very materially affected by the negligence of either party. If the bank which forwards the forged check was negligent and could by the use of due diligence have discovered the forgery, the bank which pays such forged check may recover from the bank which forwards it.⁴ If, on the other hand, the drawee bank omits to give reasonably prompt notice of the fact of the forgery it cannot recover the payment even if such recovery would have been permitted otherwise.⁵ In jurisdictions in which the payee bank is ordinarily allowed to recover, only reasonably prompt notice is necessary.⁶ The right of recovery has been recognized under special circumstances. A sent a check to B on a bank, X. C, a person of almost the same name as B, obtained the check, endorsed it with his own name and deposited it with the bank Y, which forwarded it to X, but did not show that it was collecting it as agent merely. X paid Y and Y paid C. A then sued the bank X in Minnesota to recover the amount of his deposit without deducting this check. X gave notice to Y, which was located in Massachusetts, of the pendency of this action. Y did not defend and judgment was rendered against X. X then sued Y and recovered the payment. The ground of recovery was based on the theory that the judgment was conclusive against Y.⁷ As the bank, even if bound to know the signature of the depositor, is not charged

³ First National Bank v. Bank, 4 Ind. App. 355; 51 Am. St. Rep. 221; 30 N. E. 808; Corn Exchange Bank v. Bank, 91 N. Y. 73; 43 Am. Rep. 655; People's Bank v. Bank, 88 Tenn. 299; 17 Am. St. Rep. 884; 6 L. R. A. 724; 12 S. W. 716.

⁴ Canadian Bank v. Bingham, 30 Wash. 484; 60 L. R. A. 955; 71 Pac. 43.

⁵ United States v. Bank, 6 Fed. 134.

⁶ Schroeder v. Harvey, 75 Ill. 638.

⁷ First National Bank v. Bank, 182 Mass. 130; 94 Am. St. Rep. 637; 65 N. E. 24 (citing on the proposition that the judgment was binding on the other bank: Knickerbocker v. Wilcox, 83 Mich. 200; 21 Am. St. Rep. 595; 47 N. W. 123; and Konitsky v. Meyer, 49 N. Y. 571).

with knowledge of the contents of all instruments executed by him, money paid out on an altered check may be recovered.⁸ Accordingly payment of a genuine check on a forged indorsement may be recovered.⁹ So if a bank, in reliance upon the representations of a person as to his identity, delivers a check to him which he indorses with the name of the person whom he represents himself to be, and delivers to A, to whom the bank pays it, the bank making the payment cannot recover from A if the representations as to the identity of the indorser are false and the indorsement is forged.¹⁰ A altered a check on the drawee bank, X, raising the amount and deposited it with a bank, Y, which sent it to X through the clearing house. X paid Y and Y paid A. On learning of the alteration X sued Y. It was held that no recovery could be had.¹¹ Under any theory, no recovery can be had unless the bank making the payment can show that it has suffered a loss. If it has the means of charging such checks against the account of its depositor, it cannot maintain an action to recover such payment.¹²

§822. Recovery of payment causing overdraft.

If a bank pays a check which overdraws a depositor's account, some authorities hold that the bank cannot recover from payee if he does not know that such check will make an overdraft. The

⁸ *Espy v. Bank*, 18 Wall. (U.S.) 614; *Parke v. Roser*, 67 Ind. 500; 33 Am. Rep. 102; *National Bank v. Bank*, 122 N. Y. 367; 25 N. E. 355.

⁹ *First National Bank v. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247; 26 L. R. A. 289; 38 N. E. 739; affirming 40 Ill. App. 640; *First National Bank v. Bank*, 4 Ind. App. 355; 51 Am. St. Rep. 221; 30 N. E. 808; *First National Bank v. Bank*, 182 Mass. 130; 94 Am. St. Rep. 637; 65 N. E. 24; *Carpenter v. Bank*, 123 Mass. 66; *National Bank v. Bangs*, 106 Mass. 441; 8 Am.

Rep. 349; *Hensel v. Ry.*, 37 Minn. 87; 33 N. W. 329; *First National Bank v. Bank*, 56 Neb. 149; 76 N. W. 430; *Shaffer v. McKee*, 19 O. S. 526; *Rouvant v. Bank*, 63 Tex. 610.

¹⁰ *Land Title and Trust Co. v. Bank*, 196 Pa. St. 230; 79 Am. St. Rep. 717; 50 L. R. A. 75; 46 Atl. 420.

¹¹ *Crocker-Woolworth National Bank v. Bank*, 139 Cal. 564; 96 Am. St. Rep. 169; 63 L. R. A. 245; 73 Pac. 456.

¹² *Land, etc., Co. v. Bank*, 196 Pa. St. 230; 79 Am. St. Rep. 717; 50 L. R. A. 75; 46 Atl. 420.

reasons given for such holding are different in different jurisdictions. In some recovery is denied because the bank is chargeable with knowledge of the amount of depositors' funds in its hands.¹ "The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point there should be none hereafter;"² in others because the mistake is as to a collateral matter.³ Under this rule, where A gave B a check on a bank which B deposited in the same bank, receiving credit therefor on his pass-book, the bank cannot on the same day return the check and cancel the credit to B because A's account was overdrawn.⁴ Such a deposit is treated as a payment. Accordingly where a different theory obtains and such a deposit is held to be for collection only, not amounting to a payment by the bank of the check thus deposited, the bank may erase the credit given for a check on discovering that the drawer has no funds.⁵ In Massachusetts a payment of a check without the bank's examining the drawer's account, which had not been reduced during the preceding month, was held to be made with such negligence as to preclude recovery.⁶ Under different circumstances a recovery has been allowed. B, an agent of a bank, Y, sold goods which had been pledged to Y, and put the proceeds in the bank, Y, in his own name. B then drew a check payable to A upon the bank Y. A deposited this in the bank X, and X paid it to Y. Under the rules of the clearing house, checks which were not good could be returned if not retained after one P. M.

¹ *Manufacturers' National Bank v. Swift*, 70 Md. 515; 14 Am. St. Rep. 381; 17 Atl. 336; *Oddie v. Bank*, 45 N. Y. 735; 6 Am. Rep. 160.

² *Oddie v. Bank*, 45 N. Y. 735, 742; 6 Am. Rep. 160. In *Merchants' National Bank v. Swift*, *supra*, the depositor's account proved insufficient because a deposit made by him and put to his credit was of

trust funds which he could not retain, and the facts of such deposit were all known to the bank.

³ *Chambers v. Miller*, 13 C. B. N. S. 125.

⁴ *Oddie v. Bank*, 45 N. Y. 735; 6 Am. Rep. 160.

⁵ *National, etc., Co. v. McDonald*, 51 Cal. 64; 21 Am. Rep. 697.

⁶ *Boylston National Bank v. Richardson*, 101 Mass. 287.

Before the bank X had paid B, but after it had given B credit for the amount of this check upon his book, Y demanded repayment of this amount from X. On X's refusal Y sued. It was held that Y could recover the amount of such check less the amount of B's deposit in the bank actually belonging to B.⁷ If the payee knows that the check makes an overdraft and the bank pays in ignorance of such fact, the bank has been allowed to recover from the payee.⁸

§823. No recovery for mistake as to collateral matter.

In order to permit recovery of a payment, however, the mistake of fact must not be as to some collateral matter, but must affect the very existence of the liability which the payment was intended to discharge.¹ If a liability of any sort exists payment thereof cannot be recovered on account of some mistake in the inducement.² Thus, where A owes B, and C takes A's check, thinking it good, and pays B personally, C cannot recover such payment from B if A's check proves worthless.³ So where A is indebted to B and by mistake as to some other liability pays B on a different non-existent claim, A cannot recover

⁷ Merchants' National Bank v. Bank, 139 Mass. 513; 2 N. E. 89.

⁸ Martin v. Morgan, 3 Moore (C. P. & Ex.) 635; Peterson v. Bank, 52 Pa. St. 206; 91 Am. Dec. 146.

¹ Aiken v. Short, 1 Hurl. & N. 210; Garretson v. Joseph, 100 Ala. 279; 13 So. 948; Langevin v. St. Paul, 49 Minn. 189; 15 L. R. A. 766; 51 N. W. 817; Southwick v. Bank, 84 N. Y. 420; Pepperday v. Bank, 183 Pa. St. 519; 63 Am. St. Rep. 769; 39 L. R. A. 529; 38 Atl. 1030; Buffalo v. O'Malley, 61 Wis. 255; 50 Am. Rep. 137; 20 N. W. 913. "A mistake where that is the foundation of the action must relate to a fact which is material, essential to the transaction between the parties. A payment made under the influence of a mistake concern-

ing a fact which, even if it were as it is supposed to be, would create no legal obligation, but merely operate as an inducement upon the mind of the party paying the money, the other party being without fault, would not justify a recovery as for money had and received." Langevin v. St. Paul, 49 Minn. 189, 196; 15 L. R. A. 766; 51 N. W. 817.

² Pensacola, etc., R. R. v. Braxton, 34 Fla. 471; 16 So. 317. "The mistake must be to such an extent as will amount to destruction of the consideration." Ashley v. Jennings, 48 Mo. App. 142, 147.

³ Garretson v. Joseph, 100 Ala. 279; 13 So. 948; Pepperday v. Bank, 183 Pa. St. 519; 63 Am. St. Rep. 769; 39 L. R. A. 529; 38 Atl. 1030.

such payment from B until A's indebtedness to B is satisfied.⁴ Thus where A had a claim against a railroad for killing cattle, and after he had presented his claim he received a voucher, which the railroad paid, he is not obliged to repay such sum until his claim is settled, even though such order was intended for another man of the same name and was paid under mistake as to the identity of the person asking payment.⁵ So if A owns two lots and B a third adjoining A's, and the city brings suit to enforce an assessment on such lots and takes a decree for the assessment against the three lots jointly, A cannot redeem his lots alone, but must redeem B's as well. Hence if A redeems all three, thinking that B's lot belongs to A, this is a mere matter of inducement and A cannot recover from the city the amount due on B's lot alone. This is true especially after the city has paid over the money received at the tax-sale, from which sale A was redeeming his land, to the contractors.⁶ A endorsed several instruments for B, thinking them in effect promissory notes. As they fell due, and were not paid by B, A paid those first maturing to C, the holder thereof, under the belief that A was liable as endorser. A resisted payment of the last instruments of the series and established his non-liability.⁷ A then sued C to recover the payment made by him to C on the first instrument of the series. It was held that he could not recover, even though he had been mistaken in his belief that upon paying such instruments he would be subrogated to the security held therefor.⁸ By mistake of fact, is meant mistake as to the fact creating or relieving from liability, and not mistake as to the evidence by which such fact was to be proven.

⁴ Pensacola, etc., R. R. v. Braxton, 34 Fla. 471; 16 So. 317; Ashley v. Jennings, 48 Mo. App. 142.

⁵ Pensacola, etc., R. R. v. Braxton, 34 Fla. 471; 16 So. 317.

⁶ Langevin v. St. Paul, 49 Minn. 189; 15 L. R. A. 766; 51 N. W. 817.

⁷ First National Bank v. Alton, 60 Conn. 402; 22 Atl. 1010.

⁸ Alton v. Bank, 157 Mass. 341; 34 Am. St. Rep. 285; 18 L. R. A. 144; 32 N. E. 228. The court said that the right of subrogation was "A collateral matter and no part of his principal contract by which he makes himself surety. The existence of that right is not the implied foundation of the principal contract."

Thus where A paid a debt and subsequently lost the receipt, and on demand of his creditor paid the debt again, it was held that A could not recover such payment after he had found his receipt, and was thus able to prove that he had paid it before.⁹ Payment of a judgment not a lien on the homestead, made because the judgment debtor, by reason of a mistake in his abstract of title thinks it is a lien thereon and that he cannot borrow money on his homestead unless such debt is paid, is not under mistake.¹⁰

§824. Negligence of party making payment.—Held not to bar recovery.

Where payment is made by one who is under no legal liability, under mistake of fact as to the existence of such liability, the weight of authority is that such payment may be recovered, even if the party making it could have discovered his mistake if he had used proper diligence.¹ The mere fact that the party making the payment had the means of knowing the facts does not prevent him from recovering.² It is not the means of knowledge possessed by the party making the payment, but his actual knowledge or ignorance of material facts that determines his right to recover.³ So, where A paid money for

⁹ *Marriott v. Hampton*, 7 T. R. 269.

¹⁰ *Lathrope v. McBride*, 31 Neb. 289; 47 N. W. 922. Nor is such payment under duress.

¹ *Union National Bank v. McKey*, 102 Fed. 662; *Brown v. Tillinghast*, 84 Fed. 71; *Merrill v. Brantley*, 133 Ala. 537; 31 So. 847; *Rutherford v. McIvor*, 21 Ala. 750; *Indianapolis v. McAvoy*, 86 Ind. 587; *Metropolitan Life Ins. Co. v. Bowser*, 20 Ind. App. 557; 50 N. E. 86; *Douglas County v. Keller*, 43 Neb. 635; 62 N. W. 60; *Mayer v. New York*, 63 N. Y. 455; *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139; *McKibben v.*

Doyle, 173 Pa. St. 579; 51 Am. St. Rep. 785; 34 Atl. 455; *Hummel v. Flores* (Tex. Civ. App.), 39 S. W. 309; *City National Bank v. Peed* (Va.), 32 S. E. 34.

² *Indianapolis v. McAvoy*, 86 Ind. 587; *McKibben v. Doyle*, 173 Pa. St. 579; 51 Am. St. Rep. 785; 34 Atl. 455.

³ "The possession of the means of knowledge by the party who paid the money can be regarded as affording a strong observation to the jury to induce them to believe that he had an actual knowledge of the circumstances; but . . . there is no conclusive rule of law that because a party has the means of

a party-wall, relying on B's claim of ownership, A may recover, though A had the means of learning of B's want of title.⁴ So A, a mortgagee of a cotton crop, whose mortgage secures a debt greater than the value of the crop, who knows that B holds a second mortgage on the same crop, and who buys from B such crop and pays for it, may recover from B the money thus paid where he did not know that it was the same crop, even if he could have learned such fact by due diligence.⁵ Thus where a sheriff made a levy upon property which had been taken on a prior attachment, and hearing nothing from such prior attaching officer or creditor, sold such property and paid the proceeds over to the party whose execution the sheriff was serving, and the latter was afterwards obliged to pay over the amount for which the prior attachment was issued, it was held that he might recover the amount of such payment from the execution creditor to whom he had paid the entire amount.⁶ Accordingly one who has known a fact but has forgotten it, and under such forgetfulness makes a payment, may recover such payment.⁷ Thus where A, acting as clerk for B, an express messenger, delivered a package of money to C and forgot to make a note or take a receipt of it, and C, after A had forgotten the facts, claimed that he had not received the money, and thereupon A and B contributed to make up the amount and paid the express company, which paid C, A was allowed on learning of his mistake to recover the amount from C.⁸

§825. Negligence held to bar recovery.

There is, however, some authority for the proposition that one paying under mistake of fact, which he could have dis-

knowledge he has the knowledge itself." 2 Chitty Cont. (11 Am. Ed.) 930; quoted in *Brown v. College Corner, etc., Co.*, 56 Ind. 110; which in turn is quoted in *Stotsenburg v. Fordice*, 142 Ind. 490; 41 N. E. 313, 810.

⁴ *McKibben v. Doyle*, 173 Pa. St. 579; 51 Am. St. Rep. 785; 34 Atl. 455.

⁵ *Merrill v. Brantley*, 133 Ala. 537; 31 So. 847.

⁶ *Glenn v. Shannon*, 12 S. C. 570.

⁷ *Kelly v. Solari*, 9 M. & W. 54; *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139; *Guild v. Baldridge*, 2 Swan. (Tenn.) 295.

⁸ *Houser v. McGinnas*, 108 N. C. 631; 13 S. E. 139.

covered by due diligence cannot recover such payment.¹ So a debtor who makes a payment under a mistake of a fact which he would have known had he used ordinary diligence in examining his receipts, cannot recover.² So it has been held that as an executor has the means of knowing the solvency of the estate, he cannot recover a payment made under a mistake of fact as to such solvency.³ So an administrator who believing that the estate of his principal is solvent pays a note of such principal cannot recover a payment in excess of the dividend which such estate pays from a surety on such note, although the surety would have been obliged to pay the note had the administrator not done so, and though the loss will fall on the administrator personally.⁴ No relief can be had for mistake of a fact which knowledge of which the party making the mistake was specially charged.⁵ Thus where A and B, who were to furnish timber to X agree that it should all be furnished in A's name, and he should draw the money and pay B, and A drew some of the money, giving credit for the rest, and paid B a greater proportion of the cash paid in than corresponded to the share of timber furnished by B, though less than was due B for the timber, it was held that A was bound to know how much timber B had furnished as compared with A, and hence that A could not recover an excess of payment, even assuming that B was entitled only to his proportionate share of the cash paid in.⁶ Where it was the sheriff's duty to look up municipal liens and assessments upon property which he has sold before distributing the funds, a sheriff who overlooks a lien, and pays money to the mortgagee, cannot recover from such mortgagee

¹ *Alton v. Bank*, 157 Mass. 341; 34 Am. St. Rep. 285; 18 L. R. A. 144; 32 N. E. 228. *Brummitt v. McGuire*, 107 N. C. 351; 12 S. E. 191; *Stevens v. Head*, 9 Vt. 174; 31 Am. Dec. 617; *Proudfoot v. Clevenger*, 33 W. Va. 267; 10 S. E. 394.

² *Brummitt v. McGuire*, 107 N. C. 351; 12 S. E. 191.

³ *Paine v. Drury*, 19 Pick. (Mass.)

400; *Carson v. McFarland*, 2 Rawle (Pa.) 118; 19 Am. Dec. 627; *Shriver v. Garrison*, 30 W. Va. 456; 4 S. E. 660.

⁴ *Proudfoot v. Clevenger*, 33 W. Va. 267; 10 S. E. 394.

⁵ *Simmons v. Looney*, 41 W. Va. 738; 24 S. E. 677.

⁶ *Simmons v. Looney*, 41 W. Va. 738; 24 S. E. 677.

the amount which the sheriff is afterwards compelled to pay to the city.⁷ A payment by a mistake of fact, of which fact the party making the payment has constructive notice cannot be recovered. Thus where a city elected to take part of the land under lease for public use, and by the statute such election conveyed the legal title in such part to the city, a lessee, who after such election has paid the entire rent to his lessor, cannot recover from him an amount proportioned to the value of the property thus taken by the city; since, even if he has no actual notice of such election he is, as a party to the proceeding, bound to take notice.⁸

§826. Innocent payee must be placed in *statu quo*.

If the person to whom the money is paid by mistake receives it in good faith and without knowledge of the mistake under which it is paid, he cannot be compelled to repay it unless he can be placed in *statu quo*.¹ If he has paid the money over to those who, as far as he is concerned are entitled to it² he cannot be compelled to refund. If he has otherwise altered his position in reliance on such payment he is not liable therefor.³ Thus where A, a mortgagor, believes that certain realty which A and B, the mortgagee, intended to include under the mortgage, is covered thereby, and in that belief A pays money to B

⁷ *Krumbhaar v. Yewdall*, 153 Pa. St. 476; 26 Atl. 219. In this case the mortgagee had subsequently altered his position, on the assumption that there were no assessment liens upon such property, and he could not be placed in *statu quo*. The court, however, rest their opinion on the ground that the mortgagee took the payment in good faith, and had done nothing to mislead the sheriff.

⁸ *McCardell v. Miller*, 22 R. I. 96; 46 Atl. 184.

¹ *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *Langevin v. St.*

Paul, 49 Minn. 189; 15 L. R. A. 766; 51 N. W. 817; *Behring v. Somerville*, 63 N. J. L. 568; 49 L. R. A. 578; 44 Atl. 641; *Krumbhaar v. Yewdall*, 153 Pa. St. 476; 26 Atl. 219; *Richley v. Clark*, 11 Utah 467; 40 Pac. 717.

² *Langevin v. St. Paul*, 49 Minn. 189; 15 L. R. A. 766; 51 N. W. 817.

³ *Krumbhaar v. Yewdall*, 153 Pa. St. 476; 26 Atl. 219. (In this case defendant was held not liable, though his immunity was placed on other grounds.)

to secure a release of such realty from such mortgage, and subsequently in a foreclosure suit such payment is credited on the debt and B's rights are fixed by decree, A cannot thereafter recover from B.⁴ The opinion of the majority was based on the theory that in such cases the more negligent of the two should suffer. One judge dissented for the reason that B knew of such mistake before the decree was rendered, but still allowed such payment to be credited on his debt. Thus A, the owner of a note and mortgage assigned it to B by assignment of record, but kept the mortgage. Subsequently A assigned it again to C, who had no actual notice of the assignment to B. X, the mortgagor, paid C's interest in the mortgage to C. Subsequently X was obliged to pay the entire debt to B. X then sued C to recover the amount paid to C, but it was held that X could not recover.⁵ The rule that a party who is guilty of negligence in not ascertaining facts and so makes a payment under a mistake of fact cannot recover⁶ applies with the greatest force where he has by his negligence misled the adversary party, who has altered his position and cannot be placed in *statu quo*.⁷ Thus A was the agent of B, the railroad company. X was A's cashier, and had worked in that capacity for A's predecessor. The rules of the railroad required prompt settlement each month of all money received for freight. X was an embezzler when A entered on his employment; but A allowed X to neglect the rule requiring prompt payment and to transmit money, really received as cash on recent freight accounts, as payments on older accounts. X's defalcation was thus concealed for a time. When it was discovered, the railroad company claimed that the shortage had arisen since A's employment began; and A, believing such claim, paid X's shortage. The delay in discovering the shortage caused the release of a

⁴ Richley v. Clark, 11 Utah 467; 40 Pac. 717.

⁵ Behring v. Somerville, 63 N. J. L. 568; 49 L. R. A. 578; 44 Atl. 641. (C in reliance on X's payment had released the note and

mortgage which he was holding as collateral.)

⁶ See § 825.

⁷ Fegan v. Ry., 9 N. D. 30; 81 N. W. 39.

surety on X's bond, by lapse of time. It was held that A, on learning that X's shortage was created before A's employment began, could not recover the payment from the railroad.⁸

§827. Mistake need not be mutual.

While the mistake under which payments whose recovery are allowed are made may be mutual,¹ it is not necessary to recovery that it should be mutual.² The doctrine of mutuality of mistake applies primarily to mistakes in expression,³ and has no application to payment by mistake. The cases occasionally cited to show its necessity in the law of payments are cases in which a *bona fide* payee has so altered his position that he cannot be placed in *statu quo*.

IX. PAYMENT BY MISTAKE OF LAW.

§828. Payment by mistake of law.

Money paid with full knowledge of all material facts, under mistake of law, cannot be recovered in the absence of other reasons for allowing such recovery.¹ The same principles apply where there is full knowledge of facts but one party subse-

⁸ Fegan v. Ry., 9 N. D. 30; 81 N. W. 39.

¹ Worley v. Moore, 97 Ind. 15.

² Stotsenburg v. Fordice, 142 Ind. 490; 41 N. E. 313, 810.

³ See § 84.

¹ Bilbie v. Lumley, 2 East. 469; Holt v. Thomas, 105 Cal. 273; 38 Pac. 891; Brumagin v. Tillinghast, 18 Cal. 265; 79 Am. Dec. 176; Morgan Park (Village of) v. Knopf, 199 Ill. 444; 65 N. E. 322; McWhinney v. Logansport, 132 Ind. 9; 31 N. E. 449; Painter v. Polk Co., 81 Ia. 242; 25 Am. St. Rep. 489; 47 N. W. 65; Cherokee County v. Hubbard, 8 Kan. App. 500; 55 Pac. 557; Louisville, etc., Ry. v. Hop-

kins Co., 87 Ky. 605; 9 S. W. 497; Coburn v. Neal, 94 Me. 541; 48 Atl. 178; Bragdon v. Freedom, 84 Me. 431; 24 Atl. 895; Freeman v. Curtis, 51 Me. 140; 81 Am. Dec. 564; Baltimore v. Lefferman, 4 Gill 425; 45 Am. Dec. 145; Taber v. New Bedford, 177 Mass. 197; 58 N. E. 640; Alton v. Bank, 157 Mass. 341; 34 Am. St. Rep. 285; 18 L. R. A. 144; 32 N. E. 228; Forbes v. Appleton, 5 Cush. 115; Lamb v. Rathburn, 118 Mich. 666; 77 N. W. 268; Erkens v. Nicolin, 39 Minn. 461; 40 N. W. 567; Needles v. Burk, 81 Mo. 569; 51 Am. Rep. 251; Kane v. Dauernheim, 60 Mo. App. 64; Stratford Savings Bank v. Church, 69 N.

quently wishes to avoid the transaction.² Payments of this sort are merely examples, and the most common kind, of voluntary payments, and fall within the rule that voluntary payments cannot be recovered.

§829. Illustrations.—Total failure of consideration.

The principle that payments made under a mistake of law cannot be recovered applies to payments made by one who was under no legal liability to make them, and who receives nothing in return therefor, although by reason of his mistake of law he believes that by such payments he is discharging a legal liability.¹ Thus one who pays under an erroneous construction of the contract,² as a misconstruction as to the rate of interest after maturity,³ or mistaking the liability of indorsers,⁴ or believing that he is legally liable for his minor child's tort,⁵ cannot recover such payment. So if the holder of the legal title of stock pays an assessment thereon after insolvency,⁶ or if an executor, mistaking the law as to lapsed legacies, pays to an adopted child of

H. 582; 44 Atl. 105; Camden v. Green, 54 N. J. L. 591; 33 Am. St. Rep. 686; 25 Atl. 357; Newburgh Savings Bank v. Woodbury, 173 N. Y. 55; 65 N. E. 858; Vanderbeck v. Rochester, 122 N. Y. 285; 10 L. R. A. 178; 25 N. E. 408; Flynn v. Hurd, 118 N. Y. 19; 22 N. E. 1109; Devereux v. Ins. Co., 98 N. C. 6; 3 S. E. 639; Commissioners v. Commissioners, 75 N. C. 240; Matthews v. Smith, 67 N. C. 374; First National Bank v. Taylor, 122 N. C. 569; 29 S. E. 831; Phillips v. MeConica, 59 O. S. 1; 69 Am. St. Rep. 753; 51 N. E. 445; Cincinnati v. Coke Co., 53 O. S. 278; 41 N. E. 239; Railroad Co. v. Iron Co., 46 O. S. 44; 1 L. R. A. 412; 18 N. E. 486; Mays v. Cincinnati, 1 O. S. 269; Robinson v. Charleston, 2 Rich. L. (S. C.) 317; 45 Am. Dec. 739; Evans v. Hughes County, 3 S. D.

244, 580; 52 N. W. 1062; 54 N. W. 603; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Shriver v. Garrison, 30 W. Va. 456; 4 S. E. 660; Beard v. Beard, 25 W. Va. 486; 52 Am. Rep. 219; Birkhauser v. Schmitt, 45 Wis. 316; 30 Am. Rep. 740.

² Buckley v. Redmond, 95 Mich. 282; 54 N. W. 771; Haeg v. Haeg, 53 Minn. 33; 55 N. W. 1114.

¹ Strafford Savings Bank v. Church, 69 N. H. 582; 44 Atl. 105.

² Cincinnati v. Coke Co., 53 O. S. 278; 41 N. E. 239.

³ Rector v. Collins, 46 Ark. 167; 55 Am. Rep. 571.

⁴ First National Bank v. Taylor, 122 N. C. 569; 29 S. E. 831.

⁵ Needles v. Burk, 81 Mo. 569; 51 Am. Rep. 251.

⁶ Holt v. Thomas, 105 Cal. 273; 38 Pac. 891.

testator's deceased daughter a legacy which had lapsed by the death of such daughter before testator,⁷ such payments cannot be recovered. Thus A believed that he was liable as indorser on a check, whereas under the facts known to him he was not liable as a matter of law. He made a payment on such supposed liability and agreed to pay the rest. Subsequently he resisted liability on this promise successfully,⁸ and then sued to recover the payment already made. As such payment was made under a pure mistake of law, no recovery could be had.⁹ So a husband who as administrator of his deceased wife delivers certain securities to her son as his distributive share cannot afterwards assert an interest in them as husband.¹⁰ So in the absence of duress, one who pays a license fee in excess of the amount fixed by law,¹¹ or pays an unauthorized tax, no duress existing,¹² cannot recover the amount so paid. So a public officer who pays into the treasury fees which he is entitled to retain cannot recover them.¹³

§830. Doctrine that payments by mistake of law may be recovered.

In some jurisdictions recovery of money paid under a mistake of law may be recovered where the party to whom it is paid is in no way entitled thereto.¹ Thus an executor who pays a

⁷ *Phillips v. McConica*, 59 O. S. 1; 69 Am. St. Rep. 753; 51 N. E. 445.

⁸ *Neal v. Coburn*, 92 Me. 139; 69 Am. St. Rep. 495; 42 Atl. 348.

⁹ *Coburn v. Neal*, 94 Me. 541; 48 Atl. 178.

¹⁰ *Hughes v. Pealer*, 80 Mich. 540; 45 N. W. 589. In this case the court found as a fact that the husband knew his rights.

¹¹ *Camden v. Green*, 54 N. J. L. 591; 33 Am. St. Rep. 686; 25 Atl. 357.

¹² *Louisville, etc., Ry. v. Marion County*, 89 Ky. 531; 12 S. W. 1064;

Yates v. Ins. Co., 200 Ill. 202; 65 N. E. 726; *Manistee Lumber Co. v. Springfield Township*, 92 Mich. 277; 52 N. W. 468.

¹³ *Wesson v. Collins*, 72 Miss. 844, 850; 18 So. 360, 917.

¹ *Mansfield v. Lynch*, 59 Conn. 320; 12 L. R. A. 285; 22 Atl. 313; *Lyon v. Mason & Foard Co.*, 102 Ky. 594; 44 S. W. 135; *Bruner v. Stanton*, 102 Ky. 459; 43 S. W. 411. "We mean distinctly to assert that when money is paid by one under a mistake of his rights and his duty, and which he was under no moral or legal obligation to pay, and which

legacy under an erroneous construction of the will,² or who pays debts in full under a mistaken belief that certain other debts of whose existence he knows are not legally enforceable because not proved by writing signed by decedent,³ may recover such payments, or the amount thereof in excess of what should have been paid. So where one pays a license fee under the mistaken belief that the ordinance imposing it is valid may recover such payment.⁴ Where a public officer permits one in ignorance of the law to pay license fees for burial permits, which fees were not authorized by law it has been held that such payments may be recovered as made by fraud.⁵ If A attempts to effect insurance, and without any fraud on A's part the insurance never takes effect,⁶ as where a mortgagee by mistake of law takes out insurance on the mortgaged property believing that it protects his interest,⁷ or without fraud the insured makes a warranty broken when made, such as one concerning his occupation,⁸ or the location of the property insured,⁹ A may recover the premiums paid. If the agent of the insurance company has misled both the insurance company and the insured, the right of the insured to recover the premiums paid in is clear.¹⁰ To keep them "would be an act of bad faith and of the grossest injustice

the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether the mistake be one of law or fact; and this we insist may be done both upon the principles of Christian morals and the Common Law." *Northrop v. Graves*, 19 Conn. 548, 554; 50 Am. Dec. 264; quoted in *Mansfield v. Lynch*, 59 Conn. 320, 327; 12 L. R. A. 285; 22 Atl. 313.

² *Northrop v. Graves*, 19 Conn. 548; 50 Am. Dec. 264.

³ *Mansfield v. Lynch*, 59 Conn. 320; 12 L. R. A. 285; 22 Atl. 313.

⁴ *Bruner v. Stanton*, 102 Ky. 459; 43 S. W. 411. "He is not presumed to know more than those who constitute the legislative and execu-

tive departments of the government under which he lives." *Louisville v. Anderson*, 79 Ky. 334, 340; 42 Am. Rep. 220; quoted in *Bruner v. Stanton*, 102 Ky. 459, 461; 43 S. W. 411.

⁵ *Marcotte v. Allen*, 91 Me. 74; 40 L. R. A. 185; 39 Atl. 346.

⁶ *Metropolitan Life Ins. Co. v. Bowser*, 20 Ind. App. 557; 50 N. E. 86.

⁷ *Waller v. Assurance Co.*, 64 Ia. 101; 19 N. W. 865.

⁸ *McDonald v. Ins. Co.*, 68 N. H. 4; 73 Am. St. Rep. 548; 38 Atl. 500.

⁹ *Jones v. Ins. Co.*, 90 Tenn. 604; 25 Am. St. Rep. 706; 18 S. W. 260.

¹⁰ *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

and dishonesty.”¹¹ This right of recovery of payment made under mistake of law is limited to cases where such payment should not have been made in morals and in good conscience. The mere non-existence of legal liability is not enough to justify recovery. Thus a husband conveyed land to his wife, B, and she agreed as part of the consideration to assume a debt of his. By reason of her coverture such agreement had no validity. Subsequently she paid such debt. It was held that she could not thereafter recover it, even though such payment could not have been compelled.¹²

§831. Mistake of law coupled with other operative facts.

Other reasons may, however, enable the party who has paid money under mistake of law to recover it. Thus where the payment is obtained by B's knowing A's mistake and taking advantage of it;¹ or by actively causing A to make such mistake,² or by B's using A's mistake as a means of exerting undue influence over A,³ A may recover the money so paid. So where the probate judge rendered services in settling a will contest, contrary to a statute which forbade a probate judge to practice law, payment made to him by his client in ignorance of the law and under his influence may be recovered.⁴ The principle that a payment made by one person under a mistake of law, and received by one who knows that the other party is paying by reason of such mistake, may be recovered, is not limited to cases of payment to a public officer. Payment under such facts may be recovered from a private person to whom such payment is made.⁵ In case of a known mistake of law mere silence may be fraud.⁶

¹¹ *Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 233; quoted in *McDonald v. Ins. Co.*, 68 N. H. 4, 6; 73 Am. St. Rep. 548; 38 Atl. 500.

¹² *Ruppell v. Kissel* (Ky.), 74 S. W. 220.

¹ *Toland v. Corey*, 6 Utah 392; 24 Pac. 190.

² *Kinney v. Dodge*, 101 Ind. 573.

³ *Evans v. Funk*, 151 Ill. 650; 38

N. E. 230; *Baehr v. Wolf*, 59 Ill. 470.

⁴ *Evans v. Funk*, 151 Ill. 650; 38 N. E. 230.

⁵ *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556.

⁶ *Downing v. Deaborn*, 77 Me. 457; 1 Atl. 407.

Under the civil code of California § 1578, payment under a mistake of law, which is shared substantially by all the parties, may be recovered.⁷ So where the mortgagee's attorney advises the mortgagor that as the mortgage covers the rents and profits, the mortgagee is entitled to the proceeds of the crops, and the mortgagor accordingly pays over the proceeds of the crop, such payment is made under a mistake of law shared by all parties and may be recovered.⁸

X. MONEY LAID OUT AND EXPENDED.

§832. Money paid for use of another.— Voluntary payment.

Money paid to the use of another cannot be recovered unless there is a promise, either express or implied, to repay it.¹ If A voluntarily pays B's debt to C, with full knowledge of the facts, under no compulsion, and without B's previous request or subsequent ratification, A cannot recover the money thus paid from C as money paid to C's use.² Thus, if an agent pays a note of his principals out of his own money, without their authority, he cannot collect from one of the makers who does not assent to such payment.³ So if, without any compulsion of law, A has paid taxes on B's property, A cannot recover from B. Thus a lessee who has paid taxes on the leased property which the lessor should have paid, but has not done so at lessor's request nor because lessor has refused to pay such taxes, cannot recover for such taxes from lessor where he has for years paid the full

⁷ Gregory v. Clabrough's Executors, 129 Cal. 475; 62 Pac. 72.

⁸ Gregory v. Clabrough's Executors, 129 Cal. 475; 62 Pac. 72.

¹ Kenan v. Holloway, 16 Ala. 53; 50 Am. Dec. 162; Helm v. Smith Fee Co., 76 Minn. 328; 79 N. W. 313; Contoocook Fire Precinct v. Hopkinton, 71 N. H. 574; 53 Atl. 797; Flynn v. Hurd, 118 N. Y. 19; 22 N. E. 1109; Peoples', etc., Bank v. Craig, 63 O. S. 374; 52 L. R. A. 872; 59 N. E. 102; Crumlish v. Im-

provement Co., 38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456.

² Flynn v. Hurd, 118 N. Y. 19; 22 N. E. 1109; Kershaw County v. Camden, 33 S. C. 140; 11 S. E. 635; Crumlish v. Improvement Co., 38 W. Va. 390; 45 Am. St. Rep. 872; 23 L. R. A. 120; 18 S. E. 456.

³ Peoples', etc., Bank v. Craig, 63 O. S. 374; 52 L. R. A. 872; 59 N. E. 102.

amount of the rent without demanding repayment for such taxes, or deducting the amount thus paid from the rent.⁴ So a remainder-man who has the property assessed to him instead of to the life tenant and has paid taxes thereon with the knowledge of the life tenant but not at his request, cannot recover from him the amounts thus paid.⁵ One having no interest in realty which could be affected by a tax is a volunteer as to taxes paid by him and cannot recover.⁶ If taxes on B's land are paid by A under mistake of fact, A may recover from B. Thus where B had acquired title by adverse possession, and A, the original owner, not knowing of such adverse possession continues to pay taxes on such realty, B may recover from A the amount thus paid.⁷ So if A is legally liable for taxes which as between B and A it is B's duty to pay, A may recover from B the amounts so paid.⁸ If the claim which A pays to C is not one which should have been enforced against B legally, it is still clearer that A has no right to recover from B in the absence of previous request or subsequent ratification. Thus B had ordered cabbages to be shipped to A by C, a common carrier, in a ventilated fruit car not to be iced. The car was not iced when forwarded from the place of shipment; but at some time in the transit it was iced, probably by C's agents, without authority from B. A paid to C the charges for icing the car. It was held that A could not recover from B for such payment.⁹ B had agreed to deliver four hundred cords of wood to A, to be transported by A to Milwaukee. When B came to deliver such wood to be loaded, he found that about sixty cords of wood, of such grade that it did not comply with the terms of the contract, was piled in front of the wood which he intended to ship under his contract. In order to save the cost of handling this sixty cord load twice, B agreed with C, the captain of the vessel, to transport this load

⁴ *Western, etc., Ry. v. State* (Ga.), 14 L. R. A. 438.

⁵ *Huddleson v. Washington*, 136 Cal. 514; 69 Pac. 146.

⁶ *Rushton v. Burke*, 6 Dak. 478; 43 N. W. 815.

⁷ *Merrill v. Tobin*, 82 Ia. 529; 48 N. W. 1044.

⁸ See § 838.

⁹ *Earl v. Commission Co.*, 70 Ark. 61; 66 S. W. 148.

of wood at B's dock at Milwaukee. C, however, instead of doing this, delivered this sixty cord load of other wood to A at A's yard. A refused to accept this load of wood under the contract, but paid to C the freight for such transportation. It was held that A could not recover such amount from B.¹⁰ If A voluntarily pays B's debt to C, and B refuses to reimburse A, A cannot recover such payment from C.¹¹ Thus, where a married woman voluntarily delivers notes which belong to her separate estate in payment of her husband's debt, she cannot subsequently recover the notes or the proceeds thereof from the person to whom they are delivered in payment.¹² The rule, that when he voluntarily pays the debt of another, cannot recover from such other, has no application where, instead of paying the debt, the person who advances the money takes the assignment of the claim. A trust company, B, had arranged with a packing company, C, that C should keep a certain deposit with B, and that B should pay tickets which were issued for the payment of live stock bought by C. C's deposit with B was not to be used in payment of such advances, but B was to forward to C a statement of the money thus advanced, and C was to remit the amount thereof to B. Subsequently, the trust company asked A, a bank, to advance money to pay these tickets. A did so, taking the assignment of the tickets. B subsequently became insolvent. It was held, as between A and C, that A had a right to recover from C the amount advanced by A upon such tickets which were assigned over to A.¹³

§833. Exceptions to doctrine of voluntary services and payments.
— Funeral expenses.

Certain duties imposed by law are of such character as to be easily evaded contrary to the policy of the law, if the general principles forbidding recovery in cases of voluntary payments,

¹⁰ Sanderson v. Brick Co., 110 Wis. 618; 86 N. W. 169.

¹¹ Boyer v. Richardson, 52 Neb. 156; 71 N. W. 981.

¹² Gillespie v. Simpson (Ark.), 18 S. W. 1050.

¹³ Sioux National Bank v. Packing Co., 63 Fed. 805.

services or furnishing goods are applied. These cases form an exception to these general principles. The common feature of these exceptional cases is that from their nature, strong reasons of public policy demand prompt action, and to secure this action in cases of the neglect or omission of the person primarily liable, any other person taking such action may recover therefor from the person or fund primarily liable. In cases of the latter class the person to whom support is furnished would perish or hold his existence only on the precarious tenure of charity if obliged to await the result of a direct action to compel the person legally liable for such support to perform his legal duty even if an appropriate action existed in every case. Hence a right of action in implied assumpsit is given to the person furnishing such support. Since the Common Law remedy in such cases was an action in general assumpsit, these rights of action are classed with implied contract, though there is usually no genuine agreement. Funeral expenses form a prominent class of cases illustrating this general principle. In the absence of an executor or administrator, or his omission to act, a third person who pays for funeral expenses or renders them because of the necessities of the particular case and not as an officious intermeddler may recover from the decedent's estate a reasonable compensation therefor.¹ Thus the widow may recover the amount expended by her for grave clothes and undertaker's expenses for the burial of her husband.² So a son of the deceased, who not knowing that the latter had any property, bought a cemetery lot which was larger than necessary, but there was nothing to show that a smaller lot could have been bought, may be reimbursed out of his parent's estate.³ So one who furnishes a reasonable amount of flowers at decedent's funeral, at the request of decedent's

¹ *Fogg v. Holbrook*, 88 Me. 169; 33 L. R. A. 660; 33 Atl. 792; *Marple v. Morse*, 180 Mass. 508; 62 N. E. 966; *Booth v. Radford*, 57 Mich. 357; 24 N. W. 102; *Sullivan v. Horner*, 41 N. J. Eq. 299; 7 Atl. 411; *Ray v. Honeycutt*, 119 N. C.

510; 26 S. E. 127; *O'Reilly v. Kelly*, 22 R. I. 151; 50 L. R. A. 483; 46 Atl. 681.

² *France's Estate*, 75 Pa. St. 220.

³ *Marple v. Morse*, 180 Mass. 508; 62 N. E. 966.

sister-in-law who had been acting as his housekeeper may recover therefor out of decedent's estate.⁴ Funeral expenses paid by one before appointment of an administrator should be credited upon his debt due to decedent, and may be set-off against such debt in a subsequent suit by the administrator.⁵ So if A, an executor of B's will, pays the funeral expenses of C, a legatee under C's will, who dies in poverty, A may credit such payment on C's legacy.⁶ A different question arises where a husband pays his wife's funeral expenses and seeks reimbursement out of her estate. At Common Law the husband was liable for these expenses, and in paying them he was discharging his own legal obligation. Accordingly, he could not be reimbursed out of his wife's estate;⁷ and if her executor has paid such expenses he may deduct them from the husband's share of his wife's estate, as money paid out to the husband's use.⁸ In some states statutes have made funeral expenses a debt of the decedent's estate, and have provided for their payment. Under such statutes some courts have held that a husband who pays the funeral expenses of his wife is entitled to reimbursement out of her estate.⁹ Without deciding this question, it has been held that a son who pays his mother's funeral expenses and who is afterwards appointed her executor, may credit himself with such expenses in his account as against the objection of his sister that such expenses should have been paid by the husband of the decedent.¹⁰ The estate of the deceased wife is liable by such statute even if the ultimate liability rests upon her husband.¹¹ If the corpse were to remain unburied until the person primarily liable for

⁴ O'Reilly v. Kelly, 22 R. I. 151; 50 L. R. A. 483; 46 Atl. 681.

⁵ Phillips v. Phillips, 87 Me. 324; 32 Atl. 963.

⁶ Wilson v. Staats, 33 N. J. Eq. 524.

⁷ Matter of Weringer, 100 Cal. 345; 34 Pac. 825; Staple's Appeal, 52 Conn. 425; Waesch's Estate, 166 Pa. St. 204; 30 Atl. 1124.

⁸ Brand's Executor v. Brand, 109 Ky. 721; 60 S. W. 704.

⁹ Morrissey v. Mulhern, 168 Mass. 412; 47 N. E. 407; Constantinides v. Walsh, 146 Mass. 281; 4 Am. St. Rep. 311; 15 N. E. 631; Moulton v. Smith, 16 R. I. 126; 27 Am. St. Rep. 728; 12 Atl. 891.

¹⁰ McClelland v. Filson, 44 O. S. 184; 58 Am. Rep. 814; 5 N. E. 861.

¹¹ Gould v. Moulahan, 53 N. J. Eq. 341; 33 Atl. 483.

funeral expenses were compelled to do his duty, it would be an outrage to public decency even if an appropriate action for that purpose existed. Hence a right of action in *assumpsit* is given to the person who buries the corpse or pays for the funeral expenses. This right of action is accordingly limited to cases where the person primarily liable either omits to act voluntarily or is so situated that he has no opportunity to act. One who intermeddles officiously cannot recover. Thus where a stranger took possession of money of the decedent and out of that fund paid the funeral expenses, he cannot set off such expenses as a credit in an action against him by the executor of the decedent.¹²

§834. Liability of husband for wife's necessities.

Another class of cases illustrating this general principle exists where one who furnishes necessities to a wife whose husband refuses or omits to supply them may recover from him.¹ While this liability is often explained on the theory of the wife's implied agency as if it were a genuine implied contract, it is wider than that. If the husband does not supply his wife with necessities he is liable even if the circumstances negative his assent, as where he deserts her,² or drives her away. So he is liable even if she is incapable of acting as agent, as where she is insane.³ So the husband is liable where the circumstances show that the party furnishing the necessities had no intention of contracting with the husband, as where he does not know that the woman is married,⁴ as long as he does not furnish necessities on the exclusive credit of the woman. The fact that the married woman has property of her own does not defeat her husband's liability for her necessities as long as such necessities

¹² *Shaw v. Hallihan*, 46 Vt. 389; 14 Am. Rep. 628.

¹ *St. Vincent's Hospital v. Davis*, 129 Cal. 20; 61 Pac. 477; *St. John's Parish v. Bronson*, 40 Conn. 75; 16 Am. Rep. 17; *Rariden v. Mason*, 30 Ind. App. 425; 65 N. E. 554; *Thorpe v. Shapleigh*, 67 Me. 235; *Eames v. Sweetser*, 101 Mass. 78.

² *Prescott v. Webster*, 175 Mass. 316; 56 N. E. 577; *East v. King*, 77 Miss. 738; 27 So. 608.

³ *St. Vincent's Institution v. Davis*, 129 Cal. 20; 61 Pac. 477.

⁴ *St. Vincent's Institution v. Davis*, 129 Cal. 20; 61 Pac. 477.

are not furnished on her credit alone.⁵ The husband is not liable unless he has refused to furnish his wife with necessities,⁶ and to make provision therefor. Even if the husband and wife have separated, he is not liable to third persons for her support as long as he has made a reasonable provision therefor.⁷ So if a husband is willing to support an insane wife, and demands her custody in good faith, the authorities of an asylum who refuse to surrender her cannot thereafter recover from him.⁸ However, if the husband refuses to allow his wife to live with him, she is not bound to receive support at a place indicated by him, but may select any reasonable place where the expense of her support is not disproportionate to her husband's income and he is bound to support her there.⁹ If the separation is due to the wife's aggression her husband is not liable for her support.¹⁰ The husband is not liable unless the goods furnished are necessities.¹¹ What are necessities is in many cases a relative term, depending on the social standing, financial condition and style of living of the parties. It undoubtedly includes board, lodging and necessary clothing,¹² medical attendance of a regular physician,¹³ services of a dentist,¹⁴ and in proper cases, services of an attorney where necessary for her protection, especially where her husband prefers unfounded charges against her.¹⁵ Legal services in a divorce suit, however, are in many jurisdictions fixed by the court before which the divorce is pending and are

⁵ *Ott v. Hentall*, 70 N. H. 231; 51 L. R. A. 226; 47 Atl. 80.

⁶ *S. E. Olson Co. v. Youngquist*, 76 Minn. 26; 78 N. W. 870; *Bergh v. Warner*, 47 Minn. 250; 28 Am. St. Rep. 362; 50 N. W. 77.

⁷ *Crittenden v. Schermerhorn*, 39 Mich. 661; 33 Am. Rep. 440; *Harshaw v. Merryman*, 18 Mo. 106; *Cory v. Cook*, 24 R. I. 421; 53 Atl. 315; *Hunt v. Hayes*, 64 Vt. 89; 33 Am. St. Rep. 917; 15 L. R. A. 661; 23 Atl. 920.

⁸ *St. Vincent's Institution v. Davis*, 129 Cal. 17; 61 Pac. 476.

⁹ *Kirk v. Chinstrand*, 85 Minn. 108; 56 L. R. A. 333; 88 N. W. 422.

¹⁰ *Peaks v. Mayhew*, 94 Me. 571; 48 Atl. 172.

¹¹ *S. E. Olson Co. v. Youngquist*, 72 Minn. 432; 75 N. W. 727; affirmed, 76 Minn. 26; 78 N. W. 870.

¹² *Oltman v. Yost*, 62 Minn. 261; 64 N. W. 564.

¹³ *Bevier v. Galloway*, 71 Ill. 517; *Tebbetts v. Hapgood*, 34 N. H. 420.

¹⁴ *Freeman v. Holmes*, 62 Ga. 556.

¹⁵ *Conant v. Burnham*, 133 Mass. 503; 43 Am. Rep. 532.

provided for by an allowance of alimony.¹⁶ Reasonable funeral services for burying the body of a married woman are necessities chargeable against her husband.¹⁷ Where alimony has been allowed and paid a husband is not liable to persons who thereafter furnish his wife with necessities.¹⁸ Money loaned to a married woman and by her expended for necessities is not treated as a necessary at Common Law and her husband is not liable therefor.¹⁹ But in equity one who has loaned money to a married woman may recover from her husband so much thereof as has been actually expended by her for necessities at a reasonable price, if the circumstances are such that he could have recovered for the necessities had he furnished them directly to her.²⁰ But this rule has been held not to apply where the husband has by reason of sickness been unable to furnish necessities to his wife;²¹ and has been denied altogether.²² The principle here involved is analogous to that controlling in loans to an infant.²³

§835. Liability of parent for necessities of minor child.

Another class of cases exists where one who supplies necessities to a minor child whose parent refuses or omits to supply them, may recover from such parent. If the child is living with his parent, such parent has a wide discretion as to the style of living to be adopted by his family. He is, therefore, liable only in a very clear case of omission to supply necessities, unless he

¹⁶ *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Wolcott v. Patterson*, 100 Mich. 227; 43 Am. St. Rep. 456; 24 L. R. A. 629; 58 N. W. 1006; *Wescott v. Hinckley*, 56 N. J. L. 343; 29 Atl. 154.

¹⁷ *Sears v. Giddey*, 41 Mich. 590; 32 Am. Rep. 168; 2 N. W. 917; *Gleason v. Warner*, 78 Minn. 405; 81 N. W. 206.

¹⁸ *Bennett v. O'Fallon*, 2 Mo. 69; 22 Am. Dec. 440; *Hare v. Gibson*, 32 O. S. 33; 30 Am. Rep. 568.

¹⁹ *Knox v. Bushnell*, 3 C. B. N. S. 334; *Zeigler v. David*, 23 Ala. 127; *Marshall v. Perkins*, 20 R. I. 34; 78 Am. St. Rep. 841; 37 Atl. 301.
²⁰ *Harris v. Lee*, 1 P. Wms. 482; *Kenyon v. Farris*, 47 Conn. 510; 36 Am. Rep. 86.

²¹ *Leuppie v. Osborn*, 52 N. J. Eq. 637; 29 Atl. 433.

²² *Skinner v. Tirrell*, 159 Mass. 474; 38 Am. St. Rep. 447; 21 L. R. A. 673; 34 N. E. 692.

²³ See § 871.

has authorized his child to buy the goods for which suit is brought or has expressly or impliedly agreed to pay therefor.¹ If the child has left this parent's home with the consent of such parent, necessities furnished such child constitute a liability against the parent if the child is not in fact provided with them.² Thus A's minor daughter, B, was by A's permission living apart from A and supporting herself. She fell sick and X attended her as a physician. B did not know of her illness and the circumstances were such as to make it impracticable to notify him. It was held that X could recover from B.³ If the child has left his father's home, without the consent of the father, the question of the latter's liability turns on whether the father's wrongful act caused the child to leave, or whether such child left without legal excuse. If a minor abandons his father's home without his father's being at fault, the father is not liable to third persons who furnish such child with necessities.⁴ If the child is compelled to leave home by the wrongful act of the parent, the latter is liable to third persons who furnish such child with necessities.⁵ What are necessities depends on the financial ability, social standing and style of living assumed by the parents of the child. In clear cases it may be a matter of law that certain things are or are not necessities. Thus a father was held not liable for services rendered without his knowledge in tutoring his son during vacation, the son living at home.⁶ If dependent on surrounding facts it is for the jury to determine, as whether a commercial education furnished to a child whose father had abandoned his family without cause⁷

¹ Conboy v. Howe, 59 Conn. 112; 22 Atl. 35; Gotts v. Clark, 78 Ill. 229; Farmington v. Jones, 36 N. H. 271; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480; 7 Am. Dec. 395; McLaughlin v. McLaughlin, 159 Pa. St. 489; 28 Atl. 302.

² Cooper v. McNamara, 92 Ia. 243; 60 N. W. 522.

³ Porter v. Powell, 79 Ia. 151; 18 Am. St. Rep. 353; 7 L. R. A. 176; 44 N. W. 295.

⁴ Hunt v. Thompson, 4 Ill. 179; 36 Am. Dec. 538; Glynn v. Glynn. 94 Me. 465; 48 Atl. 105; Angel v. McLellan, 16 Mass. 28; 8 Am. Dec. 118.

⁵ Stanton v. Willson, 3 Day. (Conn.) 37; 3 Am. Dec. 255.

⁶ Peacock v. Linton, 22 R. I. 328; 53 L. R. A. 192; 47 Atl. 887.

⁷ Cory v. Cook, 24 R. I. 421; 53 Atl. 315.

was a necessary. A parent is liable for reasonable funeral expenses of his child, even if such child leaves an estate.⁸ In some cases the liability of a father to third persons for the support of his minor children has been said not to exist in any case in the absence of statutory provision therefor.⁹ In all jurisdictions the liability of the parent is limited in the absence of contract on his part, express or implied, or some statutory provision, to the support of his minor children, and he is not liable for necessities furnished to his adult children.¹⁰ Where slavery existed a master was liable for necessities furnished to a slave whom such master had not furnished with necessities. Thus a master who drives his slave away is liable to a physician who cares for such slave while sick, even if the master forbids him to care for such slave.¹¹

§836. Support of paupers.

The duty of supporting paupers which rests upon public corporations and quasi-corporations is a creature of statute. In passing such statutes the legislature intended to set forth fully and completely the duty and liability of such public organizations. Accordingly in the absence of statutory provision therefor, no recovery can be had from the public corporation which is liable for such support but neglects to furnish it, by any person furnishing such support,¹ whether a natural person,² or an-

⁸ *Rowe v. Raper*, 23 Ind. App. 27; 77 Am. St. Rep. 411; 54 N. E. 770.

⁹ *Murphy v. Ottenheimer*, 84 Ill. 39; 25 Am. Rep. 424; *Holt v. Baldwin*, 46 Mo. 265; 2 Am. Rep. 515; *Freeman v. Robinson*, 38 N. J. L. 383; 20 Am. Rep. 399; *Jackson v. Mull*, 6 Wyom. 55; 42 Pac. 603.

¹⁰ *White v. Mann*, 110 Ind. 74; 10 N. E. 629; *Blachley v. Laba*, 63 Ia. 22; 50 Am. Rep. 724; 18 N. W. 658.

¹¹ *Fairchild v. Bell*, 2 Brev. (S. C.) 129; 3 Am. Dec. 702.

¹ *Gilligan v. Grattan*, 63 Neb.

242; 88 N. W. 477; *Patrick v. Baldwin*, 109 Wis. 342; 53 L. R. A. 613; 85 N. W. 274; overruling in effect *Mappes v. Iowa County*, 47 Wis. 31; 1 N. W. 359.

² *Morgan County v. Seaton*, 122 Ind. 521; 24 N. E. 213; *O'Keefe v. Northampton*, 145 Mass. 115; 13 N. E. 382; *Caswell v. Hazard*, 10 R. I. 490; *Magoon v. Berlin*, 49 Vt. 13; *Patrick v. Baldwin*, 109 Wis. 342; 53 L. R. A. 613; 85 N. W. 274; overruling in effect *Mappes v. Iowa County*, 47 Wis. 31; 1 N. W. 359.

other public corporation.³ While many statutes give such right of recovery, either to a private person,⁴ or to a public corporation,⁵ such right of action is limited by the terms of the statute giving it, and does not exist unless such terms are complied with.⁶ Thus where the remedy given by statute is an action for money laid out and expended, this means an action in assumpsit, not in case, and a pleading will be construed to be in assumpsit if it states facts sufficient to show such liability, even if no express promise is alleged.⁷ Where a town is given a right to recover for support which it furnishes, no recovery can be had for support furnished through the voluntary subscription of private individuals.⁸ In some few states, however, it seems to be held that a statute providing that a pauper is to be supported at the expense of a public corporation, imposes a liability on such corporation in favor of persons furnishing necessities to a pauper at least after the public corporation has notice of the needs of such pauper and thereafter omits to furnish such necessities.⁹

§837. Payment on request.

If A pays B's debt upon B's request, either express or implied, A may recover from B.¹ Thus, where the president and gen-

³ *Bristol v. New Britain*, 71 Conn. 201; 41 Atl. 548; *Marlborough v. Framingham*, 13 Met. (Mass.) 328; *Strafford County v. Rockingham County*, 71 N. H. 37; 51 Atl. 677; *Millcreek Township v. Miami*, 10 Ohio 375.

⁴ *Wile v. Southbury*, 43 Conn. 53; *Wing v. Chesterfield*, 116 Mass. 353; *Blodgett v. Lowell*, 33 Vt. 174.

⁵ *Bristol v. Fox*, 159 Ill. 500; 42 N. E. 887; *Clay County v. Palo Alto County*, 82 Ia. 626; 48 N. W. 1053; *Auburn v. Lewiston*, 85 Me. 282; 27 Atl. 159; *Reading v. Malden*, 141 Mass. 580; 7 N. E. 21; *Taylor Township v. Shenango Township*, 114 Pa. St. 394; 6 Atl. 475; *Chittenden v. Stockbridge*, 63 Vt. 308; 21 Atl. 1102; *Charles-*

ton v. Lunenburgh, 23 Vt. 525; *Portage County v. Neshkoro*, 109 Wis. 520; 85 N. W. 414.

⁶ *Palmer v. Hampden*, 182 Mass. 511; 65 N. E. 817; *Loudon v. Merimack County*, 71 N. H. 573; 53 Atl. 906; *Rutland v. Chittenden*, 74 Vt. 219; 52 Atl. 426; *Danville v. Hartford*, 73 Vt. 300; 50 Atl. 1082; *Topham v. Waterbury*, 73 Vt. 185; 50 Atl. 860.

⁷ *Woodstock v. Hancock*, 62 Vt. 348; 19 Atl. 991.

⁸ *Orland v. Penobscot*, 97 Me. 29; 53 Atl. 830.

⁹ *Eckman v. Brady Township*, 81 Mich. 70; 45 N. W. 502. To the same effect see *Perry County v. Du Quoin*, 99 Ill. 479.

¹ *Littleton Savings Bank v. Land*

eral manager of a corporation takes up a debt of the corporation, in part with his individual funds, and in part with funds furnished by a stockholder, they may join in an action against the corporation for money thus furnished.² If A, the agent of a railroad company, delivers freight to B upon B's promise to pay the freight charges thereon, and B does not make such payment, and as a result thereof A is obliged to pay such amount to the company, it being contrary to the rules of the company to deliver the freight until the charges were paid, A may recover from B.³ A carrier of imports may pay the duties thereon and claim a lien on the property therefor.⁴ A payment to a third person made on request may be recovered even if made under a spécial contract which proves unenforceable. Thus the directors and a majority of the stockholders in a corporation agreed with A, a stockholder, that A should spend a certain amount of money in developing a mine belonging to the corporation and receive compensation in stock. The contract was set aside by the court; but as the performance was beneficial to the corporation it was held that A could recover from the corporation the money thus expended.⁵ If A expends money on B's account at X's request, A has no right to recover from B unless X was authorized by B to make such request.⁶

§838. Payment of another's debt to protect one's interests.

If A is obliged to pay B's debt in order to protect A's proprietary interests, A's payment is not voluntary and he may recover from B.¹ If the debt which B owes, and upon which B is pri-

Co., 76 Ia. 660; 39 N. W. 201; *Armstrong v. Keith*, 3 J. J. Mar. (Ky.) 153; 20 Am. Dec. 131; *Wheeler v. Young*, 143 Mass. 143; 9 N. E. 531; *Rosemond v. Register Co.*, 62 Minn. 374; 64 N. W. 925; *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373; 83 N. W. 172; *Albany v. McNamara*, 117 N. Y. 168; 6 L. R. A. 212; 22 N. E. 931.

² *Rosemond v. Register Co.*, 62 Minn. 374; 64 N. W. 925.

³ *Grand Island Mercantile Co. v. McMeans*, 60 Neb. 373; 83 N. W. 172.

⁴ *Wabash R. R. v. Pearce*, 192 U. S. 179.

⁵ *Jones v. Green*, 129 Mich. 203; 95 Am. St. Rep. 433; 88 N. W. 1047.

⁶ *Little Bros. v. Phosphate Co.*, — Fla. —; 32 So. 808; *Allen v. Bobo*, 81 Miss. 443; 33 So. 288.

¹ *Exall v. Partridge*, 8 T. R. 308; *Post v. Gilbert*, 44 Conn. 9; *Gleason*

marily liable, is a lien upon A's property, and A is obliged to pay such lien to protect his interest in the property, he may recover from B.² Thus, where property subject to an assessment was conveyed, and the grantor had promised as a part of the consideration to pay the assessments due thereon, and he does not make such payments, and by reason thereof the grantee is obliged to pay such assessments, he may recover from the grantor, on the theory of an implied contract in an action for money paid, and need not sue on the express contract to pay the assessment.³ So, if a court has by decree found that A is holding stock for B, subject to a lien in favor of A for advances which he has made to B, on account of such stock, A may recover from B for assessments made upon the stock by the corporation and paid by A to the corporation to preserve his interest in it, and his right to recover from B is not defeated by his taking an appeal from such decree.⁴ So if a lessee to protect his interest is obliged to pay taxes on the leased realty he may recover from his lessor.⁵ So if a lessee covenants in the lease to pay taxes on the leased realty, and does not do so, the lessor may pay such taxes and recover from the lessee or his assignee, even after the lessor has conveyed his interest by a deed containing a covenant against encumbrances.⁶ The party paying such liens cannot recover unless the payment is necessary to protect his interests. So a mortgagee who pays taxes on the realty mortgaged to enable him to negotiate his mortgage, and who subsequently transfers the mortgage to the mortgagors, releasing the mortgage debt, cannot recover from them the amount thus expended as taxes.⁷ The tax thus paid must be on the property in which the person paying it owns an interest or he cannot recover. So where a first mortgagee foreclosed and made the assignee of a second

v. Dyke, 22 Pick. (Mass.) 390.

² Gleason v. Dyke, 22 Pick. (Mass.) 390; Hunt v. Amidon, 4 Hill (N. Y.) 345; 40 Am. Dec. 283.

³ Post v. Gilbert, 44 Conn. 9.

⁴ Irvine v. Angus, 93 Fed. 629; 35 C. C. A. 501.

⁵ Vermont, etc., Ry. v. Ry., 63 Vt. 1; 10 L. R. A. 562; 21 Atl. 262; 731.

⁶ Wills v. Summers, 45 Minn. 90; 47 N. W. 463.

⁷ Kersenbrock v. Muff, 29 Neb. 530; 45 N. W. 778.

mortgagee a party to the suit, but the interest of the second mortgagee had been sold for taxes and had been bought in by the state, the first mortgagee cannot after buying in the realty and paying to the state the amount for which such second mortgage had been sold with costs, recover such amount from such assignee.⁸ In order to enable A to recover from B for paying a debt of B's, which was a lien upon A's property, the lien must be a valid debt of B's, and must also be a lien upon A's property. Thus, if a grantee takes by a warranty deed, with a covenant against incumbrances, he cannot recover from his grantor for payment of a void tax assessed against such property.⁹ So, A held the legal title to realty, and A, B and C each had a third of the beneficial interest therein. C bought in the property at a tax sale, taking a deed thereto in his wife's name. X, a judgment creditor of A, redeemed the land to protect his interest. X cannot recover from B, since one co-owner cannot acquire interests as against another at a tax sale, and C's right to recover from B for his share of the taxes thus paid was restricted to the balance, if any, due on the accounts of each as to the property owned in common.¹⁰ If A induces B to enter into a contract for the sale of land by false representations as to the identity of A, B being induced to believe that he is dealing with X, and B avoids such contract, A cannot recover the amount which he has paid to redeem such land from a tax sale.¹¹ A conveyed realty to B, who took possession and paid taxes. Subsequently the conveyance was set aside on the theory that it was intended as a will. It was held that equity and good conscience required payment of such taxes, and that slight circumstances were sufficient from which to infer a promise to pay,¹² implying a promise to pay recovery could be had.

⁸ *Canadian, etc., Co. v. Boas*, 136 Cal. 419; 69 Pac. 18.

⁹ *Balfour v. Whitman*, 89 Mich. 202; 50 N. W. 744.

¹⁰ *Lindley v. Snell*, 80 Ia. 103; 45 N. W. 726.

¹¹ *Ellsworth v. Randall*, 78 Ia.

141; 16 Am. St. Rep. 425; 42 N. W. 629.

¹² *Smith v. Roundtree*, 185 Ill. 219; 56 N. E. 1130; affirming 85 Ill. App. 161. (This case, however, falls short of holding that in the absence of some circumstances im-

§839. Payment by party secondarily liable.

If A has, at B's request, incurred a liability by reason of which A is subsequently bound to pay a debt to C upon which B was primarily liable, A may recover from B for such payment although B did not expressly request A to make such payment. Thus, if A has become surety for B, at B's request, and A is obliged to pay the debt, A may recover such payment from B.¹ This right of recovery does not, however, rest on express contract of any sort between the parties. One surety who has paid more than his proportionate share of the debt may recover from his co-sureties.² If A is bound by law to pay a debt for which B is primarily liable, such payment is not voluntary, and A can recover. Thus, where certain damages for opening streets must by law be paid out of a county treasury, although the liability therefor is against the city in the first instance, such payments are not voluntary, and the county may recover therefor from the city.³ So if a county agrees to pay for certain fire plugs which by order of the fiscal court are to be entered on the contract of the water-works company with the city, and the city is thus obliged to pay for them, it may recover from the county.⁴ If B has executed and delivered a negotiable instrument to A, in whose hands it is unenforceable, and A sells such negotiable instrument to X, a *bona fide* holder, who enforces the instrument against B, B may recover from A. Thus where a city issues bonds to a corporation, in payment of an *ultra vires* subscription by the city to the capital stock of such corporation, and the corporation delivers the bonds to a *bona fide* purchaser in whose

plying a promise to pay, recovery could be had.)

¹ Hall v. Smith, 5 How. (U. S.) 96; Curtis v. Parks, 55 Cal. 106; Chamberlain v. Lesley, 39 Fla. 452; 22 So. 736; Kennedy v. Gaddie (Ky.), 32 S. W. 408; Gibbs v. Bryant, 1 Pick. (Mass.) 118; Merchants' National Bank v. Opera House Co., 23 Mont. 33; 75 Am. St.

Rep. 499; 45 L. R. A. 285; 57 Pac. 445.

² Berlin v. New Britain School Society, 9 Conn. 175; Rushworth v. Moore, 36 N. H. 188; Aldrich v. Aldrich, 56 Vt. 324; 48 Am. Rep. 791.

³ Lancaster County v. Lancaster, 160 Pa. St. 411; 28 Atl. 854.

⁴ Stanford (City of) v. Lincoln County (Ky.), 61 S. W. 463.

hands they are enforceable against the city, the city may maintain an action against the corporation for the proceeds of such bonds.⁵ A entered into a contract with B for the sale of real property, by the terms of which contract A reserved as his own a building thereon. Subsequently, at B's request, A made to X a warranty deed for such property with full covenants of warranty, X having purchased B's rights in such contract. X claimed the building by force of the deed, and B was obliged to pay X the value of such improvements for the privilege of removing them. It was held that A could recover from B the amount thus paid, since B got the benefit thereof in the additional price received by him on sale of his interests in such property.⁶

XI. WAIVER OF TORT.

§840. Waiver of tort.—Nature and theory of doctrine.

At the original English Common Law, an injured person who brought suit in contract, was not allowed to show an injury which really amounted to a tort as a means of proving the allegations of his complaint.¹ In the early part of the eighteenth century the English courts began to hold that in some cases it was possible for the injured party to maintain an action in implied contract on an injury which really amounted to a tort.² This principle has been extended and developed at Modern Law.³ This doctrine, of course, carries us beyond the limits of real contracts. The doctrine is really not one of substantive law at all, but one of adjective law. It determines the right of an injured party to elect between the remedies given by the actions in tort and in contract. The exact limits of the extent of this doctrine at Modern Law, are very indefinite. Different

⁵ *Geneseo v. Natural Gas Co.*, 55 Kan. 358; 40 Pac. 655.

⁶ *Edmunds v. Depper*, 97 Ky. 661; 31 S. W. 468.

¹ *Phillips v. Thompson*, 3 Lev. 191.

² *Lamine v. Dorrell*, 2 L. Ray. 1216; decided 1705 A. D.

³ *Seavey v. Dana*, 61 N. H. 339; *Smith v. Smith*, 43 N. H. 536.

jurisdictions have very different views on the question of what cases fall within it. In discussing the various classes of cases brought under this doctrine, we will therefore begin with those on which there is the least divergence of authority. Since the doctrine of suing in implied contract upon a tort, is really a case of election of remedies, the election of one remedy when complete bars the other. Thus where several persons detach machinery, and carry it away, and an action is subsequently brought against two of such persons in *assumpsit*, and judgment is obtained, the injured party cannot subsequently sue the remaining wrongdoers in tort.⁴ The action against a wrongdoer on an implied contract, lies to recover the value of property taken wrongfully from the real owner and received by the wrongdoer. One of several joint wrongdoers is liable in tort, and cannot be held in implied contract if he did not receive the property converted, or the proceeds thereof.⁵ So the amount of recovery is limited to the value of the property appropriated by the wrongdoer and not by the damage done to the owner of the property. If A removed sand from B's land with B's acquiescence, both parties, however, laboring under a mistake of fact and thinking that the land came within the limits of the property sold by A to B, B may recover from A in *assumpsit* for the value of the sand thus converted.⁶

§841. Taking money or personal property converted into money.

If B converts A's money to his own use, A may sue B therefor in an action for money had and received.¹ This is true, even if B's conversion amounted to larceny.² If B has converted A's

⁴ *Terry v. Munger*, 121 N. Y. 161; 18 Am. St. Rep. 803; 8 L. R. A. 216; 24 N. E. 272.

⁵ *Ward v. Hood*, 124 Ala. 570; 82 Am. St. Rep. 205; 27 So. 245; *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212; 33 S. E. 175.

⁶ *Merriwether v. Bell* (Ky.), 58 S. W. 987. The measure of damages will not be the injury done to the

property; but the value of the sand taken.

¹ See § 789.

² *Guernsey v. Davis*, 67 Kan. 378; 73 Pac. 101; *Howe v. Clancey*, 53 Me. 130. *Contra*, *Drury v. Douglas*, 35 Vt. 474. In this case B delivered money to A to carry to X. A appropriated it. It was held that *assumpsit* would not lie.

chattels, other than money, to his own use, and B has sold them and received the money therefor, A may maintain an action against him for money had and received.³ Thus, where X delivers to A, as his agent, to sell upon commission, certain tobacco which really belongs to B, and A sells this tobacco at auction, delivers it to the purchaser, collects the money, and pays it to X, with full knowledge of B's rights in such tobacco, B may maintain an action against A for money had and received.⁴ So, if A, a treasurer of a corporation, B, fraudulently issues certificates of B's stock in excess of his authority, and such certificates are so intermingled with the genuine stock that they cannot be distinguished from it, and A appropriates the money thus received for his own use, B may recover from A in an action for money had and received.⁵ So, if B cuts timber from A's land and sells it, B may recover from A for money had and received, if the question of the title to the realty is not involved.⁶ B, a creditor of Y, secured an attachment and seized certain property as Y's. X, claiming as vendee from Y, maintained an action against B in trespass for the value of the property, and recovered a judgment against him, which B satisfied. A, a subsequent attaching creditor, had the property sold under the attachments, and received the money therefor. B may recover such amount from A.⁷ If A sells B's property on credit, it has been held that B may recover from him for money had

³ *Griel v. Pollak*, 105 Ala. 249; 16 So. 704; *Halleck v. Mixer*, 16 Cal. 574; *Cushman v. Hayes*, 46 Ill. 145; *Moses v. Arnold*, 43 Ia. 187; 22 Am. Rep. 239; *Robinson v. Bird*, 158 Mass. 357; 35 Am. St. Rep. 495; 33 N. E. 391; *Nelson v. Kilbride*, 113 Mich. 637; 71 N. W. 1089; *Tolan v. Hodgeboom*, 38 Mich. 625; *Koch v. Branch*, 44 Mo. 542; 100 Am. Dec. 324; *White v. Boyd*, 124 N. C. 177; 32 S. E. 499; *Scottish, etc., Co. v. Brooks*, 109 N. C. 698; 14 S. E. 315; *Huffman v.*

Hughlett, 11 Lea (Tenn.) 549; *Hutchinson v. Ford*, 62 Vt. 97; 18 Atl. 1044.

⁴ *White v. Boyd*, 124 N. C. 177; 32 S. E. 495.

⁵ *Rutland Ry. Co. v. Haven*, 62 Vt. 39; 19 Atl. 769.

⁶ *Guarantee, etc., Co. v. Investment Co.*, 107 La. 251; 31 So. 736. *Nelson v. Kilbride*, 113 Mich. 637; 71 N. W. 1089.

⁷ *Griel v. Pollak*, 105 Ala. 249; 16 So. 704.

and received after the term of credit has expired.⁸ If one who has received the property of another and has held it for so long a time that a presumption may arise that he has sold it, he may be liable in an action for money had and received; but within a shorter period of time the action will not lie.⁹

**§842. Taking personal property not converted into money.—
Theory that assumpsit will not lie.**

If A has converted B's property to his own use, but has kept the property in his possession, and has not sold it, there is a divergence of authority upon the question of whether he can recover from A upon an implied contract. Some authorities hold that B cannot maintain an action for money had and received.¹ This view is probably correct enough if we consider the nature of averments in an action for money had and received, and the total failure of proof that must follow in such cases. When we consider, however, that the entire action is brought upon a fiction, there seems no good reason for restricting the fiction arbitrarily in cases of this sort. In some jurisdictions this distinction seems to be recognized, and while an action for money had and received will not lie where the party converting the property to its own use still retains it, an action in account will lie.² "The owner of goods in the possession of another party, who without legal excuse, refuses to deliver them to the owner on demand, may sue in tort for a conversion, or he may waive the tort and treat the wrongdoer as a purchaser and sue and recover upon account for their value."³ In these cases, however, possession of the property in question passed with the consent of the owner; a fact which in many jurisdictions gives a right to maintain assumpsit.

In many jurisdictions, however, it is held that the real owner

⁸ *Burton Lumber Co. v. Wilder*, 108 Ala. 669; 18 So. 552.

⁹ *Moody v. Walker*, 89 Ala. 619; 7 So. 246.

¹ *Snodgrass v. Coulson*, 90 Ala. 347; 7 So. 736.

² *Bradfield v. Patterson*, 106 Ala. 397; 17 So. 536; *Pharr v. Bachelor*, 3 Ala. 237.

³ *Bradfield v. Patterson*, 106 Ala. 397, 401; 17 So. 536.

of the property converted cannot recover from the wrongdoer in any form of action in implied contract, if the wrongdoer has not sold the property and received the proceeds thereof, and the original taking is unlawful.⁴ Thus if the wrongdoer has the property in his possession, as where he converted both to his own use and made a fence out of it,⁵ or if he has bartered it for other personal property,⁶ assumpsit will not lie. On this theory, in an action for money had and received, the real owner cannot recover if he cannot show the amount received by the wrongdoer on such sale.⁷ It has been said that to allow assumpsit in such cases would abolish all distinctions between actions *ex contractu* and those *ex delicto*.⁸ But even where this theory obtains it is not necessary that payment should be actually received in money. If the property converted has been sold at a value estimated in money, he is liable in an action for money had and received even if he subsequently receives something other than money in discharge of the obligation due to him by reason of such sale.⁹ A different rule prevails in some states where the original taking is lawful, and with the consent of the real owner, and there is a subsequent unlawful conversion. If B delivers property to A voluntarily, and A subsequently refuses to return

⁴ *Miller v. King*, 67 Ala. 575; *Smith v. Jernigan*, 83 Ala. 256; 3 So. 515; *Chamblee v. McKenzie*, 31 Ark. 155; *Barlow v. Stalworth*, 27 Ga. 517; *Kellogg v. Turpie*, 93 Ill. 265; 34 Am. Rep. 163; *Johnston v. Salisbury*, 61 Ill. 316; *Moses v. Arnold*, 43 Ia. 187; 22 Am. Rep. 239; *Quimby v. Lowell*, 89 Me. 547; 36 Atl. 902; *Androscoggin Water Power Co. v. Metcalf*, 65 Me. 40; *Allen v. Ford*, 19 Pick. (Mass.) 217; *McCormick Harvesting Machine Co. v. Waldo*, 128 Mich. 135; 87 N. W. 55; *St. John v. Iron Co.*, 122 Mich. 68; 80 N. W. 998; *Tolan v. Hodgeboom*, 38 Mich. 624; *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; 42 N. W. 384; *Carson River Lumber*

Co. v. Bassett, 2 Nev. 249; *Smith v. Smith*, 43 N. H. 536; *Allen v. Woodward*, 22 N. H. 544; *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Willett v. Willett*, 3 Watts (Pa.) 277; *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595.

⁵ *Folsom v. Cornell*, 150 Mass. 115; 22 N. E. 705.

⁶ *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595.

⁷ *Glasscock v. Hazell*, 109 N. C. 145; 13 S. E. 789.

⁸ *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595.

⁹ *Fuller v. Duren*, 36 Ala. 73; 76 Am. Dec. 318; *Miller v. Miller*, 7 Pick. (Mass.) 133; 19 Am. Dec. 264.

it, or pay for it, B may maintain *assumpsit*.¹⁰ Thus, if a bailee converts property to his own use, the bailor may waive tort, and sue in *assumpsit*.¹¹ If A's property is sold with A's consent, and the price therefor is paid to B, B must account therefor to A in an action for money had and received. Thus, where certain stock was sold and the money was received by B, it was held a question of fact for the jury whose stock it was; and if the stock belonged to A, B would have to account to A for such money.¹² So, where A forwarded butter to certain commission merchants, B, in the regular course of business, and B sold the same and received payment therefor, A may compel B to pay over such money to him after deducting commissions.¹³ So, if A, the owner of one-half of a patent right, has sold the entire patent right to a stranger, and received the money therefor, B, the owner of the other half, may maintain an action against A for one-half of such proceeds.¹⁴ So, a tenant in common who collects more than his share of the rents and profits of the realty owned in common, is liable to the other tenant in common in *assumpsit*.¹⁵ So, if one tenant in common mines and sells coal, and there is no dispute as to his right to do so, as to the amount of the coal mined, or as to his right to sell it at that price, but the only dispute is as to the amount which the other co-tenant is entitled to receive, the latter may maintain an action against the former.¹⁶ If A quarries stone on B's land, and takes it away, and either sells it or uses it, A is liable to B in *assumpsit*, not for the amount of the damage done to B's property, but for the value of the property thus converted by A.¹⁷ If a railroad company

¹⁰ *Grinnell v. Anderson*, 122 Mich. 533; 81 N. W. 329; *Newman v. Olney*, 118 Mich. 545; 77 N. W. 9; *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; 42 N. W. 384; *Ginsburg v. Lumber Co.*, 85 Mich. 439; 48 N. W. 952.

¹¹ *Newman v. Olney*, 118 Mich. 545; 77 N. W. 9.

¹² *Shouldice v. McLeod's Estate*, 130 Mich. 444; 90 N. W. 288.

¹³ *Tucker v. Utley*, 168 Mass. 415; 47 N. E. 198.

¹⁴ *Currier v. Hallowell*, 158 Mass. 254; 33 N. E. 497.

¹⁵ *Hudson v. Coe*, 79 Me. 83; 1 Am. St. Rep. 288; 8 Atl. 249.

¹⁶ *Winton Coal Co. v. Coal Co.*, 170 Pa. St. 437; 33 Atl. 110.

¹⁷ *Downs v. Finnegan*, 58 Minn. 112; 49 Am. St. Rep. 488; 59 N. W. 981.

enters upon B's land and permanently appropriates it as a part of its right of way, and B acquiesces therein, B may recover against the railroad company *indebitatus assumpsit*.¹⁸

§843. Theory that assumpsit will lie.

Another line of authorities, greater numerically, and treating the fiction of implied contract more rationally, allow the real owner to recover from the wrongdoer, even where the wrongdoer has not sold the property.¹ Where this theory obtains it is, of course, immaterial whether the property has been bartered or sold on credit, since the liability on the common counts in assumpsit exists even if the property converted has not been sold at all. Under this theory assumpsit will lie where the wrongful act consists in making use of property, and not in attempting to deprive the owner of it permanently. Thus A was to work for B for a year, giving B his entire time. Instead A used B's team on A's business. It was held that B could recover a reasonable compensation for such use from A, on the theory of an implied promise, even if A in fact did not intend to pay therefor.²

§844. Wrongful occupancy of real property.

If the tort complained of consisted in adverse possession of real property, or any form of possession thereof without the consent of the true owner, the Common Law did not allow such tort to be waived and an action in assumpsit for use and occupation to be brought. Assumpsit could not be made the means of trying the title to land.¹ Accordingly, an action in assumpsit

¹⁸ *Chattanooga, etc., Ry. v. Town Co.*, 89 Ga. 732; 16 S. E. 308.

¹ *Roberts v. Evans*, 43 Cal. 380; *Toledo, etc., Ry. v. Chew*, 67 Ill. 378; *Morford v. White*, 53 Ind. 547; *Jones v. Gregg*, 17 Ind. 84; *Eversole v. Moore*, 3 Bush. (Ky.) 49; *Gordon v. Bruner*, 49 Mo. 570; *Moore v. Richardson*, 68 N. J. L. 305; 53 Atl. 1032; *Galvin v. Mill Co.*, 14 Mont. 508; 37 Pac. 366;

Terry v. Munger, 121 N. Y. 161; 18 Am. St. Rep. 803; 8 L. R. A. 216; 24 N. E. 272; *Barker v. Cory*, 15 Ohio 9; *McCombs v. Guild*, 9 Lea (Tenn.) 81; *Kirkman v. Philips*, 7 Heisk. (Tenn.) 222; *Maloney v. Barr*, 27 W. Va. 381; *Walker v. Duncan*, 68 Wis. 624; 32 N. W. 689.
² *Stebbins v. Waterhouse*, 58 Conn. 370; 20 Atl. 480.

¹ *Burdin v. Ordway*, 88 Me. 375;

could not be brought unless there was either an express or an implied contract between the owner and the possessor creating the relation of landlord and tenant.² Where decedent's widow occupies the homestead after the period fixed by statute for her occupancy had expired, the heir cannot recover from her in an action for the rent thereof.³ One who holds wrongful possession, adverse to that of the real owner, cannot be held liable in an action for use and occupation.⁴ Where the person in wrongful adverse possession collects rents of the property, it has been held that he is not liable to the real owner for money had and received. Thus, one in possession under an invalid tax deed has been held not to be liable in this form of action.⁵ A railroad company took some of A's land for a right of way. Subsequently, A sold his property to B. It was held that B could not maintain an action against the railroad company for use and occupation.⁶ Neither could B in this case sue as A's assignee in trespass, since such a claim could not be assigned. A vendee in possession under a contract of sale is not, on breach of such con-

34 Atl. 175; *Boston v. Binney*, 11 Pick. (Mass.) 1; 22 Am. Dec. 353.

² *Grady v. Ibach*, 94 Ala. 152; 10 So. 287; *O'Conner v. Corbitt*, 3 Cal. 370; *Atlanta, etc., Ry. v. McHan*, 110 Ga. 543; 35 S. E. 634; *Waller v. Morgan*, 18 B. Mon. (Ky.) 136; *Emery v. Emery*, 87 Me. 281; 32 Atl. 900; *Janouch v. Pence* (Neb.), 93 N. W. 217; *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186; *Collyer v. Collyer*, 113 N. Y. 442; 21 N. E. 114; *Faulcon v. Johnston*, 102 N. C. 264; 11 Am. St. Rep. 737; 9 S. E. 394; *Cincinnati v. Walls*, 1 O. S. 222; *Richey v. Hinde*, 6 Ohio 371; *Butler v. Cowles*, 4 Ohio 205; 19 Am. Dec. 612; *Blake v. Preston*, 67 Vt. 613; 32 Atl. 491; *Ackerman v. Lyman*, 20 Wis. 454.

³ *Emery v. Emery*, 87 Me. 281; 32 Atl. 900.

⁴ *Atlanta, etc., Ry. v. McHan*, 110 Ga. 543; 35 S. E. 634;

Williams v. Hollis, 19 Ga. 313; *Richardson v. Richardson*, 72 Me. 403; *Bigelow v. Jones*, 10 Pick. (Mass.) 161; *Henderson v. Detroit*, 61 Mich. 378; 28 N. W. 133; *Hartman v. Weiland*, 36 Minn. 223; 30 N. W. 815; *Barron v. Marsh*, 63 N. H. 107; *Stockwell v. Phelps*, 34 N. Y. 363; 90 Am. Dec. 710; *Faulcon v. Johnston*, 102 N. C. 264; 11 Am. St. Rep. 737; 9 S. E. 394; *Watson v. Brainard*, 33 Vt. 88. "The disseizor is a trespasser and cannot be treated as a tenant. The tort cannot be waived for the purpose of trying the title to lands in an action of assumpsit." *Richardson v. Richardson*, 72 Me. 403, 408; quoted in *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186.

⁵ *Phoenix Ins. Co. v. Hoyt* (Neb.), 91 N. W. 186.

⁶ *Allen v. R. R.*, 107 Ga. 838; 33 S. E. 696.

tract, liable for use and occupation,⁷ even if the contract is subsequently rescinded.⁸ If a person in possession, who has made a contract to purchase the land, did not enter into possession under such contract of purchase, this principle does not apply. Thus A, the owner and mortgagor of a piece of land, and B, A's son, were living together on the mortgaged premises. C, the owner of the mortgage, agreed with B that C should foreclose the mortgage, buy the property in, and convey it to B. C performed the contract as far as foreclosure and buying in were concerned. B remained in possession, but did not perform the contract on his part and it was subsequently rescinded. It was held that B was liable to C in an action for use and occupation.⁹ So if the person in possession under a contract of sale has agreed to pay rent in case of rescission, this principle has no application. A transferred property to B under an agreement made between their respective husbands, by which A was to take the property back or obtain a purchaser therefor if B was dissatisfied with the purchase; and in such case B was to pay for the use and occupation of the land. B, after accepting the deed, became dissatisfied, and reconveyed the property to A. It was held that B could not take advantage of the contract made on her behalf by her husband for reconveyance, and avoid liability for use and occupation.¹⁰ If the vendor under a contract of sale retains possession, the vendee cannot recover from him in an action for use and occupation.¹¹ By statute in some jurisdictions an action for use and occupation may be brought where the premises are wrongfully occupied, even though there is no agreement, express or implied, for the payment of rent.¹² Under the code of civil procedure, the court sometimes does not at-

⁷ *Nance v. Alexander*, 49 Ind. 516;
Jones v. Tipton, 2 Dana (Ky.) 295;
Bishop v. Clark, 82 Me. 532; 20 Atl.
 88; *Little v. Pearson*, 7 Pick.
 (Mass.) 301; 19 Am. Dec. 289;
Hough v. Birge, 11 Vt. 190; 34 Am.
 Dec. 682.

⁸ *Belger v. Sanchez*, 137 Cal. 614;
 70 Pac. 738.

⁹ *Lynch v. Pearson*, 125 Cal. 21;
 57 Pac. 676.

¹⁰ *Van Brunt v. Calder*, 167 N.
 Y. 458; 60 N. E. 755.

¹¹ *Greenup v. Vernor*, 16 Ill. 26.

¹² *Parkinson v. Shew*, 12 S. D.
 171; 80 N. W. 189.

tempt to say whether the action in which relief is given would have been at Common Law an action for rent or for use and occupation.¹³ Where possession is taken under a contract other than one for the sale of such realty, an action for use and occupation will lie.¹⁴ A mortgagee, who purchases at foreclosure sale, and enters into rightful possession, and who upon redemption by the mortgagor within a year from the date of such sale, is liable for rents during the period of his occupation, is liable to the mortgagee for such rents collected in an action for money had and received.¹⁵ Thus where a railroad construction company took possession of the working plant of certain contractors, claiming the right so to do under the contract on the ground of contractor's default, and asserting such right by means of an injunction, it was held that after it was adjudged that the construction company did not possess such right, it was liable to the contractor for a reasonable compensation for the use of such plant.¹⁶

§845. Liability of trespasser in assumpsit.

One who enters upon land, not as an adverse claimant thereof but as a mere trespasser, and who severs something of value from the realty and converts it into personalty, may be held liable in assumpsit wherever he could have been held in assumpsit had the property thus converted been personalty originally.¹ The title to land is in no way involved in such form of action. But if the acts of such trespasser amount to adverse possession, the question of title is involved and assumpsit will not lie.² One whose property has been occupied by another, may recover therefor, even after conveying such property to a third person.³

¹³ Van Brunt v. Calder, 167 N. Y. 458; 60 N. E. 755.

¹⁴ P. P. Emory Mfg. Co. v. Rood, 182 Mass. 166; 65 N. E. 58.

¹⁵ Siems v. Bank, 7 S. D. 338; 64 N. W. 167.

¹⁶ Champlain Construction Co. v. O'Brien, 117 Fed. 271.

¹ Phelps v. Church, 99 Fed. 683;

40 C. C. A. 72; Downs v. Finnegan, 58 Minn. 112; 49 Am. St. Rep. 488; 59 N. W. 981.

² Downs v. Finnegan, 58 Minn. 112; 49 Am. St. Rep. 488; 59 N. W. 981.

³ Bowie v. Herring, 116 Ia. 209; 89 N. W. 976.

§846. Assumpsit for occupation of realty under a formal lease.

An action for use and occupation would not lie at Common Law, if the occupant was holding by a formal lease under seal.¹ At Modern Law the same principle applies, where the occupant holds by a formal lease which is enforceable and contains an express covenant to pay rent. An occupant who enters under a formal lease, may be liable for use and occupation, if for any reason the lease itself proves unenforceable. Thus, where a tenant was partially evicted by his landlord, and his landlord had sued in debt and failed to recover because of such partial eviction,² it was held that he might sue the tenant on a *quantum meruit* account in assumpsit for the beneficial use which the tenant had.³ If a lease under seal has been subsequently modified or varied in legal effect, in any other way whatever than by another instrument under seal, the resulting obligation is treated in law as a simple obligation, and not a specialty. Accordingly, an action in assumpsit can be brought upon such an obligation in a proper case, and the fact that the original lease was under seal does not prevent this form of action. Thus, where by statute the election of a city to take for public use part of any land under lease, discharges such lease as to the part taken, but leaves it valid as to the residue, and upon such election the city acquires legal title in the part taken, a tenant holding under a sealed lease is liable after such election in an action for the use and occupation of the residue.⁴ If A holds property under a perpetual lease from B, and A sells to X, subject to the annual rent reserved, and X recognizes B's rights in such property, the law implies a promise by X to B to pay the rent; and accordingly, assumpsit will lie.⁵ A statute allowing assumpsit on sealed

¹ Codman v. Jenkins, 14 Mass. 93;

Drill Co., 67 N. H. 450; 39 Atl. 330.

² Meredith Association v. Twist-Drill Co., 66 N. H. 539; 30 Atl. 1119.

⁴ McCordell v. Miller, 22 R. L. 96; 46 Atl. 184.

⁵ Derrick v. Luddy, 64 Vt. 462; 24 Atl. 1050.

³ Meredith Association v. Twist-

contracts makes it possible to maintain assumpsit on a written lease under seal.⁶

§847. Other forms of occupancy excluding liability in contract.

One who is in possession under a contract by which he is to have the use of the premises in question gratuitously, cannot be held liable in an action for use and occupation.¹ An action of assumpsit for use and occupation will not lie against one who does not sustain the relation of tenant, even though such person may have lived upon such real property in a subordinate relation to the tenant. Thus, where A had made a lease to B, and B's granddaughter, X, lived with B on the premises, not paying rent or board, it was held that A could not recover from X in an action for use and occupation.² Under a statute providing that the expenses of the family shall be chargeable on the property of the husband or wife, or either of them, and permitting either joint or several actions to be brought against them, it has been held that where a lease is made to the husband a joint action for use and occupation may be brought against husband and wife.³

§848. Torts not affecting property.

The right to waive tort and sue in assumpsit is limited in some jurisdictions to torts affecting property, whereby one is enriched by receiving property or its proceeds which in good conscience belong to another. It has there no application to other forms of tort. If A has by duress compelled B to work for him, B cannot recover from A on an implied contract. Thus a convict who has been compelled to work on Sundays and holidays for the person hiring him has been denied the right to recover from such person on an implied contract, even though the statute

⁶ *Beecher v. Duffield*, 97 Mich. 423; 56 N. W. 777; *Conkling v. Tuttle*, 52 Mich. 630; 18 N. W. 391; *Dalton v. Laudahn*, 30 Mich. 349.

¹ *Chicago v. Milling Co.*, 196 Ill. 580; 63 N. E. 1043; affirming 97 Ill.

App. 651. (Even if such contract is invalid.)

² *Austin v. Whipple*, 178 Mass. 155; 59 N. E. 636.

³ *Walker v. Houghteling*, 107 Fed. 619; 46 C. C. A. 512.

specifically provided that a convict should not be compelled to work on Sundays and holidays.¹ A represented to B that he had adopted her as his daughter, and thus he induced her to render domestic services for him. It was held that she could not recover for work and labor.² If a man represents himself as single and thus induces a woman to marry him, live with him, and perform domestic services for him, it has been held that she cannot recover in assumpsit for such services, and that her remedy is in tort.³ A consideration of these cases will show that if it is ever in accordance with principles of justice to waive tort and sue in quasi-contract, cases like these are the very ones where such right should be recognized. Accordingly in some states a juster view permits such recovery, as in the case of a woman who renders domestic services to a man, being induced by his fraud to believe that they were married.⁴

¹ Sloss, etc., Co. v. Harvey, 116 Ala. 656; 22 So. 994.

² Graham v. Stanton, 177 Mass. 321; 58 N. E. 1023.

³ Cooper v. Cooper, 147 Mass. 370; 9 Am. St. Rep. 721; 17 N. E. 892.

⁴ Schmitt v. Schneider, 109 Ga. 628; 35 S. E. 145; Fox v. Dawson, 8 Mart. (La.) 94; Higgins v. Breen, 9 Mo. 497; Knott v. Knott (N. J. Eq.), 51 Atl. 15.

PART IV.

PARTIES.

CHAPTER XXXVIII.

CONTRACTS OF INFANTS.

§849. Abnormal status as affecting contractual capacity.

In the discussion of contracts up to this point we have assumed that both parties to the contract were of normal status. Many of the propositions of contract law have no application in cases in which one party or the other is of abnormal status. A discussion of the contracts of persons of abnormal status involves questions both of contract and of quasi-contract. The commoner types of abnormal status of natural persons will first be considered, then questions of partnership, agency, and of liability as trustees and the like which are often confused with agency; and then the contracts of artificial persons, that is, of the government and of public and private corporations.

§850. Theory underlying doctrine of infancy.

A child lacks the judgment and discretion necessary to make ordinary contracts. If his contracts were binding on him in all cases, extravagance in personal expenditures and recklessness in business ventures would often burden him before his majority with debts which he could never pay. The policy of our law deprives him in many cases of the control of his own property and transfers it to his guardian; and as a corollary the law is unwilling to allow him to bind himself by contracts concerning the management of his estate, since these are matters to which his guardian should attend. On the other hand the law imposes certain obligations upon him, and these obligations are in no way weakened if the infant voluntarily promises to discharge them. The wise policy of the law, therefore, must hold that certain contracts are not binding upon the infant, at least if he

wishes to escape liability; while others are binding, at least to the extent of the pre-existing liability of the infant. As the object of the law is not solely the protection of the infant, but rather an adjustment of his rights and duties in such way as will promote the general well-being, a complicated set of questions is left for solution in cases where the infant has received something of value under the contract and his right to avoid his liability limits the right of the other party to recover his property. With these questions the following sections are concerned.

§851. The termination of minority at Common Law.

The Common Law fixed the age of majority at twenty-one for both males and females. Persons under that age were infants or minors.¹ This rule is, of course, an arbitrary one. There is but little difference in the discretion of one on the day before and on the day after majority.² "A minor who has nearly attained his majority may be as able to protect his interests in a contract as one who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises."³ Unless some arbitrary point of time is fixed by law, the capacity of the infant would necessarily be a question of fact in each case; and from the uncertainty and practical difficulty that would be thus caused the courts have always shrunk. The exact moment at which the age of twenty-one was reached and minority ended was settled at Common

¹ Anon., 1 Salk. 44; 1 Black. Com. 463; Rowland v. McGure, 64 Ark. 412; 42 S. W. 1068. "An infant or minor (whom we call any that is under the age of 21 years . . .)" Coke Litt., 2 b.

² McCarty v. Carter, 49 Ill. 53; 95 Am. Dec. 572; Baker v. Lovett, 6 Mass. 78; 4 Am. Dec. 88; Harner v. Dipple, 31 O. S. 72; 27 Am. Rep. 496.

³ McCarty v. Carter, 49 Ill. 53,

55; 95 Am. Dec. 572. "Whenever he arrives at majority, a time fixed by an arbitrary rule, which in the nature of things cannot affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of its affairs; hence the law imposes on him full responsibility for all his acts and contracts." Harner v. Dipple, 31 O. S. 72, 74.

Law as the first moment of the day preceding the twenty-first anniversary of birth.⁴ "On the day before the twenty-first anniversary he is held to be twenty-one years of age."⁵ Thus limitations against an infant begins to run the day before his twenty-first birthday.⁶ This rule is said to rest upon the principle that the law does not recognize fractions of a day. It does not, however, follow from that principle at all; but it really rests on nothing but precedent. It is impossible to show why the rule ignoring fractions of a day is not complied with by making majority begin at the first moment of the twenty-first anniversary of birth. Still although some authorities quoted in its favor are really not all clear on the point,⁷ though it has been ably and logically criticised, it is probably too well fortified to be shaken and is, though illogical, as convenient a rule as any.

§852. Effect of emancipation.

While the emancipation of an infant from parental control gives him a property in his own earnings from that time,¹ it does not relate back so as to permit him to recover for services previously rendered,² and it does not in any way enlarge the contractual capacity of the infant.³ It often is, however, of practical importance in determining with whom the contract was

⁴ Swinburne, pt. 2, § 2, pl. 7;
² Kent Com. 233; Met. Cont. 38;
⁷ Wait Act. & Def. 129; Fitzhugh v. Dennington, 6 Mod. 259; Anon. 1 Salk. 44; Roe v. Hersey, 3 Wils. 274; Wells v. Wells, 6 Ind. 447; Hamlin v. Stevenson, 4 Dana (Ky.) 597; Bardwell v. Purrington, 107 Mass. 419; Phelan v. Douglass, 11 How. Pr. 193; Ross v. Morrow, 85 Tex. 172; 16 L. R. A. 542; 19 S. W. 1090.

⁵ Ross v. Morrow, 85 Tex. 172, 175; 16 L. R. A. 542; 19 S. W. 1090.

⁶ Ross v. Morrow, 85 Tex. 172; 16 L. R. A. 542; 19 S. W. 1090.

⁷ In the earlier cases this rule is stated apparently as a mere dictum. Anon. 1 Salk. 44; Fitzhugh v. Dennington, 6 Mod. 259. The rule as given in the later cases is often based on Blackstone; but that author merely said, 1 Com. 463, "So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth. . . ."

¹ Clay v. Shirley, 65 N. H. 644; 23 Atl. 521.

² Kreider v. Fanning, 74 Ill. App. 237.

³ Burns v. Smith, 29 Ind. App. 181; 64 N. E. 94; Tandy v. Master-

made; and also in deciding many questions under the law of necessities.

§853. Statutes affecting capacity of minors.

The legislature, under most American constitutions, has full power to modify the Common Law rules of the capacity of infants as far as concerns transactions after the passage of the statute. Where special legislation is forbidden, special statutes affecting capacity are, of course, unconstitutional.¹ Without a clause in the constitution forbidding special legislation, an infant's disabilities may be removed by special statute.² The statutes affecting the Common Law rules as to the incapacity of minors are of several kinds, three of which will be noticed here. First, in many states the age at which majority is reached has been changed, the most common modification being the reduction of the age of majority in females to eighteen.³ In North Dakota a contract of an infant over eighteen is subject to his right to disaffirm within one year. If not so disaffirmed is as valid as if he were an adult.⁴ Second, certain statutes provide that by a proceeding in a designated court the disabilities of a minor may be removed.⁵ The general effect of these statutes is the same, though there is some variance in the details. The record must

son's Admr., 1 Bibb. 330; *Mason v. Wright*, 13 Met. (Mass.) 306; *Tyler v. Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; 35 N. W. 902; *Geneux v. Sibley*, 18 R. I. 43; 25 Atl. 345; *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630. The effect of emancipation is "to enable him to make contracts for his own services and to apply his wages to the support of his family, otherwise it does not enlarge his power to contract, so that he is bound by his contracts except for actual necessities." *Burns v. Smith*, 29 Ind. App. 181, 184; 64 N. E. 94.

¹ *State ex rel. Lamson v. Baker*, 25 Fla. 598; 6 So. 445.

² *Collins v. Park*, 93 Ky. 6; 18 S. W. 1013.

³ *Rowland v. McGuire*, 64 Ark. 412; 42 S. W. 1068; *Stevenson v. Westfall*, 18 Ill. 209; *Cogel v. Ralph*, 24 Minn. 194; *Sparhawk v. Buell*, 9 Vt. 41.

⁴ *Luce v. Jestrab*, — N. D. —; 97 N. W. 848.

⁵ *Wilkinson v. Buster*, 124 Ala. 574; 26 So. 940; *Cox v. Johnson*, 80 Ala. 22; *Hindman v. O'Connor*, 54 Ark. 627; 13 L. R. A. 490; 16 S. W. 1052; *Cooper v. Rhodes*, 30 La. Ann. 533; *Brown v. Wheelock*, 75 Tex. 385; 12 S. W. 111, 841.

show that the minor resides in the county where the application is made or the decree removing the disabilities is void.⁶ After the decree is made, it is valid in the county where made, and in other counties where a certified copy of the decree is filed.⁷ Since the statute authorizing the removal of the disabilities of a minor applies to those who are capable of managing their own business, an order of court removing the disabilities of a minor of fourteen is void.⁸ Since an infant over eighteen whose disabilities have thus been removed may bind himself by his undertakings, he may take the bar examination.⁹ While these statutes need not provide for notice of the application,¹⁰ yet such formalities as they require must be complied with.¹¹ Third, other statutes remove the disability of the infant as to certain kinds of contracts. Thus in Georgia an infant who engages in business with the consent of his guardian may bind himself by contract for his business debts,¹² even if such contract is made with such guardian after he is discharged from his trust.¹³ In Texas the marriage settlements of minors are binding, but this does not operate to make other contracts binding.¹⁴ In Iowa an infant who by reason of his engaging in business causes the other party to believe that he is an adult is liable on his contracts. This statute, however, does not apply to an infant who purchases realty while working as a farm-hand, such acts not constituting an "engaging in business."¹⁵

§854. Infant married women.

The disabilities of married women are elsewhere discussed.¹

⁶ *Hindman v. O'Connor*, 64 Ark. 627; 13 L. R. A. 490; 16 S. W. 1052.

⁷ *Wilkinson v. Buster*, 124 Ala. 574; 26 So. 940.

⁸ *Dols v. Hilton*, 48 Ark. 305; 3 S. W. 193; to the same effect is *Pochelu's Emancipation*, 41 La. Ann. 331; 6 So. 541.

⁹ *State ex rel. Lamson v. Baker*, 25 Fla. 598; 6 So. 445.

¹⁰ *Hindman v. O'Connor*, 54 Ark.

627; 13 L. R. A. 490; 16 S. W. 1052.

¹¹ *Cox v. Johnson*, 80 Ala. 22.

¹² *McKamy v. Cooper*, 81 Ga. 679; 8 S. E. 312. So where his parents consent. *Jimmerson v. Lawrence*, 112 Ga. 340; 37 S. E. 371.

¹³ *Ullmer v. Fitzgerald*, 106 Ga. 815; 32 S. E. 869.

¹⁴ *Burr v. Wilson*, 18 Tex. 367.

¹⁵ *Beickler v. Guenther*, 121 Ia. 419; 96 N. W. 895.

¹ See Ch. XLI.

The statutes which modify the Common Law rules of coverture in some states specifically apply to infants and remove together the disabilities of infancy and coverture.² Thus in Nebraska the statute removes the disabilities of a married woman over sixteen years of age,³ while in Alabama the limit is eighteen years, and the statute applies to married women of that age even if married before they were eighteen.⁴ In states in which the statute removing the disabilities of a married woman does not specifically apply to infants, it is held that notwithstanding the statute, the disability of infancy remains.⁵ "Where the party is an infant as well as *feme covert*, the disability arising from infancy remains, although she execute and acknowledge a deed in the form prescribed by statute."⁶ A proviso in a deed to a married woman that "nothing herein shall prevent her selling said land . . . by her husband uniting with her" does not remove the disability of infancy.⁷

§855. Original rule concerning the effect of an infant's contract.

The Common Law rule as to the effect and validity of an infant's contracts was that if the court could, as a matter of

² Knight v. Colman, 117 Ala. 266; 22 So. 974; Daley v. Minnesota, etc., Co., 43 Minn. 517; 45 N. W. 1100; Ward v. Lavery, 19 Neb. 429; 27 N. W. 393; Chubb v. Johnson, 11 Tex. 469.

³ Ward v. Lavery, 19 Neb. 429; 27 N. W. 393.

⁴ Knight v. Colman, 117 Ala. 266; 22 So. 974.

⁵ Confederation, etc., Association v. Kinnear, 23 Ont. App. 497; Harrod v. Myers, 21 Ark. 592; 76 Am. Dec. 409; Watson v. Billings, 38 Ark. 278; 42 Am. Rep. 1; Magee v. Welsh, 18 Cal. 155; Law v. Long, 41 Ind. 586; Losey v. Bond, 94 Ind. 67; Hoyt v. Swar, 53 Ill. 134; Phillips v. Green, 3 A. K. Marsh. (Ky.) 7; 13 Am. Dec. 124; Prewitt v. Graves, 5 J. J. Marsh. 114; Cum-

mings v. Everett, 82 Me. 260; 19 Atl. 456; Webb v. Hall, 35 Me. 336; Walsh v. Young, 110 Mass. 396; Craig v. Van Bebber, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; Sanford v. McLean, 3 Paige (N. Y.) 117; 23 Am. Dec. 773; Bool v. Mix, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; Epps v. Flowers, 101 N. C. 158; 7 S. E. 680; Hughes v. Watson, 10 Ohio 127; McMorris v. Webb, 17 S. C. 558; 43 Am. Rep. 629; Bradshaw v. Van Valkenburg, 97 Tenn. 316; 37 S. W. 88; Walton v. Gaines, 94 Tenn. 420; 29 S. W. 458.

⁶ Syllabus of Bool v. Mix, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; quoted in Hughes v. Watson, 10 Ohio 127, 134.

⁷ Sewell v. Sewell, 92 Ky. 500; 36 Am. St. Rep. 606; 18 S. W. 162.

law, determine that the contract was prejudicial to the infant, it was void; if beneficial, as for necessities, it was valid; and if it was doubtful whether it was beneficial or prejudicial it was voidable.¹ Thus a contract clearly beneficial to the infant was held binding.² An apparent modification of this rule, though not always recognized as such by the courts, restricts void contracts to such as are clearly, certainly or necessarily to the prejudice of the infant.³ In *Robinson v. Weeks*,⁴ a somewhat different classification from that given in the text was set forth at length and the contracts of infants were divided into three classes: binding, if for necessities at fair and just rates; void, if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment or the like; and voidable, at the election of the minor, either during his minority or within a reasonable time after he becomes of age; including all the agreements of a minor which may be beneficial and are not for necessities until fully executed on both sides, and all executed contracts of this sort where the other party can be placed substantially in *statu quo*. An examination of the authorities cited will show that this rule was based on a line of dicta; and that the real decisions in almost all of the cases did not require the statement of the rule in the form given. The questions decided are generally presented where the infant has taken steps sufficient to avoid the contract, and it has thereby become unimportant whether the contract was originally void or merely voidable. Wherever

¹ *Harvey v. Ashley*, 3 Atk. 607; *Zouch v. Parsons*, 3 Burr. 1794; *Keane v. Boycott*, 2 H. Black. 512; *Baylis v. Dinely*, 3 Maule & S. 477; *Tucker v. Moreland*, 10 Pet. 58; *Waugh v. Emerson*, 79 Ala. 295; *Green v. Wilding*, 59 Ia. 679; 44 Am. Rep. 696; 13 N. W. 761; *Succession of Wilder*, 22 La. Ann. 219; 2 Am. Rep. 721; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; 26 Am.

Dec. 251. Of these cases *Keane v. Boycott*, 2 H. Bla. 511, while not the earliest is perhaps the one most often quoted.

² *Waugh v. Emerson*, 79 Ala. 295; *Nickerson v. Easton*, 12 Pick. (Mass.) 110; *Stone v. Dennison*, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; *Breed v. Judd*, 1 Gray (Mass.) 455.

³ *Hastings v. Dollarhide*, 24 Cal. 195; *Bradford v. French*, 110 Mass. 365; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134.

⁴ 56 Me. 102.

questions of the possibility of ratification by the infant or the right of the adult to avoid have been raised the conclusion reached is consistent only with the view that the contract called "void" is really voidable.

§856. Present standing of original rule.

Before discussing the modern rule, it must be noticed that the old rule just given is not obsolete everywhere. It still persists in obiters.¹ The English courts still apply the test regularly in contracts for work and labor.² Thus, a contract by which an infant, in consideration of a special rate of fare agrees not to hold the railroad for its negligence is so manifestly prejudicial as to be not binding;³ and an apprenticeship deed containing a provision that the master was not to pay wages to the apprentice or to instruct him or teach him while his business was interrupted by "turn-outs" including lock-outs, was so much to the detriment of the infant as to be unenforceable.⁴ On the other hand, an agreement by an infant employee to accept a certain sum from a mutual insurance society in lieu of damages,⁵ and a promise by an infant that in consideration of employment he will not compete in business with the employer within a distance of five miles, and for a period of two years after the termination of the employment, are both for the benefit of the infant and enforceable.⁶ The English courts have intimated that this rule is not limited to labor contracts.⁷ Some American

¹ *Askey v. Williams*, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101.

² *Reg. v. Lord*, 12 Q. B. 757; *Fellows v. Wood*, 50 L. T. (N. S.) 513; *Meakin v. Morris*, 12 Q. B. D. 352; *Evans v. Ware* (1892), 3 Ch. 502; *Corn v. Matthews* (1893), 1 Q. B. 310; *Flower v. Ry. Co.* (1894), 2 Q. B. 65; *Clements v. Ry. Co.* (1894), 2 Q. B. 482. The test of the validity of such a contract is said to be "whether on the true construction of the contract as a whole it was for his advantage. . . . If

it was for his advantage it was not a voidable contract but one binding on him, which he had no right to repudiate." *Clements v. Ry. Co.* (1894), 2 Q. B. 482, 489.

³ *Flower v. Ry. Co.* (1894), 2 Q. B. 65.

⁴ *Corn v. Matthews* (1893), 1 Q. B. 310.

⁵ *Clements v. Ry. Co.* (1894), 2 Q. B. 482.

⁶ *Evans v. Ware* (1892), 3 Ch. 502.

⁷ "I will not attempt to say how

states still hold to the original rule, in its literal application.⁸ Thus a deed from an infant without consideration was held void as being prejudicial; and so a covenant of seizin in a deed by the infant's grantee to another was broken as soon as made.⁹ So a gratuitous release by an infant to a witness to restore his competency was held void, and of no effect on such competency.¹⁰

§857. Modern rule concerning the effect of an infant's contracts.

The modern rule, in force in a great majority of the different jurisdictions, also divides the contracts of infants into void, voidable and valid contracts; but the lines of distinction between the different classes of contracts are very different from those laid down by the Common Law rule. Void contracts consist in many states of formal powers of attorney; in fewer still, of general appointments of agents; and in a very few of gratuitous gifts. Valid contracts consist of certain executed contracts of status and all promises by an infant to perform some legal obligation already imposed upon him; and all other contracts are voidable. These different classes of contracts will be discussed in detail in the following sections. The modern English Statute makes an infant's contracts, except for necessities, void and incapable of ratification. Thus, acceptances given by an infant debtor who is sued with others after majority are void.¹

far the rule extends but that it does apply to some contracts that are not contracts of labor is clear from many decided cases." *Clements v. Ry. Co.* (1894), 2 Q. B. 482, 492.

⁸ *Robinson v. Coulter*, 90 Tenn. 705; 25 Am. St. Rep. 708; 18 S. W. 250. Where the rule is reiterated as follows: "The rule governing the contracts of minors long established, is, that they are either void, voidable or valid, according as they shall appear prejudicial, uncertain, or beneficial. If to his benefit—as for

necessaries—they are valid; if of an uncertain character as to benefit or prejudice, they are voidable only, . . ."

⁹ *Robinson v. Coulter*, 90 Tenn. 705; 25 Am. St. Rep. 708; 18 S. W. 250.

¹⁰ *Langford v. Frey*, 8 Humph. (Tenn.) 443. See also on the same point *Swafford v. Ferguson*, 3 Lea 292; 31 Am. Rep. 639; *Scobey v. Waters*, 10 Lea 551.

¹ *Smith v. King* (1892), 2 Q. B. D. 543.

§858. Void contracts.—Powers of attorney.

A supplement to the original Common Law rule already given was the rule originally laid down in conveyancing that grants made by an infant which did not take effect by delivery by his hand were void.¹ This rule survives in modified form and in many, perhaps the majority of jurisdictions, a power of attorney for the conveyance of real estate executed by an infant is said to be absolutely void.² The true meaning of this rule is of course that no rights of any sort pass under a deed delivered as an execution of such power. Many of these decisions would have resulted the same way if the power had been merely voidable. In others, it is purely obiter, not being called for in the least by the facts of the case.³ In the rest, however, the point is clearly and necessarily involved in the decision. The more rational view of an infant's power of attorney is that it is voidable and not void. Under our theory of the transfer of estates in realty there can be no logical distinction between delivery by the hand of the infant and by the hand of his agent. Accordingly some courts have held that a power of attorney given by an infant was merely voidable, and might be ratified by him on arriving at majority.⁴ The validity of a power coupled with an interest, as one inserted in a mortgage, is also an unsettled question.⁵ Powers of attorney other than those for the convey-

¹ Perkins on Conveyancing, § 12; Zouch v. Parsons, 3 Burr. 1794; Allen v. Allen, 2 Dru. & War. 307; Doe v. Roberts, 16 M. & W. 778; Phillips v. Green, 3 A. K. Marsh. (Ky.) 7; 13 Am. Dec. 124; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236; 19 Am. Dec. 71; Dana v. Coombs, 6 Me. 89; 19 Am. Dec. 194; Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127; 1 Am. Dec. 105.

² Zouch v. Parsons, 3 Burr. 1794; Flexner v. Dickerson, 72 Ala. 318; Philpot v. Bingham, 55 Ala. 435; Waples v. Hastings, 3 Harr. (Del.) 403; Hiestand v. Kuns, 8 Blackf. Ind. 345; 46 Am. Dec. 481; Pyle

v. Cravens, 4 Litt. (Ky.) 18; Lawrence v. McArter, 10 Ohio 37; Knox v. Flack, 22 Pa. St. 337.

³ Cole v. Pennoyer, 14 Ill. 158; Fairbanks v. Snow, 145 Mass. 153; 1 Am. St. Rep. 446; 13 N. E. 596; Mustard v. Wohlford's Heirs, 15 Grattan (Va.) 329; 76 Am. Dec. 209.

⁴ Coursolle v. Weyerhauser, 69 Minn. 328; 72 N. W. 697; Ferguson v. Ry. Co., 73 Tex. 344; 11 S. W. 347.

⁵ In Askey v. Williams, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101, such a power was held voidable. In Rocks v. Cornell, 21 R. I. 532; 45 Atl. 552, it was said to be void.

ance of real estate have been said to be void.⁶ Thus an infant cannot appoint an attorney to make affidavit for him in replevin.⁷ The more rational view is to look upon the power and the acts thereunder as being merely voidable.⁸

§859. Void contracts.—Appointments of agents.

The rule given in the preceding section that powers of attorney are held void in many jurisdictions has been applied in some jurisdictions to all appointments of agents.¹ Such an appointment is said to be "absolutely void."² While in some of these cases, this rule is obiter, in others it is specifically decided. Thus it has been held that the infant could not ratify the contract made by the agent, on reaching majority;³ and also, that no title passed by a sale made by the agent for the infant,⁴ or by an assignment of a note.⁵ It was also said that an infant cannot adopt the act of an agent.⁶ The clear weight of modern authority, however, seems to be that an appointment of an agent is voidable only, and not void.⁷ Thus an appointment of an

⁶ *Fetrow v. Wiseman*, 40 Ind. 148; *Hustand v. Kuns*, 8 Blackf. (Ind.) 345; 46 Am. Dec. 481; *Mustard v. Wohlford's Heirs*, 15 Grattan (Va.) 329; 76 Am. Dec. 209.

⁷ *Turner v. Bondalier*, 31 Mo. App. 582.

⁸ *Karcher v. Green*, 8 Houst. (Del.) 163; 32 Atl. 225. In this case a judgment on power of attorney signed by a minor was set aside.

¹ *Cole v. Pennoyer*, 14 Ill. 158; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298; *Armitage v. Widoe*, 36 Mich. 124; *Boal v. Mix*, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; 30 Am. Dec. 77; *Burns v. Smith*, 29 Ind. App. 181; 94 Am. St. Rep. 268; 64 N. E. 94; *Poston v. Williams*, 99 Mo. App. 513; 73 S. W. 1099.

² *Burns v. Smith*, 29 Ind. App.

181; 94 Am. St. Rep. 268; 64 N. E. 94.

³ *Doe v. Roberts*, 16 Mee. & W. 777; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756.

⁴ *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; 30 Am. Dec. 77.

⁵ *Semple v. Morrison*, 7 T. B. Mon. (Ky.) 298.

⁶ *Armitage v. Widoe*, 36 Mich. 124. *Contra*, *Ward v. Steamboat Little Red*, 8 Mo. 358.

⁷ *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Simpson v. Ins. Co.*, 184 Mass. 348; 68 N. E. 673; *Stiff v. Keith*, 143 Mass. 224; 9 N. E. 577; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506; *Cummings v. Powell*, 8 Tex. 80; *Voglesang v. Null*, 67 Tex. 465; 3 S. W. 451; *Ferguson v. Ry. Co.*, 73

agent, by an infant, to execute a promissory note,⁸ or to indorse one,⁹ even if non-negotiable,¹⁰ or to rescind a contract,¹¹ is merely voidable. The agent cannot be sued on an implied breach of warranty of authority;¹² nor can the adversary party avoid a contract made through an agent with an undisclosed principal who proves to be a minor.¹³ Hence also an infant can bind himself for necessities by an agent.¹⁴

§860. Other contracts held void.

An infant's contract to arbitrate has been said to be absolutely void.¹ While not strictly contracts, gratuitous transfers of property are in some jurisdictions held absolutely void and incapable of ratification.²

§861. Valid contracts.—Marriage.

The validity of certain contracts of minors depends in part on the legal effect of certain statutes,—though this effect is not always expressed in the exact wording of the statutes,—and in part upon Common Law rules. At Common Law a male could contract a valid and binding marriage at the age of fourteen; a female at the age of twelve.¹ While this age is changed by statute in many states, persons under the age of infancy are by statute in almost all jurisdictions allowed to contract valid marriages.² From the Common Law rule just given and from the

Tex. 344; 11 S. W. 347; *Askey v. Williams*, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101.

⁸ *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229.

⁹ *Hardy v. Waters*, 38 Me. 450.

¹⁰ *Hastings v. Dollarhide*, 24 Cal. 195.

¹¹ *Towle v. Dresser*, 73 Me. 252.

¹² *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506.

¹³ *Stiff v. Keith*, 143 Mass. 224; 9 N. E. 577; *Cummings v. Powell*, 8 Tex. 80.

¹⁴ *Fruchey v. Eagleson*, 15 Ind. App. 88; 43 N. E. 146; see § 865 *et seq.*

¹ *Millsaps v. Estes*, 134 N. C. 486; 46 S. E. 988.

² *Robinson v. Coulter*, 90 Tenn. 705; 25 Am. St. Rep. 708; 18 S. W. 250.

¹ 1 Black Com. 436; *Fisher v. Bernard*, 65 Vt. 663; 27 Atl. 316.

² Such a statute prevents a person above the Common Law age and under the statutory age from binding himself by a valid marriage, even if it does not specifically abolish the

various local statutes, it follows that an executed contract of marriage entered into by one below the age of full majority but above the age so fixed by law is absolutely valid.³ While such statutes generally require the consent of a parent or guardian if the party to be married is under the full age of majority, a marriage without such consent is perfectly valid,⁴ even if it is a misdemeanor to enter into such a marriage.⁵ By statute, a marriage under the ordinary age of consent may in certain cases be valid if all the requirements of the statute are complied with, and otherwise, void.⁶ An infant's executory contract of marriage, however, as it does not cause any change in status is not binding upon him but like his contracts in general, is voidable.⁷ While *Develin v. Riggsbee*,⁸ is often cited as contrary to the principle laid down, it merely holds that a minor female may give a valid release from a promise to marry.

Common Law rule. *Eliot v. Eliot*, 77 Wis. 634; 10 L. R. A. 568; 46 N. W. 806.

³ *Hunter v. Milam* (Cal.), 41 Pac. 332; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Governor v. Rector*, 10 Humph. (Tenn.) 57; *Pool v. Pratt*, 1 Chip. (Vt.) 252.

⁴ *LaCoste v. Guidroz*, 47 La. Ann. 295; 16 So. 836; *Commonwealth v. Graham*, 157 Mass. 73; 34 Am. St. Rep. 255; 16 L. R. A. 578; 31 N. E. 706; *Holland v. Beard*, 59 Miss. 161; 42 Am. Rep. 360; *Wilkinson v. Dellingier*, 126 N. C. 462; 35 S. E. 819; apparently to this effect is *Western, etc., Co. v. Proctor*, 6 Tex. Civ. App. 300; 25 S. W. 811; where damages were allowed for failure to deliver a telegram forbidding the clerk to issue a license to the plaintiff's daughter. Apparently *contra Eliot v. Eliot*, 81 Wis. 295; 15 L. R. A. 259; 51 N. W. 81; where the boy who was under eighteen, the age of consent, represented

that he was nineteen and it was held, first, that no estoppel could arise; and, second, that if there could be an estoppel, it could only have arisen from his misrepresentation that his parents had given their consent as required by statute.

⁵ *Hunter v. Milam* (Cal.), 41 Pac. 332.

⁶ *People v. Schoonmaker*, 119 Mich. 242; 77 N. W. 934. The statute involved in this case allowed a marriage under the age of consent, where the girl was seduced, the parents consented, and the parties lived together after the age of consent.

⁷ *McConkey v. Barnes*, 42 Ill. App. 511; *Frost v. Vought*, 37 Mich. 65; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; 15 Dec. 475; *Rush v. Wick*, 31 O. S. 521; 27 Am. Rep. 523; *Warwick v. Cooper*, 5 Sneed. (Tenn.) 659; *Wells v. Hardy*, 21 Tex. Civ. App. 454; 51 S. W. 503; *Pool v. Pratt*, 1 Chip. (Vt.) 252.

⁸ 4 Ind. 464.

§862. Valid contracts.—Enlistment.

The statutes of the United States allow minors over sixteen to enlist in the army if the parent or guardian consents to such enlistment. This clearly recognizes the capacity of the minor to bind himself by a contract of enlistment.¹ The practical question arising most often under these statutes is whether in cases of enlistment without such written consent the infant can himself avoid the contract. The better line of authorities holds that he cannot, and that the privilege of avoiding the contract belongs to the parent or guardian; accordingly if he deserts, this does not avoid the contract and he may be punished therefor.² Other authorities hold that the minor may avoid such contract without being punished for desertion,³ and that he may avoid it either before or after he arrives at majority.⁴ In any event, one appointed guardian after the enlistment of a minor cannot give the written consent required by statute,⁵ while the delay of a father who does not by habeas corpus procure the discharge of his son who was enlisted in the navy under the age of eighteen, before that age, does not validate the enlistment.⁶ Whether the same rules on this point apply to the volunteer service as to the regular army is in dispute.⁷ It has been held, under different statutes, that in the navy, a minor over eighteen, enlisting

¹ *Morrissey v. Perry*, 137 U. S. 157; *In re Dowd*, 90 Fed. 718; *Solomon v. Davenport*, 87 Fed. 318; *Lanahan v. Birge*, 30 Conn. 438; *Ex parte Anderson*, 16 Ia. 595; *In re Graham*, 8 Jones (N. C.) 416; *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93; *In re Tarble*, 25 Wis. 390; 3 Am. Rep. 85.

² *Morrissey v. Perry*, 137 U. S. 157; *In re Dowd*, 90 Fed. 718; *Solomon v. Davenport*, 87 Fed. 318; *In re Kaufman*, 41 Fed. 876; *In re Cosenow*, 37 Fed. 668; *In re Zimmerman*, 30 Fed. 176; *Ex parte Anderson*, 16 Ia. 595; *In re Graham*, 8 Jones L. (N. C.) 416; *Common-*

wealth v. Gamble, 11 Serg. & R. (Pa.) 93; *United States v. Blakeney*, 3 Gratt. (Va.) 405.

³ *United States v. Hanchett*, 18 Fed. 26; *In re Davison*, 21 Fed. 618; *In re Baker*, 23 Fed. 30; *In re Chapman*, 37 Fed. 327; 2 L. R. A. 332; *In re Von Dieselskie*, 5 Mack. (D. C.) 485; *Commonwealth v. Fox*, 7 Pa. St. 336.

⁴ *In re Chapman*, 37 Fed. 327; 2 L. R. A. 332.

⁵ *In re Perrone*, 89 Fed. 150.

⁶ *In re Falconer*, 91 Fed. 649.

⁷ That they do, *In re Burns*, 87 Fed. 796. *Contra*, *Lanahan v. Birge*, 30 Conn. 438.

without consent of parent or guardian cannot be discharged on habeas corpus on suit of the parent.⁸

§863. Valid contracts.—Apprenticeship.

Under the old theory of an infant's contracts, a reasonable contract for teaching him a trade was for his benefit;¹ under the modern theory it is held to be a necessary.² For one or the other of these reasons, many authorities have held that a contract of apprenticeship executed by an infant is binding upon him at Common Law.³ In these cases, however, there were either statutes making such a contract valid, or the infant had not taken proper steps to avoid the contract.

Other authorities have held that at Common Law in the absence of statute or local custom an infant's contract of apprenticeship is voidable and not valid.⁴ Under some statutes an infant is empowered to bind himself by a contract of apprenticeship.⁵ In England an apprenticeship deed executed by an infant apprentice is not enforceable against him if the covenants are detrimental to him;⁶ but otherwise it is enforceable.⁷ Under some of these statutes, a master may recover from an infant ap-

⁸ *In re Norton*, 98 Fed. 606; *In re Doyle*, 18 Fed. 369; *United States v. Bainbridge*, 1 Mason (U. S.) 71; *Commonwealth v. Downes*, 24 Pick. (Mass.) 227. (*Contra. In re McNulty*, 2 Low. (U. S.) 270; *In re McLave*, 8 Blatch. (U. S.) 67, disapproved in *In re Norton*, 98 Fed. 606.)

¹ *Rex v. Wigston*, 3 B. & C. 484.

² *Walter v. Everard* (1891), 2 Q. B. 369; *Pardey v. American Ship Windlass Co.*, 20 R. I. 147; 78 Am. St. Rep. 844; 37 Atl. 706.

³ *Rex v. Arundel*, 5 M. & S. 257; *Rex v. Wigston*, 3 B. & C. 484; 5 Dowl. & R. 339; *Cooper v. Simmons*, 7 Ex. 707; 7 H. & N. 707; *Bratzman v. Bunnell*, 5 Whart. (Pa.) 128; 34 Am. Dec. 537; *Par-*

dey v. Ship Windlass Co., 20 R. I. 147; 78 Am. St. Rep. 844; 37 Atl. 706; *Frazier v. Rowan*, 2 Brev. (S. C.) 47. So by local custom, *Horn v. Chandler*, 1 Mod. 271.

⁴ *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. (Ind.) 337; 30 Am. Dec. 662.

⁵ *Whitmore v. Whitecomb*, 43 Me. 458; *Harper v. Gilbert*, 5 Cush. (Mass.) 417; *Fisher v. Lunger*, 33 N. J. L. 100; *State v. Reuff*, 29 W. Va. 751; 6 Am. St. Rep. 676; 2 S. E. 801.

⁶ *Corn v. Matthews* (1893), 1 Q. B. 310.

⁷ *Green v. Thompson* (1899), 2 Q. B. 1.

prentice for damages for breach of his covenants,⁸ or for deferred premiums.⁹ Under other statutes no such action can be maintained against an infant who pleads infancy.¹⁰ If the infant does not sign the articles of apprenticeship it is void as to him.¹¹

§864. Valid contracts.—Performance of legal duty.

If a liability is imposed upon an infant by Common Law, equity or statute, a fair and reasonable contract entered into for the purpose of discharging the liability is valid.¹ Thus, if an infant holds the legal title to property in trust and agrees to and does execute the trust he cannot thereafter avoid such executed agreement.² So where a mortgage debt is discharged, an infant mortgagee is bound by his release;³ and an infant to whom the legal title is conveyed in order to defraud his father's creditors is bound by his conveyance at his father's direction,⁴ especially where he conveys for the benefit of the defrauded creditors.⁵ So an infant who by agreement with the executor

⁸ Woodruff v. Logan, 6 Ark. 276; 42 Am. Dec. 695.

⁹ Walter v. Everard (1891), 2 Q. B. 369. This case distinguishes Gylbert v. Fletcher, Cro., Car. 179, on the ground that in the latter case ample remedies for enforcing good behavior existed in the master's right of punishment, or if appealing to a justice of the peace; reasons which "do not apply to a covenant by an infant to pay a premium."

¹⁰ Gylbert v. Fletcher, Cro. Car. 179; Lylly's Case, 7 Mod. 15; Moses v. Stevens, 2 Pick. (Mass.) 332. Ordinary contracts for work and labor present different questions from contracts of apprenticeship which involve instruction, and are separately discussed.

¹¹ Anderson v. Young, 54 S. Car. 388; 44 L. R. A. 277; 32 S. E. 448.

¹ Elliott v. Horn, 10 Ala. 348; 44 Am. Dec. 488; Nordholt v. Nordholt,

87 Cal. 552; 22 Am. St. Rep. 268; 26 Pac. 599; Stowers v. Hollis, 83 Ky. 544; Starr v. Wright, 20 O. S. 97; Williams v. Ivory, 173 Pa. St. 536; 34 Atl. 291; Kearby v. Hopkins, 14 Tex. Civ. App. 166; 36 S. W. 506.

² Elliott v. Horn, 10 Ala. 348; 44 Am. Dec. 488; Nordholt v. Nordholt, 87 Cal. 552; 22 Am. St. Rep. 268; 26 Pac. 599; Prouty v. Edgar, 6 Ia. 353 (where the minor conveyed the legal title); Bridges v. Bidwell, 20 Neb. 185; 29 N. W. 302 (where the minor mortgaged the legal title); Trader v. Jarvis, 23 W. Va. 100 (where the minor assigned his interest in an indemnity bond on being protected against loss).

³ Zouch v. Parsons, 3 Burr. 1794.

⁴ Elliott v. Horn, 10 Ala. 348; 44 Am. Dec. 488.

⁵ Starr v. Wright, 20 O. S. 97.

buys land in his own name at the executor's sale and at once conveys it to the executor, cannot afterward avoid such conveyance.⁶ Since an infant as well as an adult is subject to Criminal Law, it follows that bonds and other undertakings entered into pursuant to such laws are valid. Of this class are recognizances,⁷ bonds to pay fines,⁸ and assignments to avoid arrest.⁹ Thus a minor who had fraudulently obtained goods by representing himself to be of full age, and who was lawfully arrested therefor on a civil suit, which arrest he avoided by making an assignment under the statute, cannot avoid such assignment.¹⁰ Further an infant is subject to the statutes concerning bastardy as well as an adult; and therefore his undertakings under such statutes such as bonds to the public, to support the child,¹¹ or agreements with the mother, by way of compromise, for its support.¹² Other examples of valid contracts are dissolving bonds or re-delivery bonds, given by an infant to obtain possession of his property previously attached, or the proceeds thereof.¹³ So agreements for the discharge of valid liens are binding.¹⁴ So a male infant who marries is bound at Common Law for his wife's ante-nuptial debts.¹⁵

⁶ Sheldon's Lessee v. Newton, 3 O. S. 494.

⁷ State v. Weatherwax, 12 Kan. 463; McCall v. Parker, 13 Met. (Mass.) 372; 46 Am. Dec. 735.

⁸ Dial v. Wood, 9 Baxt. (Tenn.) 296.

⁹ People v. Mullin, 25 Wend. (N. Y.) 698; Williams v. Ivory, 173 Pa. St. 536; 34 Atl. 291.

¹⁰ Williams v. Ivory, 173 Pa. St. 536; 34 Atl. 291, in which case the court said, citing and quoting People v. Mullin, 25 Wend. (N. Y.) 698, "an infant as well as an adult was entitled to the benefit of the act which is general in its terms, viz., 'every person may at any time petition,' etc. Besides the relief from imprisonment being so highly beneficial to the petitioner his act in making an assignment must in law

be regarded as valid notwithstanding his nonage."

¹¹ Bordentown v. Wallace, 50 N. J. L. 13; 11 Atl. 267; People v. Moores, 4 Denio (N. Y.) 518; 47 Am. Dec. 272.

¹² Gavin v. Burton, 8 Ind. 69; Stowers v. Hollis, 83 Ky. 544.

¹³ Sanger v. Hibbard, 2 Ind. Ter. 547; 53 S. W. 300.

¹⁴ Where there was a mortgage on land given to a minor by her father, and subsequently the father agreed with the mortgagee for an extension of time, the minor not objecting and the mortgage was then assigned, it was held that the assignee had a valid lien. Kearby v. Hopkins. 14 Tex. Civ. App. 166; 36 S. W. 506.

¹⁵ Butler v. Breck, 7 Met. (Mass.) 164; 39 Am. Dec. 768; Roach v.

§865. Valid contracts.—Necessaries.—Nature of liability.

In some cases the courts have said that an infant's contract for necessaries is absolutely valid and binding;¹ and in others, they have gone to the opposite extreme and held that an infant could not be held on his contract for necessaries at all, but only on his legal liability to pay for them.² Both of these forms of expression are largely obiter and the true rule which is supported by the great weight of authority is that an infant's contract for necessaries received by him may be the foundation of an action but that it differs from a valid contract of the ordinary type in that only the reasonable value of the necessaries furnished and not the price contracted for, may be recovered.³ Thus, an agreement by a minor employee that his employer shall pay all his wages to dealers who supplied the family with which such minor boarded, is enforceable only to the extent of a reasonable support for such minor; and he can recover the excess of his wages above such support.⁴ Thus, while a minor may repudiate a contract with his attorneys to pay half the sum re-

Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220; 60 Am. Dec. 258.

¹ *Fridge v. State*, 3 Gill & J. (Md.) 103; 20 Am. Dec. 463.

² *In re Soltkyoff* (1891) 1 Q. B. 413; *Bliss v. Perryman*, 1 Scam. (2 Ill.) 484; *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759; *Beeler v. Young*, 1 Bibb. (Ky.) 519.

³ *Walter v. Everard* (1891), 2 Q. B. 369; *Barnes v. Barnes*, 50 Conn. 572; *Burton v. Willin*, 6 Houst. (Del.) 522; 22 Am. St. Rep. 363; *Hunt v. Thompson*, 4 Ill. 179; 36 Am. Dec. 538; *Price v. Sanders*, 60 Ind. 310; *Kilgore v. Rich*, 83 Me. 305; 23 Am. St. Rep. 780; 12 L. R. A. 859; 22 Atl. 176; *Trainer v. Trumbull*, 141 Mass. 527; 6 N. E. 761; *Earle v. Reed*, 10 Met. (Mass.) 387; *Stone v. Dennison*, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; *Welch v. Olmstead*, 90 Mich. 492; 51 N. W.

541; *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434; *Locke v. Smith*, 41 N. H. 346; *Pardey v. Windlass Co.*, 20 R. I. 147; 78 Am. St. Rep. 844; 37 Atl. 706; *Genereux v. Sibley*, 18 R. I. 43; 25 Atl. 345; *Rainwater v. Durham*, 2 Nott. & McC. (S. C.) 524; 10 Am. Dec. 637; *Askey v. Williams*, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101; *Smith v. Crohn* (Tex. Civ. App.), 37 S. W. 469. "An infant may make an express written contract for necessaries upon which he may be sued, but . . . by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessaries received by him." *Askey v. Williams*, 74 Tex. 294, 297; 5 L. R. A. 176; 11 S. W. 1101.

⁴ *Genereux v. Sibley*, 18 R. I. 43; 25 Atl. 345.

covered, he cannot refuse a reasonable compensation.⁵ The right of a minor to refuse to pay an unreasonable contract price is especially true where an unfair advantage was taken of him by false representations as to the value of the goods.⁶ The liability of the minor, furthermore "does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature; for it may be imposed upon an infant too young to understand the nature of a contract at all;"⁷ and accordingly an infant may be held for necessities in the absence of any express contract.⁸ As a corollary, it follows that an executory contract for necessities — that is for necessities not yet received by the infant — has none of the peculiarities of an executed contract for necessities, but is voidable like the ordinary contract of an infant.⁹ The liability of an infant for necessities is one created by the law for the good of the infant; since if he could not bind himself in any way for necessities, a minor though owning property would be left to the charities of those who would, in reliance solely on his honor, provide him with the means of living.¹⁰

⁵ *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821 (provided their services are necessities, or are beneficial).

See § 867.

⁶ *Welch v. Olmstead*, 90 Mich. 492; 51 N. W. 541.

⁷ *Gregory v. Lee*, 64 Conn. 407; 25 L. R. A. 618; 30 Atl. 53; *Trainer v. Trumbull*, 141 Mass. 527; 6 N. E. 761; *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434; *Gay v. Ballou*, 4 Wend. (N. Y.) 403; 21 Am. Dec. 158; *Hyman v. Cain*, 3 Jones (N. C.) 111.

⁸ "The question whether or not the infant made an express promise to pay is not important. He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies a promise to pay, from the necessities of his situation; just as in the case

of a lunatic." *Trainer v. Trumbull*, 141 Mass. 527, 530; 6 N. E. 761.

⁹ *Gregory v. Lee*, 64 Conn. 407; 25 L. R. A. 618; 30 Atl. 53. In this case an infant while attending college hired a room for ten months. He occupied it for four months and then left, after paying rent in full to the time of leaving. It was held that he was not liable for the rent beyond the time that he occupied the room. So of a lease of a house by a married infant; *Peck v. Cain*, 27 Tex. Civ. App. 38; 63 S. W. 177. In *Pool v. Pratt*, 1 Chip. (Vt.) 252, 254, the court said, "if he contract to purchase articles ever so necessary, he is not holden by his contract to receive and pay for the articles."

¹⁰ *Trainer v. Trumbull*, 141 Mass. 527; 6 N. E. 761; *Squier v. Hydliff*, 9 Mich. 274. "The liability of an

§866. What are necessities.

Whether the goods furnished to the infant may be necessities, and whether there is any evidence tending to show that the goods were necessities, is a question for the court to decide, and is usually treated as a question of law; whether under the circumstances of each particular case, the goods furnished were necessities is a question of fact, and in jury cases is to be decided by the jury under proper instructions from the court.¹ Therefore precedents cannot be followed rigidly, but full regard must be paid to the attending circumstances of the case under discussion, and of the case relied upon as a precedent. The general rule as to what may be necessities is that they are "those things that are conducive and fairly proper for his comfortable support and education according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation."² While not a definite and exact rule, it cannot safely be stated more exactly, and has been repeated often.³ It follows that the infant's station in life must be regarded in determining what are necessities.⁴

infant for necessities is based on the necessity of his situation. As he must live, the law allows to anyone supplying his wants a reasonable compensation. The law implies the promise to pay from the necessity of his situation." *Epperson v. Nugent*, 57 Miss. 45, 47; 34 Am. Rep. 434.

¹*Peters v. Fleming*, 6 M. & W. 43; *Ryder v. Wombell*, L. R. 4 Ex. 32; *McKanna v. Merry*, 61 Ill. 177; *Garr v. Haskett*, 86 Ind. 373; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Tupper v. Caldwell*, 12 Met. (Mass.) 559; 46 Am. Dec. 704; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Jordan v. Coffield*, 70 N. C. 110; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80;

40 Am. Dec. 542; *Grace v. Hale*, 2 Humph. (Tenn.) 27; 36 Am. Dec. 296.

²*Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274, 278.

³*Hanas v. Slaney* 8 Term. R. 578; *Brayshaw v. Eaton*, 7 Scott 183; 5 Bing. (N. C.) 231; *Peters v. Fleming*, 6 Mees. & W. 43; *Smith-peters v. Griffin's Admr.*, 10 B. Mon. (Ky.) 259; *Tupper v. Caldwell* 12 Met. (Mass.) 559; 46 Am. Dec. 704; *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434.

⁴*Hanas v. Slaney*, 8 T. R. 578; *Strong v. Foote*, 42 Conn. 203; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537.

§867. **Examples of necessities.**

Lord Coke said, in a rule much quoted since, "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physick, and such other necessities, and likewise for his good teaching or instruction whereby he may profit himself afterwards."¹ Much of the subsequent law of necessities is merely an amplification of this short rule. Thus food,² lodging,³ suitable clothing,⁴ medical attendance,⁵ and nursing in time of sickness,⁶ and services rendered by a dentist,⁷ may all be necessities. A trade education,⁸ and a common school education,⁹ have been held to be necessities; but not a collegiate,¹⁰ or a professional education.¹¹ The propriety of denying that a collegiate or a professional education may be a necessary for one not possessed of wealth, considerable social standing, or marked ability, is very doubtful in this country. It places preparation for teaching or for other learned professions on a less favored footing than preparation for a trade or for business life. In this

¹ Co. Litt. 172a.

² Barnes v. Barnes, 50 Conn. 572; Price v. Sanders, 60 Ind. 310; Kilgore v. Rich, 83 Me. 305; 23 Am. St. Rep. 780; 12 L. R. A. 859; 22 Atl. 176; Trainer v. Trumbull, 141 Mass. 527; 6 N. E. 761; Stone v. Dennison, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; Saunders v. Ott, 1 McCord. (S. C.) 572; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274; Bradley v. Pratt, 23 Vt. 378.

³ Gregory v. Lee, 64 Conn. 407; 25 L. R. A. 618; 30 Atl. 53; Price v. Sanders, 60 Ind. 310; Kilgore v. Rich, 83 Me. 305; 23 Am. St. Rep. 780; 12 L. R. A. 859; 22 Atl. 176; Trainer v. Trumbull, 141 Mass. 527; 6 N. E. 761; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

⁴ Price v. Sanders, 60 Ind. 310; Stone v. Denison, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; Lynch v. Johnson, 109 Mich. 640; 67 N. W. 908;

Saunders v. Ott, 1 McCord. (S. C.) 572; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

⁵ Price v. Sanders, 60 Ind. 310; Saunders v. Ott, 1 McCord. (S. C.) 572.

⁶ Werner's Appeal, 91 Pa. St. 222.

⁷ Strong v. Foote, 42 Conn. 203.

⁸ Walter v. Everard (1891), 2 Q. B. 369; Pardey v. American Ship-Windlass Co., 20 R. I. 147; 78 Am. St. Rep. 844; 37 Atl. 706.

⁹ Peters v. Fleming, 6 Mees. & W. 42; Saunders v. Ott, 1 McCord. (S. C.) 572; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274. See the obiter to this effect in Middlebury College v. Chandler, 16 Vt. 683; 42 Am. Dec. 537.

¹⁰ Middlebury College v. Chandler, 16 Vt. 683; 42 Am. Dec. 537.

¹¹ Turner v. Gaither, 83 N. C. 357; 35 Am. Rep. 574; Bouchell v. Clary, 3 Brev. (S. C.) 194.

country, at least, all honest occupations should be equally honorable and equally favored by the law. Attorney's services rendered in defending an infant in a criminal action,¹² or in a bastardy suit, where imprisonment may result,¹³ or in any proceeding involving personal liberty,¹⁴ or in bringing suit for a female infant for an indecent assault,¹⁵ are necessities. So, in an extreme case, are legal services in prosecuting a suit for breach of promise, where seduction was an aggravation of damages.¹⁶ But attorney's fees in defending a foreclosure suit,¹⁷ or in searching records and advising the infant of his rights,¹⁸ or in recovering land,¹⁹ are not necessities, the law preferring to compel parties to contract with the infant's guardian in matters pertaining to his property. Contrary to the views just expressed, and in accordance with a principle hereafter discussed,²⁰ it has been held that any beneficial legal services which result in advantage to the infant's estate, are necessities.²¹ Recognizances,²² and other contracts to procure release from lawful imprisonment²³ are treated as necessities. Since the law discourages an infant from incurring business debts, purchases

¹² Askey v. Williams, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101.

¹³ Barker v. Hibbard, 54 N. H. 539; 20 Am. Rep. 160.

¹⁴ McCrillis v. Bartlett, 8 N. H. 569.

¹⁵ Crafts v. Carr, 24 R. I. 397; 96 Am. St. Rep. 721; 60 L. R. A. 128; 53 Atl. 275. (The action having resulted successfully.)

¹⁶ Munson v. Washband, 31 Conn. 303; 83 Am. Dec. 151. In this case the minor was pregnant and destitute. Her attorney instituted breach of promise proceedings, which were compromised by her marriage with the defendant. The attorney then brought suit against her and her husband for reasonable attorney fees. It was held that he could recover. In *Petrie v. Williams*, 68 Hun (N. Y.) 589, it was held that

a contract by an infant to pay her attorney half the amount recovered for her in a breach of promise suit was not enforceable beyond a reasonable fee.

¹⁷ Englebert v. Troxwell, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852, including services as guardian *ad litem*.

¹⁸ Cobbey v. Buchanan, 48 Neb. 391; 67 N. W. 176.

¹⁹ Phelps v. Worcester, 11 N. H. 51.

²⁰ See § 891.

²¹ Epperson v. Nugent, 57 Miss. 45; 34 Am. Rep. 434; *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837; 17 S. W. 372.

²² *State v. Weatherwax*, 12 Kan. 463.

²³ *Buckinghamshire v. Drury*, 2 Eden. 60; *Clark v. Leslie*, 5 Esp. 28.

for purposes of business such as a barber shop and furnishings,²⁴ a horse,²⁵ or food for horses,²⁶ or a wagon to be used in farming,²⁷ or supplies for a plantation,²⁸ are not necessities. Articles purchased for business are, however, necessities as far as actually applied to the support of the minor.²⁹ So, as his property is best managed by his guardian, an infant's contracts for the preservation of his property, as for repairs,³⁰ even if required to preserve a dwelling house,³¹ though occupied by the infant,³² are not necessities; nor are materials for the construction of a house,³³ nor fire insurance.³⁴ But while material used in erecting improvements upon an infant's realty is not looked upon at Common Law as a necessary, equity will subrogate the party who makes the improvements to the increased value of the premises due to such improvement,³⁵ or to the increase in the rental value

²⁴ *Ryan v. Smith*, 165 Mass. 303; 43 N. E. 109.

²⁵ *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; 4 N. E. 891; *Wood v. Losey*, 50 Mich. 475; 15 N. W. 557; *Rainwater v. Durham*, 2 Nott. & McCord. (S. C.) 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. (Tenn.) 27; 36 Am. Dec. 296. *Contra*, *Mohney v. Evans*, 51 Pa. St. 80.

²⁶ *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Mason v. Wright*, 13 Met. (Mass.) 306.

²⁷ *Paul v. Smith*, 41 Mo. App. 275.

²⁸ *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449.

²⁹ *Turberville v. Whitehouse*, 1 Car. & P. 94; 12 Price 693.

³⁰ *Tupper v. Caldwell*, 12 Met. (Mass.) 559; 46 Am. Dec. 704; *Horstmeyer v. Connors*, 56 Mo. App. 115; *Allen v. Lardner*, 78 Hun (N. Y.) 603; *Phillips v. Lloyd*, 18 R. I. 99; 25 Atl. 909.

³¹ *Wallis v. Bardwell*, 126 Mass. 366; *Tupper v. Caldwell*, 12 Met. (Mass.) 559; 46 Am. Dec. 704.

³² *Horstmeyer v. Connors*, 56 Mo. App. 115.

³³ *Price v. Jennings*, 62 Ind. 111; *Price v. Sanders*, 60 Ind. 310; *Warrnack v. Loar* (Ky.), 11 S. W. 43, 88; *Freeman v. Bridger*, 4 Jones L. (N. C.) 1; 67 Am. Dec. 258; *Shumate v. Harbin*, 35 S. C. 521; 15 S. E. 270. If the improvement is not authorized by infants who have a homestead interest only, it cannot be charged against their interest. *Morris v. Mitchell* (Ky.), 39 S. W. 250. Some cases seem to hold the infant liable for reasonable repairs made by his orders. *Chapman v. Hughes*, 61 Miss. 339.

³⁴ *New Hampshire, etc., Co. v. Noyes*, 32 N. H. 345. But the insurer cannot avoid the contract. *Monaghan v. Ins. Co.*, 53 Mich. 238; 18 N. W. 797.

³⁵ In *McGreal v. Taylor*, 167 U. S. 688, money was loaned to pay off prior liens and to erect a building. The court held that the property should be sold and the proceeds applied (1) to reimburse the lender

due thereto.³⁶ Articles which are used as a means of diversion, such as a horse and buggy bought by a clerk and not shown to be used in his business,³⁷ or a bicycle,³⁸ as where bought by a female servant,³⁹ or by a girl of seventeen,⁴⁰ have been held in each case not to be necessities. But where the use of bicycles was common among persons of the infant's station in life in the surrounding neighborhood, it was held not error to find affirmatively that it was a necessary.⁴¹ Life insurance is not a necessary.⁴² Articles which are mere ornaments or luxuries, as betting books,⁴³ expensive dinners,⁴⁴ expensive jewelry,⁴⁵ an expensive chronometer,⁴⁶ or "liquor, pistols, powder, saddles,

for the amounts advanced for liens; (2) to pay to the infant the value of the realty less the amount of the liens and the value of the building; (3) to pay to the lender the residue which would represent the present value of the building. This modified, *Utermehle v. McGreal*, 1 App. D. C. 359, in which the entire loan was ordered repaid first, out of the proceeds of the sale. For a somewhat similar result, though with less clear reasoning, see *Rundle v. Spencer*, 67 Mich. 189; 34 N. W. 548. In *Langdon v. Clayson*, 75 Mich. 204; 42 N. W. 805, a similar result was obtained, where the minor had bought land, subject to liens, and afterwards had borrowed money on a mortgage and thereby discharged the liens, by treating the sale of the land by the minor after majority as a ratification of the entire transaction, including the mortgage.

³⁶ In *Shumate v. Harbin*, 35 S. C. 521; 15 S. E. 270, the party furnishing materials was, however, subrogated to the increased rents due to the improvement to be applied on his debt. The contract, further, was made by the infant's guardian by nature.

³⁷ *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; 7 West. 68; 9 N. E. 420. So as to a buggy, *Howard v. Simpkins*, 70 Ga. 322.

³⁸ *Gillis v. Goodwin*, 180 Mass. 140; 91 Am. St. Rep. 265; 61 N. E. 813.

³⁹ *Pyne v. Wood*, 145 Mass. 558; 14 N. E. 775.

⁴⁰ *Rice v. Butler*, 160 N. Y. 578; 73 Am. St. Rep. 703; 47 L. R. A. 303; 55 N. E. 275. In this case the court of appeals assumed, without expressly deciding, that the bicycle was not a necessary.

⁴¹ *Clyde Cycle Co. v. Hargreaves* (Q. B.), 78 Law T. N. S. 296. In this case a minor earning 21 shillings a week bought a racing bicycle for £12 10s., with which he won some racing prizes and which he used on the road somewhat. A road wheel would have cost a little more.

⁴² *Simpson v. Ins. Co.*, 184 Mass. 348; 68 N. E. 673.

⁴³ *Jenner v. Walker*, 19 L. T. 398.

⁴⁴ *Brooker v. Scott*, 11 Mees. & W. 67.

⁴⁵ *Ryder v. Wombell*, L. R. 4 Ex. 32.

⁴⁶ *Berolles v. Ramsey*, Holt N. P. 77.

bridles, whips, fiddles, fiddlestrings, etc., amounting to \$111.53½,"⁴⁷ are not necessities. In general, whatever would be necessities if for the infant himself, are necessities if supplied to his wife and children if he is married,⁴⁸ or even to his illegitimate children if he is not.⁴⁹

§868. Effect of special circumstances.

The examples given in the preceding section illustrate *prima facie* rules only. Special circumstances may bring within the class of necessities, articles which ordinarily do not belong to it. Thus the direction of a physician to take horse-back exercise may make a horse a necessary.¹ Sickness may make expensive fruits necessary.² Expensive jewelry may be necessary as an engagement present;³ and expensive goods furnished at a wedding may be necessities, though they would not ordinarily be so classed.⁴

§869. Effect of excessive supply of articles.

To allow a recovery against an infant, the articles furnished must not only be such as may be necessities, but they must also be in fact necessary for the infant under the actual circumstances. Accordingly goods which would be necessities if furnished in reasonable quantity, may be furnished in such excess as not to be necessities, at least as to the excess over a reasonable amount;¹ while if the infant is in fact furnished with the articles sold, the vendor cannot recover for the additional supply as for necessities.² The better view of the infant's liability

⁴⁷ Saunders v. Ott (S. C.), 1 McCord 572.

⁴⁸ Cantine v. Phillips' Admr., 5 Harr. (Del.) 428; Price v. Sanders, 60 Ind. 310; Chapman v. Hughes, 61 Miss. 339.

⁴⁹ Stowers v. Hollis, 83 Ky. 544.

¹ Hart v. Prater, 1 Jur. 623.

² Wharton v. Mackenzie, 5 Q. B. 606.

³ Jenner v. Walker, 19 L. T. 398.

⁴ Garr v. Haskett, 86 Ind. 373; Sams v. Stockton, 14 B. Mon. (Ky.) 232; Jordan v. Coffield, 70 N. C. 110.

¹ Johnson v. Lines, 6 Watts & S. (Pa.) 80; 40 Am. Dec. 542.

² Bainbridge v. Pickering, 2 W. Bla. 1325; Cook v. Deaton, 3 Car. & P. 114; Barnes v. Toye, L. R. 13 Q. B. D. 410; McKanna v. Merry, 61

in the latter case is that it depends upon the fact that he is not supplied with the articles furnished; and not upon the good faith or the careful inquiry into the facts made by the party supplying the goods.³ While it is sometimes said that one furnishing goods to an infant should inquire into his circumstances,⁴ this is merely good business advice and not a rule of law. If the goods are in fact necessities the party can recover without showing any previous inquiry;⁵ while if they are not necessities, no amount of careful inquiry will aid the vendor in recovering, for necessities. If the infant is supplied with sufficient money for necessities, but instead purchases on credit, the vendor cannot recover as for necessities.⁶

Ill. 177; *Angel v. McLellan*, 16 Mass. 28; 8 Am. Dec. 118; *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Hoyt v. Casey*, 114 Mass. 397; 19 Am. Rep. 371; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419; 22 Am. Dec. 652; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; 28 Am. Dec. 681; *Elrod v. Myers*, 2 Head. (Tenn.) 33; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed, 6 Lea 393. "If a tradesman trusts an infant he does it at his peril and he cannot recover if it turns out that the party has been properly supplied by his friends," per Tenterden, C. J., in *Story v. Perry*, 4 C. & P. 526, 527; 19 E. C. L. 508.

³ *Story v. Perry*, 4 Car. & P. 526; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *McKanna v. Merry*, 61 Ill. 180; *Hoyt v. Casey*, 114 Mass. 397; 19 Am. Rep. 371; *Perrin v. Wilson*, 10 Mo. 451.

⁴ "The plaintiff ought to have made inquiry." *Cook v. Deaton*, 3 C. & P. 114; 14 E. C. L. 232.

⁵ *Dalton v. Gibb*, 7 Scott 117; 5 Bing. N. C. 198. It has been said, "whether inquiry were made or not, the question for the jury would still be the same," *Brayshaw v. Eaton*, 7 Scott 183, 186; 5 Bing. N. C. 231. In a case of a husband's liability for goods furnished to his wife, the court, in discussing the necessity of inquiry, said: "The report states that the plaintiffs had no knowledge of the circumstances of the husband or the necessities of the wife. That is immaterial. The burden of proof is upon them to show facts which create the defendant's liability. If they sold goods upon his credit without his express authority, they took the risk of being able to prove an authority by implication of law." *Eames v. Sweetser*, 101 Mass. 78, 80.

⁶ *Nicholson v. Wilborn*, 13 Ga. 467; *Nicholson v. Spencer*, 11 Ga. 607; *Brent v. Williams*, 79 Miss. 355; 30 So. 713; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274. *Contra*, in *England*, *Burghart v. Hall*, 4 Mees. & W. 727.

§870. Effect of existence of parent or guardian.

The existence of a parent or guardian complicates the liability of the infant for necessities. If credit is extended to the parent, the infant cannot afterwards be held liable.¹ If the parent or guardian actually supplies the infant with necessities, additional goods are not necessities.² Where the infant lives with his parents, there is a *prima facie* presumption that he is supplied with necessities.³ It seems to be generally held that a minor living with his parents, who is actually in want by reason of their inability to supply his needs, may be held liable for necessities furnished.⁴ However, it has been held that where the father was poor and unable to procure medical attendance, the infant was not liable therefor;⁵ but in the same state, where the infant's father was in a soldiers' home, his mother in a reformatory and he himself in an almshouse, the infant is liable to one who furnishes him with support and education.⁶ So an infant may be personally liable for attorney's fees in a damage suit for an indecent assault, as it is not the parent's duty in law to pay for such attorney's services.⁷

§871: Money as a necessary.

Money expended for necessities for an infant,¹ or advanced to

¹ Thorp v. Connelly, 48 Mo. App. 59.

² See § 869.

³ Perrin v. Wilson, 10 Mo. 451; State v. Cook, 12 Ired. L. (N. C.) 67; Freeman v. Bridger, 4 Jones L. (N. Car.) 67; 67 Am. Dec. 258; Connelly v. Assignees of Hull, 3 McCord. (S. C.) 6; 15 Am. Dec. 612. *Contra*, that such presumption does not exist, Parsons v. Keys, 43 Tex. 557.

⁴ See preceding note. Goodman v. Alexander, 165 N. Y. 289; 55 L. R. A. 781; 59 N. E. 145. In Kline v. L'Amoureux, 2 Paige (N. Y.) 419; 22 Am. Dec. 652, it was said that

an infant under the care and control of a parent or guardian, able and willing to furnish him with necessities cannot bind himself therefor without the consent of such parent or guardian.

⁵ Hoyt v. Casey, 114 Mass. 397; 19 Am. R. 371. This case cannot be reconciled with the general principles of this doctrine.

⁶ Trainer v. Trumbull, 141 Mass. 527; 6 N. E. 761.

⁷ Crafts v. Carr, 24 R. I. 397; 96 Am. St. Rep. 721; 60 L. R. A. 128; 53 Atl. 275.

¹ Randall v. Sweet, 1 Denio (N. Y.) 460.

pay off a pre-existing debt for necessities,² is itself a necessary. So is money advanced for a discharge from jail.³ Money, itself, contrary to ordinary experience is not regarded by the Common Law as a necessary, even if the infant actually expends it for necessities.⁴ The reason generally given for this absurd, but well-settled rule is that the liability of the infant is fixed at the moment of the loan; and since the fund is not a necessary or expended for necessities at that moment, his subsequent investment of it in necessities does not increase his liability. In equity, however, a more rational rule is adopted, and the party lending the money is subrogated as to so much thereof as is expended by the infant for necessities, to the rights of the party furnishing the same.⁵ A loan of money to discharge prior valid liens on realty owned by the minor is not a necessary at law; that is, no personal judgment can be rendered against the minor for such indebtedness;⁶ but in equity the lender is subrogated to the rights of the holder of the prior valid liens, which have been paid off by the money advanced.⁷ This right does not exist where it is not shown that the lien thus discharged was valid as to the infant.⁸ Money loaned to an infant and not ex-

² *Hedgeley v. Holt*, 4 Car. & P. 104 (obiter as in this case the articles were not necessities); *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Kilgore v. Rich*, 83 Me. 305; 23 Am. St. Rep. 780; 12 L. R. A. 859; 22 Atl. 176.

³ In case of a civil claim, at least if the claim is for necessities. *Clark v. Leslie*, 5 Esp. 28.

⁴ *Earle v. Peale*, 1 Salk. 386; 10 Mod. 67; *Darby v. Boucher*, 1 Salk. 279; *Price v. Sanders*, 60 Ind. 310; *Bent v. Manning*, 10 Vt. 225.

⁵ *Marlow v. Pitfield*, 1 P. Wms. 558; *Watson v. Cross*, 2 Dur. (Ky.) 147; *Hickman v. Hall's Admrs.* 5 Litt. (Ky.) 338.

⁶ *Magee v. Welsh*, 18 Cal. 155; *Bicknell v. Bicknell*, 111 Mass. 265. (In this case the loan was made at

the request of the guardian, not of the infant.)

⁷ *MacGreal v. Taylor*, 167 U. S. 688; *Charles v. Hastedt*, 51 N. J. Eq. 171; 26 Atl. 564; *Folts v. Ferguson*, 77 Tex. 301; 13 S. W. 1037. "These debts having been paid by Mrs. U., the appellees are entitled in equity to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. U. for the loan of \$8,000 to be used in meeting those debts and improving the lot in question." *MacGreal v. Taylor*, 167 U. S. 688, 701; reversing in part on another point, *Utermehle v. MacGreal*, 1 App. D. C. 359.

⁸ *Thormaehlen v. Kaepfel*, 66 Wis. 378; 56 N. W. 1089.

perded by him for necessities is, of course, not a necessary.⁹

§872. Voidable contracts.

The remaining contracts of an infant are neither valid nor void but are voidable.¹ This implies that they may be disaffirmed or ratified by the infant; the methods and legal conse-

⁹ *Root v. Stevenson's Admr.*, 24 Ind. 115; *Kennedy v. Doyle*, 10 All. (Mass.) 161; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574.

¹ *McGreal v. Taylor*, 167 U. S. 688; *Shropshire v. Burns*, 46 Ala. 108; *Savage v. Lichlyter*, 59 Ark. 1; 26 S. W. 12; *Barlow v. Robinson*, 174 Ill. 317; 51 N. E. 1045; *Cole v. Pennoyer*, 14 Ill. 158; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; 17 N. E. 265; *Phipps v. Phipps*, 39 Kan. 495; 18 Pac. 707; *Breckinridge v. Ormsby*, 1 J. J. Mar. (Ky.) 236; 19 Am. Dec. 71; *McDonald v. Sargent*, 171 Mass. 492; 51 N. E. 17; *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222; *Owen v. Long*, 112 Mass. 403; *Reed v. Batchelder*, 1 Met. (Mass.) 559; *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Bloomington v. Chittenden*, 74 Mich. 698; 42 N. W. 166; *Tyler v. Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; 35 N. W. 902; *Johnson v. Insurance Co.*, 56 Minn. 365; 43 Am. St. Rep. 473; 26 L. R. A. 187; 59 N. W. 992; 57 N. W. 934; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Danville v. Mfg. Co.*, 62 N. H. 133; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506; *Willard v. Stone*, 7 Cow. (N. Y.) 22; 17 Am. Dec. 496; *Campbell v. Stokes*,

2 Wend. (N. Y.) 137; 19 Am. Dec. 561; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; 30 Am. Dec. 77; *Harner v. Dipple*, 31 O. S. 72; 27 Am. Rep. 496; *Rush v. Wick*, 31 O. S. 521; 27 Am. Rep. 523; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Bonner v. Bryant*, 79 Tex. 540; 23 Am. St. Rep. 361; 15 S. W. 49; *Cummings v. Powell*, 8 Tex. 80; *Patchin v. Cromach*, 13 Vt. 330; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; 76 Am. Dec. 209. "Many text-writers state the proposition that the contract of an infant is void, but upon a careful examination of the cases cited by them we are of the opinion that they do not support such a doctrine. . . . To hold the executory contract of a minor void would unsettle the law in many of its branches. It would necessitate the holding that the promise of a minor cannot furnish a consideration for the promise of an adult, and the latter's promise would be void, both for want of consideration and for lack of mutuality, whereas the contrary is the settled law based upon the proposition that the infant's contract is only voidable." *Brown v. Bank*, 88 Tex. 265, 274; 33 L. R. A. 359; 31 S. W. 285.

quences of which will be discussed subsequently.² By the great weight of authority not only executory contracts,³ but also contracts fully performed by one or both of the parties thereto,⁴ are voidable. So an infant's assignment of an insurance policy is voidable only, and not void.⁵ It will be seen from the special classes of contracts hereafter discussed that these contracts are voidable even if advantageous to the infant,⁶ as where he sold the goods, purchased by him, without loss,⁷ or profited by the services of an attorney in defending a foreclosure suit,⁸ or if the avoidance of such contracts is disastrous to the adversary party; as where he relied on the infant's contract and by delay lost his claim against the estate of the infant's father.⁹ The dissenting view which holds certain fair, reasonable and executed contracts of a minor to be valid is hereafter discussed.¹⁰ On

² See § 881 *et seq.*

³ *Savage v. Lichlyter*, 59 Ark. 1; 26 S. W. 12; *Gregory v. Lee*, 64 Conn. 407; 25 L. R. A. 618; 30 Atl. 53; *Barlow v. Robinson*, 174 Ill. 317; 51 N. E. 1045; *Des Moines Ins. Co. v. McIntire*, 99 Ia. 50; 68 N. W. 565; *Danville v. Mfg. Co.*, 62 N. H. 133; *Harner v. Dipple*, 31 O. S. 72; 27 Am. Rep. 496; *Rush v. Wick*, 31 O. S. 521; 27 Am. Rep. 523.

⁴ *Walker v. Pope*, 101 Ga. 665; 29 S. E. 8; *Hoffert v. Miller*, 86 Ky. 572; 6 S. W. 447; *Morse v. Ely*, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577; *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222; *Barney v. Rutledge*, 104 Mich. 289; 62 N. W. 369; *Bloomington v. Chittenden*, 74 Mich. 698; 42 N. W. 166; *Nichols, etc., Co. v. Snyder*, 78 Minn. 502; 81 N. W. 516; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114; *Grace v. Hale*, 2 Humph.

(Tenn.) 27; 36 Am. Dec. 296; *Askey v. Williams*, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101; *Darrough v. Blackford*, 84 Va. 509; 5 S. E. 542. "It is wholly immaterial whether the contract of an infant is executed or executory. He has the right to avoid it." *Leacox v. Griffith*, 76 Ia. 89, 94; 40 N. W. 109.

⁵ *Union, etc., Ins. Co. v. Hilliard*, 63 O. S. 478; 81 Am. St. Rep. 644; 53 L. R. A. 462; 59 N. E. 230.

⁶ *Magee v. Welsh*, 18 Cal. 155; *Price v. Jennings*, 62 Ind. 111; *Warnock v. Loar* (Ky.), 11 S. W. 438; *Morse v. Ely*, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577; *Tupper v. Caldwell*, 12 Met. (Mass.) 559; 46 Am. Dec. 704; *Phelps v. Worcester*, 11 N. H. 51.

⁷ *Morse v. Ely*, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577.

⁸ *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

⁹ *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222.

¹⁰ See § 891.

sound legal principle and by the better reasoning, an infant's contract whether executed or executory is to be treated as binding until it is disaffirmed by him or some one authorized by law to act for him.¹¹ This is on the theory that disaffirmance is a privilege which may be exercised by the infant at his discretion, but that subject to this right, a voidable contract of an infant stands on the same footing as any valid contract. The courts have said, however, in many cases, that an executory contract of an infant is not valid until it is ratified.¹² An examination of these cases will, however, show that in every case this proposition is a mere dictum, as the contract in each case has been avoided by the infant in a proper manner. It may be doubted if even these courts really mean all that they say. If the infant's executory contract were of no validity until he affirmed, there would be no consideration for the promise of the adversary party, and he would be able to defeat any action against him by the infant — a conclusion to which no court has come. What is probably meant by this form of statement is that: An executory contract, unless ratified, is subject to the defense of infancy until the right of disaffirmance is barred by lapse of time.¹³ This right exists therefore either for a reasonable time or for the period prescribed by the statute of limitations. In the latter case, the right to plead infancy will not be extinguished until the right to sue on the contract is extinguished. In the former case, it might be possible that the right to disaffirm would cease before the right of action on the contract would be lost. The doctrine of a reasonable time is generally applied only to executed conveyances. If two infants contract with each other, either

¹¹ *Viditz v. O'Hagan* (1899), 2 Ch. 569; 68 L. J. Ch. N. S. 553; *American, etc., Co. v. Dykes*, 111 Ala. 178; 56 Am. St. Rep. 38; 18 So. 292; *Amey v. Cockey*, 73 Md. 297; 20 Atl. 1071; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939; 20 Atl. 625.

¹² *Morton v. Steward*, 5 Ill. App. 533; *Tyler v. Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; 35 N. W. 902; *Minock v. Shortridge*, 21 Mich. 304; *State v. Plaisted*, 43 N. H. 413; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349; *Beardsley v. Hotchkiss*, 96 N. Y. 201.

¹³ See § 885.

has the same right to disaffirm that he has in contracting with an adult.¹⁴

§873. Examples of voidable contracts.—Transfers of property.

An infant's executory contract to convey realty,¹ or to purchase it;² a lease by him,³ or to him;⁴ and his deed passing realty,⁵ are all voidable. His right to avoid is not affected by the fact that adult grantors joined with him as being co-owners,⁶ or by the fact that the property sold has passed into the hands of

¹⁴ *Drude v. Curtis*, 183 Mass. 317; 62 L. R. A. 755; 67 N. E. 317.

¹ *Barlow v. Robinson*, 174 Ill. 317; 51 N. E. 1045; *Yeager v. Knight*, 60 Miss. 730; *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; 76 Am. Dec. 209.

² *Lynde v. Budd*, 2 Paige (N. Y.) 191; 21 Am. Dec. 84.

³ *Slator v. Trimble*, 14 Ir. C. L. 342; *Slator v. Brady*, 14 Ir. C. L. 61.

⁴ *Flexner v. Dickerson*, 72 Ala. 318; *Gregory v. Lee*, 64 Conn. 407; 25 L. R. A. 618; 30 Atl. 53; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429.

⁵ *McDonald v. Salmon Club*, 33 N. B. 472; *Tucker v. Moreland*, 10 Pet. (U. S.) 59; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Hastings v. Dollarhide*, 24 Cal. 195; *Walker v. Pope*, 101 Ga. 665; 29 S. E. 8; *Tunison v. Chamblin*, 88 Ill. 378; *Keil v. Healy*, 84 Ill. 104; 25 Am. Rep. 434; *Gillenwaters v. Campbell*, 142 Ind. 529; 41 N. E. 1041; *Green v. Wilding*, 59 Ia. 679; 44 Am. Rep. 696; 13 N. W. 761; *Hoffert v. Miller*, 86 Ky. 572; 6 S. W. 447; *Vallandingham v. Johnson*, 85 Ky. 288; 3 S. W. 173; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Kendall v. Lawrence*, 22 Pick.

(Mass.) 540; *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; *Craig v. Van Beber*, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Roberts v. Wiggins*, 1 N. H. 73; 8 Am. Dec. 38; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Eagle Fire Co. v. Lent*, 6 Paige (N. Y.) 635; affirming, 1 Edw. Ch. (N. Y.) 301; *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565; *Drake's Lessee v. Ramsey*, 5 Ohio 251; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114; *Ihley v. Padgett*, 27 S. C. 300; 3 S. E. 468; *Wheaton v. Easton*, 5 Yerg. (Tenn.) 41; 26 Am. Dec. 251; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Bullock v. Sprowl*, 93 Tex. 188; 77 Am. St. Rep. 849; 47 L. R. A. 326; 54 S. W. 661; *Askey v. Williams*, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Darraugh v. Blackford*, 84 Va. 509; 5 S. E. 542; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

⁶ *Dunn v. Wheeler*, 86 Me. 238; 29 Atl. 985; *Clapp v. Byrnes*, 155 N. Y. 535; 50 N. E. 277.

a *bona fide* purchaser for value.⁷ Thus, an infant remainderman assented to a sale of the realty and payment of the proceeds to the life-tenant. It was held that he could repudiate this agreement at the death of the life-tenant, even if the title had passed to an innocent purchaser.⁸

Where, however, the rights of the infant and of the co-owners are inseparable, as where they were the heirs to certain realty which was subject to a conditional oil lease, and the adult owner on behalf of all sought to forfeit the lease for a breach of condition, it was held that the minor heirs could repudiate the acts of an adult co-heir in forfeiting such oil-lease if it is in fraud of their rights or by mistake but not if for their advantage.⁹ So an infant's mortgage of his realty is voidable,¹⁰ even if for necessities.¹¹ If an infant agrees to buy certain realty from A, and thereafter while still a minor surrenders his interest in such realty for a team of horses, this is a sale of his equity and not a rescission of his original contract to buy the realty; and on coming of age he may repudiate the contract by which he surrendered such interest in realty.¹² His executory contracts to sell personalty,¹³ executed sales by him¹⁴ even if the property

⁷ Walker v. Pope, 101 Ga. 665; 29 S. E. 8; Vallandigham v. Johnson, 85 Ky. 288; 3 S. W. 173; Searcy v. Hunter, 81 Tex. 644; 26 Am. St. Rep. 837; 17 S. W. 372.

⁸ Walker v. Pope, 101 Ga. 665; 29 S. E. 8.

⁹ Wilson v. Goldstein, 152 Pa. St. 524; 25 Atl. 493. (Hence the minors could not on reaching majority sue on the lease.) In Springer v. Gas Co., 145 Pa. St. 430; 22 Atl. 986, it was held that if a guardian could forfeit an oil-lease on behalf of his wards, he could not bind adult co-owners.

¹⁰ Hubbard v. Cummings, 1 Me. 11; Monumental, etc., Association v. Herman, 33 Md. 128; Mansfield v. Gordon, 144 Mass. 168; 10 N. E. 773; Roberts v. Wiggin, 1 N. H. 73;

8 Am. Dec. 38; McGan v. Marshall, 7 Humph. (Tenn.) 121.

¹¹ McGan v. Marshall, 7 Humph. (Tenn.) 121; Askey v. Williams, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101.

¹² Beickler v. Guenther, 121 Ia. 419; 96 N. W. 895.

¹³ Petrie v. Williams, 68 Hun (N. Y.) 589.

¹⁴ White v. Branch, 51 Ind. 210; Williams v. Brown, 34 Me. 594; Kingman v. Perkins, 105 Mass. 111; Holmes v. Rice, 45 Mich. 142; Downing v. Stone, 47 Mo. App. 144; Rainwater v. Durham, 2 Nott. & McCord. (S. C.) 524; 10 Am. Dec. 637; Grace v. Hale, 2 Humph. (Tenn.) 27; 36 Am. Dec. 296; Price v. Furman, 27 Vt. 268; 65 Am. Dec. 194.

has passed into the hands of a *bona fide* purchaser,¹⁵ executed purchases by him other than necessities,¹⁶ and chattel mortgages made by him,¹⁷ are alike voidable. The proposition that an infant's purchases are voidable has been qualified by one of our ablest text-book writers. "If an infant goes upon the streets of a city, shopping, he cannot afterward retrace his steps and get back the money he paid, even though he tenders the goods in return; for to permit it would render shopkeeping impossible."¹⁸ But no authorities are given for this proposition and none appear on investigation. If the goods are necessities and the price is reasonable, the contract is binding; and, in other cases, shopkeeping is perfectly possible without the patronage of minors.

§874. Contracts for work and labor.

By the weight of authority a minor may avoid a contract of service entered into by him after performing it in whole or in part and recover the reasonable value of his services.¹ Thus a

¹⁵ *Downing v. Stone*, 47 Mo. App. 144. There is "no such thing as an innocent purchaser of a minor's property." *Englebert v. Troxell*, 40 Neb. 195, 212; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

¹⁶ *Riley v. Mallory*, 33 Conn. 201; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; 4 N. E. 891; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; 9 N. E. 420; *Butler v. Stark* (Ky.), 79 S. W. 204; *Robinson v. Weeks*, 56 Me. 102; *McCarthy v. Henderson*, 138 Mass. 310; *Barney v. Rutledge*, 104 Mich. 289; 62 N. W. 369; *Nichols, etc., Co. v. Snyder*, 78 Minn. 502; 81 N. W. 516; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678.

¹⁷ *Barney v. Rutledge*, 104 Mich. 289; 62 N. W. 369; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; 2 N. W. 942; *Cogley v. Cushman*, 16 Minn. 397; *Chapin v. Shafer*, 49 N. Y. 407.

¹⁸ *Bishop on Contracts*, Enlarged Edition, § 921.

¹ *Ray v. Haines*, 52 Ill. 485; *Van Pelt v. Corwine*, 6 Ind. 363; *Dallas v. Hollingsworth*, 3 Ind. 537; *Haugh, etc., Works v. Duncan*, 2 Ind. App. 264; 28 N. E. 334; *Derrocher v. Mills*, 58 Me. 217; 4 Am. Rep. 286; *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229; *Morse v. Ely*, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577; *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222; *Gaffney v. Hayden*, 110 Mass. 137; 14 Am. Rep. 580; *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; 1 N. W. 923; *Danville v. Mfg. Co.*, 62 N. H. 133; *Hagerty v. Lock Co.*, 62 N. H. 576; *Voorhees v. Wait*, 15 N. J. L. 343; *Thompson v. Marshall*, 50 Mo. App. 145; *Dearden v. Adams*, 19 R. I. 217; 36 Atl. 3; *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228.

minor may avoid a contract to forfeit two weeks wages unless two weeks notice of leaving is given;² or a contract requiring him to work for six months or to give two weeks' notice if he quit, to enable him to recover anything,³ and if he contracts to accept goods for his wages he may avoid this contract and demand money.⁴ The contrary view has been expressed that if an infant receives what he agreed to take for his services he cannot recover more.⁵ Of course in any event the amount already paid to the infant should be credited as a part payment.⁶ In Massachusetts a different view is entertained. Thus where A, a minor employee agreed with his employer that articles not necessities purchased by him should be deducted from A's wages, A afterwards disposed of such articles advantageously. On reaching majority A could repudiate the agreement and recover full wages.⁷ So where a minor worked under a contract that his wages were to be applied to paying off a debt due to his employer from his father's estate, it was held that on his failure to receive anything from his father's estate he could repudiate the contract and recover full wages.⁸ While some courts have practically nullified the right of a minor to avoid such a contract by holding that the employer can also set off against the value of the infant's services, all damages caused by his repudiating his contract,⁹ the better reasoning is that such damages cannot be so set off, as the infant has the right to avoid his contract

² Danville v. Mfg. Co., 62 N. H. 133.

³ Derocher v. Continental Mills, 58 Me. 217; 4 Am. Rep. 286.

⁴ Abell v. Warren, 4 Vt. 149.

⁵ Wilhelm v. Hardman, 13 Md. 140. So by statute, Murphy v. Johnson, 45 Ia. 57.

⁶ Waugh v. Emerson, 79 Ala. 295; Spicer v. Earl, 41 Mich. 191; 32 Am. Rep. 152; 1 N. W. 923; Hagerly v. Lock Co., 62 N. H. 576. A minor of nineteen whose father is dead, whose mother is married again and who has no guardian may bind

himself by a contract of employment and his employer will be released to the extent of the money and goods furnished the infant in part payment. Waugh v. Emerson, 79 Ala. 295.

⁷ Morse v. Ely, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577.

⁸ Dube v. Beaudry, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222.

⁹ Judkins v. Walker, 17 Me. 38; 35 Am. Dec. 229; Hoxie v. Lincoln. 25 Vt. 206; Thomas v. Dike, 11 Vt. 273; 34 Am. Dec. 690.

without being liable to any penalty.¹⁰ The entire value of his services for the entire time worked is recoverable; and this statement of course implies that any misconduct or negligence of the infant by which his services are less valuable than they otherwise would be must be allowed for.¹¹ A generally recognized exception to the rule that a minor's contract of service is voidable, is that a contract to work for necessities, if fair and reasonable, cannot be avoided as far as it has been executed;¹² and this principle has been applied to a contract for necessities and money,¹³ or necessities and other property;¹⁴ but if his services are reasonably worth more than his board he may recover a reasonable value for his services less board furnished.¹⁵

§875. Contracts of suretyship.

Some of the cases which followed the early rule as to the validity of an infant's contracts,¹ took a contract of suretyship as the clearest example of a contract prejudicial to an infant, and declared it void; and this rule has been repeated in later cases in dicta.² In most of these cases the result would have been the same if the contract had been held to be merely voidable; as where a mortgage was given by an infant married woman to secure a partnership,³ or an individual debt.⁴ So a court after saying that a contract of suretyship of a minor was "absolutely void" recognized it as capable of ratification.⁵ The weight

¹⁰ *Derocher v. Mills*, 58 Me. 217;
4 Am. Rep. 286; *Danville v. Mfg.*
Co., 62 N. H. 133; *Shurtliff v. Mil-*
lard, 12 R. I. 272; 34 Am. Rep. 640.

¹¹ *Vehue v. Pinkham*, 60 Me. 142.

¹² *Squier v. Hydliff*, 9 Mich. 274;
Stone v. Dennison, 13 Pick. (Mass.)
1; 23 Am. Dec. 654; *Mountain v.*
Fisher, 22 Wis. 93.

¹³ *Spicer v. Earl*, 41 Mich. 191;
32 Am. Rep. 152; 1 N. W. 923.

¹⁴ *Wilhelm v. Hardman*, 13 Md.
140.

¹⁵ *Locke v. Smith*, 41 N. H. 346.

¹ See § 855.

² *Hastings v. Dollarhide*, 24 Cal.
195; *Chandler v. McKinney*, 6 Mich.
217; 74 Am. Dec. 686; *Cronise v.*
Clark, 4 Md. Ch. 403; *Wheaton v.*
East, 5 Yerg. (Tenn.) 41; 26 Am.
Dec. 251. So under the early Con-
necticut statute, *Maples v. Wight-*
man, 4 Conn. 376; 10 Am. Dec. 149.

³ *Cronise v. Clark*, 4 Md. Ch. 403.

⁴ *Chandler v. McKinney*, 6 Mich.
217; 74 Am. Dec. 686.

⁵ *Curtin v. Patton*, 11 Serg. & R.
(Pa.) 305.

of modern authority is that an infant's contract of suretyship is not void, but voidable.⁶ Thus, becoming surety in a civil action for the appearance of the defendant,⁷ or for stay of execution,⁸ or on a note,⁹ are all voidable.

§876. Compromise and arbitration.

An infant's contract in compromise of a claim due to him, whether contract,¹ or tort,² is voidable. On his avoiding such contract whatever he has received under the compromise is to be credited upon his claim.³ So a contract by an infant to allow a note given by her to a deceased testator to be deducted from a legacy given to her by the will of such testator is voidable.⁴ It has even been held that the return of the property received under the compromise is a condition precedent to avoiding it.⁵ Moreover, although an infant is liable for his torts, his contract in compromise of a claim against him for his tort is voidable, and upon his avoiding it he may recover whatever he has parted with thereunder, leaving the other party to his original right of action.⁶ A release given by an infant to her guardian on taking his note by way of settlement of her claim against him has been

⁶ *Fetrow v. Wiseman*, 40 Ind. 148; *Wills v. Evans* (Ky.), 38 S. W. 1090; *Owens v. Long*, 112 Mass. 403; *Johnson v. Storie*, 32 Neb. 610; 49 N. W. 371; *Harner v. Dipple*, 31 O. S. 72; 27 Am. Rep. 496; *Reed v. Lane*, 61 Vt. 481; 17 Atl. 796.

⁷ *Reed v. Lane*, 61 Vt. 481; 17 Atl. 796.

⁸ *Harner v. Dipple*, 31 O. S. 72; 27 Am. Rep. 496.

⁹ *Fetrow v. Wiseman*, 40 Ind. 148; *Owens v. Long*, 112 Mass. 403; *Johnson v. Storie*, 32 Neb. 610; 49 N. W. 371.

¹ *Commonwealth ex rel. Strayer v. Hantz*, 2 Pen. & W. (Pa.) 333.

² *Mattei v. Vautro* (Q. B.), 78 L. T. Rep. 682; *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293; *Pittsburg, etc., Ry. v. Haley*, 170 Ill. 610; 48

N. E. 920 (settlement made by next friend without leave of court); *Baker v. Lovell*, 6 Mass. 78; 4 Am. Dec. 88; *Bonner v. Bryant*, 79 Tex. 540; 23 Am. St. Rep. 361; 15 S. W. 491.

³ See cases cited in two preceding notes.

⁴ *In re Cummings' Estate*, 120 Ia. 421; 94 N. W. 1117.

⁵ *Lane v. Coal Co.*, 101 Tenn. 581; 48 S. W. 1094.

See § 888.

⁶ *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489; *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290. In opposition to this view, *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519, holds that an infant's note given in a fair compromise of a tort commuted by him is valid.

said to be void, and hence not to release the sureties on his bond.⁷ Since even an executed contract of compromise is voidable, a contract to arbitrate is also voidable;⁸ and some authorities have even said that it is void.⁹

§877. Instruments negotiable in form.

While not always clearly expressed, the early view of an infant's negotiable contracts seems to have been that if valid at all, they must be strictly negotiable and subject to no defense in the hands of a *bona fide* holder for value before maturity. Since under this theory, it was impossible for such contracts to be voidable, as they must be either absolutely void or strictly valid, the courts held them void,¹ at least if in the hands of an indorsee.² In these cases, however, the only question involved was whether the infant could not avoid his contract.³ The modern view of such contracts is that while negotiable in form they are not negotiable in law. Minority may always be set up as a defense, even as against a *bona fide* holder. Accordingly, such contracts are voidable, unless for necessities.⁴ Thus, an infant's promise to pay loan from a bank is not void; hence the promise of his

⁷ *Fridge v. State*, 3 Gill & J. (Md.) 103; 20 Am. Dec. 463. In this case the decision was placed on the ground that the release as distinguished from a mere receipt was prejudicial to the infant. The same result would have followed from holding it voidable.

⁸ *Jones v. Payne*, 41 Ga. 23; *Baker v. Lovett*, 6 Mass. 78; 4 Am. Dec. 88; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Jones v. Bank*, 8 N. Y. 228.

⁹ *Millsaps v. Estes*, 134 N. C. 486; 46 S. E. 988; *Britton v. Williams*, 6 Munf. (Va.) 453.

¹ *Burgess v. Merrill*, 4 Taunt. 468; *Swasey v. Vanderheyden's Admr.*, 10 Johns. (N. Y.) 33; *McMinn v. Richmonds*, 6 Yerg. (Tenn.) 9.

² *Morton v. Steward* 5 Ill. App.

533. (In this case the consideration was necessities furnished.)

³ Except *Burgess v. Merrill*, 4 Taunt. 468, where it was held that the holder of a bill accepted by an adult and a minor should sue the adult alone.

⁴ *La Grange, etc., Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; *Keokuk, etc., Bank v. Hall*, 106 Ia. 540; 76 N. W. 832; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Baker v. Stone*, 136 Mass. 405; *Minock v. Shortridge*, 21 Mich. 304; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349; *Houston v. Cooper*, 3 N. J. L. 866 (where a note of an infant was said to be "invalid"); *Brown v. Bank*, 88 Tex. 265; 33 L. R. A. 359; 31 S. W. 285; *Askey v.*

surety is collateral only, not original.⁵ An infant's liability to a surety on his note is also voidable unless for necessities;⁶ but if for a reasonable value for necessities he must reimburse the surety.⁷ While it is ordinarily no defense to a surety that the principal is a minor,⁸ a surety on a minor's note is not liable where the minor disaffirms and returns the consideration.⁹ An infant's contract of indorsement is voidable only. It is not void, since the maker cannot refuse to pay the indorsee;¹⁰ and it is not valid, since the infant can avoid his liability to the indorsee,¹¹ and before payment by the maker he can avoid the indorsement and recovery from the maker.¹² Whether he can avoid his indorsement and recover of the maker after payment by the maker to the indorsee is a point upon which is found no direct authority and conflicting dicta.¹³ Of course if an in-

Williams, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101; Patchin v. Cromach, 13 Vt. 330. As to contracts for necessities, see § 865.

⁵ Brown v. Bank, 88 Tex. 265; 33 L. R. A. 359; 31 S. W. 285.

⁶ Leacox v. Griffith, 76 Ia. 89; 40 N. W. 109. In this case the executor became surety for an infant heir on a note and was secured by a chattel mortgage. The infant sold the property before the mortgage was recorded and the surety had to pay the note. To reimburse him the infant released to him his claims against the estate. This was held voidable. Leacox v. Griffith, 76 Ia. 89; 40 N. W. 109.

⁷ Conn v. Coburn, 7 N. H. 368; 26 Am. Dec. 746; Haines Admr. v. Tar-rant, 2 Hill (S. C.) 400. *Contra*, Ayers v. Burns, 87 Ind. 245; 44 Am. Rep. 759.

⁸ Hesser v. Steiner, 5 Watts & S. (Pa.) 476.

⁹ Keokuk, etc., Bank v. Hall, 106 Ia. 540; 76 N. W. 832; citing and following, Baker v. Kennett, 54 Mo. 82 Patterson v. Cave, 61 Mo. 439.

¹⁰ Frazier v. Massey, 14 Ind. 382; Hardy v. Waters, 38 Me. 450; Nightingale v. Withington, 15 Mass. 272; 8 Am. Dec. 101. This is true even if the indorsement is made by an agent. Hardy v. Waters, 38 Me. 450; Whitney v. Dutch, 14 Mass. 457; 7 Am. Dec. 229. However, early authority holds under the old rule given in § 855 that an indorsement made by one for an infant even in her presence and with her consent is void, so that it passes no title even though the infant does nothing to avoid it. Hence the holder cannot use it as a set-off. Semple v. Morrison, 7 T. B. Mon. (Ky.) 298.

¹¹ Nightingale v. Withington, 15 Mass. 272; 8 Am. Dec. 101; Dulty v. Brownfield, 1 Pa. St. 497.

¹² Hastings v. Dollarhide, 24 Cal. 195.

¹³ In Briggs v. McCabe, 27 Ind. 327, the court said that in such case the infant could recover, prefacing their remarks with "as to what would be the effect of payment by the maker of a note to the assignee

faunt's contracts are made void by statute, this will include commercial paper. Thus, in England an infant cannot bind himself by the acceptance of a bill of exchange given for necessities under such a statute.¹⁴

§878. Contracts of partnership.

An infant's contract of partnership usually presents one of four points for adjudication: (1) can an infant empower his partners to bind him; (2) can an infant be held personally liable by the partnership creditors; (3) can an infant recover his property contributed to the partnership as against the rights of partnership creditors; and (4) can an infant recover such property as against his partners. As we have seen,¹ an infant's appointment of an agent is by the better view, voidable and not void. Hence his authority to his partners to bind him, is voidable.² Until avoided the contract is valid. Hence it may be dissolved and a receiver appointed,³ and an assignment of the property of a firm which is largely indebted but not insolvent may be avoided by an infant partner.⁴ It is well settled, moreover, that an infant can avoid his contract of partnership to the extent of relieving himself from his individual liability for partnership debts.⁵ So a continuing partner who assumes all the firm lia-

of an infant payee before disaffirmance, it is not now necessary for us to decide." In *Welch v. Welch*, 103 Mass. 562, quoting from *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101, is a dictum that in such a case the minor could not recover; but in *Nightingale v. Withington* there was no revocation; and in *Welch v. Welch* the court held that one who had on order of an infant paid over the infant's money to the necessary support of the infant's father could not be compelled to pay it again to the infant.

¹⁴ *In re Soltykoff* (1891) 1 Q. B. 413.

¹ See § 859.

² *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Dunton v. Brown*, 31 Mich. 182; *Folds v. Allardt*, 35 Minn. 488; 29 N. W. 201.

³ *Bush v. Linthicum*, 59 Md. 344.

⁴ *Foot v. Goldman*, 68 Miss. 529; 10 So. 62.

⁵ *Lovell v. Beauchamp* (1894), A. C. 607; *Goode v. Harrison*, 5 Barn. & Ald. 147; *Conklin v. Ogborn*, 7 Ind. 553; *Mehlhop v. Rae*, 90 Ia. 30; 57 N. W. 650; *Neal v. Berry*, 86 Me. 193; 29 Atl. 987; *Mason v. Wright*, 13 Met. (Mass.) 306; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27; *Osborn v. Farr*, 42 Mich. 134; 3 N. W. 299; *Folds v. Allardt*, 35 Minn. 488; 29 N. W. 201.

bilities cannot recover from a minor partner his share of a firm note excluded from such liabilities.⁶ He may even disaffirm his individual liability without disaffirming his contract with his partners.⁷ Whether on disaffirming he can recover property contributed by him to the partnership assets, to the prejudice of partnership creditors is not so clear. In some cases, it has merely been held that the proceeding in question was not a proper one for asserting such a right, without always deciding whether the right existed.⁸ Thus pleading infancy in a suit on a partnership debt,⁹ suing the assignee in insolvency to recover one-half of the partnership assets,¹⁰ or suing to renounce the partnership and have a receiver appointed, with a prayer for priority in payment of money advanced,¹¹ have each been held not to permit the infant to recover his share of the assets to the prejudice of the firm creditors. But where the courts have expressed an opinion on this point they have denied the existence of this right.¹² The weight of authority clearly is that an in-

⁶ Neal v. Berry, 86 Me. 193; 29 Atl. 987.

⁷ Mehlhop v. Rae, 90 Ia. 30; 57 N. W. 650; Conary v. Sawyer, 92 Me. 463; 69 Am. St. Rep. 525; 43 Atl. 27; Tobey v. Wood, 123 Mass. 88; 25 Am. Rep. 27; apparently *contra*, Miller v. Sims, 2 Hill (S. C.) 479; Salinas v. Bennett, 33 S. C. 285; 11 S. E. 968.

⁸ "If an infant partner can repudiate his contract and call for a return of his share of the capital, without regard to the account of profit and loss, it must be upon some proceeding instituted for that purpose, and on which the rights of the other partners and of creditors of the firm may be considered and protected." Gay v. Johnson, 32 N. H. 167, 169.

⁹ Gay v. Johnson, 32 N. H. 167.

¹⁰ Conary v. Sawyer, 92 Me. 463; 69 Am. St. Rep. 525; 43 Atl. 27.

¹¹ Shirk v. Shultz, 113 Ind. 571; 15 N. E. 12.

¹² Shirk v. Shultz, 113 Ind. 571; 15 N. E. 12; Conary v. Sawyer, 92 Me. 463; 69 Am. St. Rep. 525; 43 Atl. 27; Bush v. Linthicum, 59 Md. 344; Pelletier v. Couture, 148 Mass. 269; 1 L. R. A. 863; 19 N. E. 400; Yates v. Lyon, 61 N. Y. 344; reversing, Yates v. Lyon, 61 Barb. (N. Y.) 205. "The plaintiff, however, contends that inasmuch as he was a minor and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as had been fully paid for at the time when insolvency proceedings were instituted. We do not think that such a contention is maintainable either on principle or on authority. . . . It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for as a partner, such goods having been paid for by the firm and being part-

fant cannot on rescinding his contract on that ground alone recover from his partners what he has advanced to the assets of the firm, but only his proportionate share after payment of all debts.¹³ This of course eliminates the question of fraud and the like. Thus a loss of capital must be divided equally, and not be borne exclusively by the adult partners.¹⁴ Unfortunately, many of the decided cases rest on the proposition that a minor cannot recover back money paid by him; and sound reason seems to be with the minority view that the minor may recover money advanced by him.¹⁵

nership assets.' *Conary v. Sawyer*, 92 Me. 463, 467; 69 Am. St. Rep. 525; 43 Atl. 27. "It is not too much to say that if an infant goes into a mercantile venture which proves unsuccessful he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been caajoled into any waste of his capital, it hardly seems equitable that the creditor of his firm should, either directly or indirectly, be called upon for reimbursement." *Yates v. Lyon*, 61 N. Y. 344, 346; reversing, *Yates v. Lyon*, 61 Barb. (N. Y.) 205. But *Yates v. Lyon* is obiter in this point, as the question was whether an assignment by a firm of which an infant was a member was void. The distinction suggested by the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 569, 604, one of the clearest discussions of the rights of infants yet written, between creditors who have disposed of property to the firm which it still retains and others, is ignored in *Conary v. Sawyer*, 92 Me. 463; 69 Am. St. Rep. 525; 43 Atl. 27.

¹³ *Ex parte Taylor*, 8 De Gex, M. & G. 254; *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; 8 Atl. 664;

Page v. Morse, 128 Mass. 99; *Moley v. Brine*, 120 Mass. 324; *Breed v. Judd*, 1 Gray (Mass.) 455.

¹⁴ *Moley v. Brine*, 120 Mass. 324. "Whilst fully recognizing the privilege which the law accords minors in regard to contracts made during their minority, yet in a case like the present, where money is paid by a minor in consideration of being admitted as a partner in the business of the appellant, and he does become and remains a partner for a given time, he ought not to be allowed to recover back the money thus paid, unless he was induced to enter into the partnership by the fraudulent representations of the appellant." *Adams v. Beall*, 67 Md. 53, 59; 1 Am. St. Rep. 379; 8 Atl. 664.

¹⁵ *Sparman v. Keim*, 83 N. Y. 245. In *Heath v. Stevens*, 48 N. H. 251, an agreement by A to pay the fire of B, a minor, to New York, and if he was not accepted for enlistment, to pay his expenses home again; if B was accepted and received a bounty, B was to pay A \$200. B was accepted, received a bounty of \$700, and paid A \$200. B subsequently sued to rescind, and he was allowed to do so, and to recover \$200 less his expenses to New York. The facts of this case resemble *Breed v. Judd*,

§879. **Infant as member of corporation.**

The courts are divided as to whether an infant can be a member of a mutual or assessment corporation.¹ So there is a conflict of authority as to whether an infant can be an incorporator of an ordinary stock corporation. It has been held that he might be an incorporator as far as collateral attack was concerned;² but on direct attack it has been held that he could not be an incorporator.³ As between vendor and vendee, there is no difference between a sale of corporation stock and other chattels, but the minor may disaffirm.⁴ This is true even if the vendor is the corporation itself, which issues its shares to the infant to take up shares in a dissolved corporation whose property has been transferred to the corporation issuing stock.⁵ It has been held that the directors may refuse to allow a transfer to a minor to be made on the books of the company;⁶ but if they do, the transfer is merely voidable,⁷ is good until avoided,⁸ and cannot afterward be ignored by the corporation;⁹ and a corpora-

1 Gray (Mass.) 455, in which the infant was sent to California for a third of his earnings; but the result was exactly opposite.

¹ In *Chicago, etc., Association v. Hunt*, 127 Ill. 257; 2 L. R. A. 549; 20 N. E. 55, it was held that he could be a member of such a corporation. In *In re Globe, etc., Association*, 135 N. Y. 280; 17 L. R. A. 547; 32 N. E. 122, affirming 63 Hun (N. Y.) 263, it was held that the statutes contemplated only members who could not avoid their contracts; and hence an infant could not be a member or incorporator.

² *In re Nassau Phosphate Co.*, 2 Ch. Div. 610; *In re Saxon & Co.* (1892), 3 Ch. 555; but in these cases the validity of the corporation was not directly attacked by the state, but collaterally.

³ In *Hamilton, etc., Co. v. Townsend*, 13 Ont. App. 534; 16 Am. & Eng. Corp. Cas. 645, it was held

that a statute authorizing five persons to form a corporation meant five persons of full age, and that if one was a minor, even if he ratified his act after majority, the incorporation was defective.

⁴ *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Robinson v. Weeks*, 56 Me. 102.

⁵ *White v. Cotton-Waste Corporation*, 178 Mass. 20; 59 N. E. 642.

⁶ *Symon's Case*, L. R. 5 Ch. App. C. 298.

⁷ *Maguire's Case*, 3 De Gex & S. 31; *Lumsden's Case*, L. R. 4 Ch. App. C. 31; *Ebbett's Case*, L. R. 5 Ch. App. C. 302; *Baker's Case*, L. R. 7 Ch. App. C. 115.

⁸ *In re Nassau Phosphate Co.*, 2 Ch. Div. 610.

⁹ *Hart's Case*, L. R. 6 Eq. 512; *Wilson's Case*, L. R. 8 Eq. 240; *Mitchell's Case*, L. R. 9 Eq. 363; *Creed v. Bank*, 1 O. S. 1.

tion which makes transfer on its books of shares of stock sold by a minor is not liable therefor.¹⁰ Under the English statutes, an avoidance by a minor relieves him from liability for calls on his stock bought or subscribed for by him,¹¹ if in a reasonable time,¹² and subject to the rule that he cannot retain the shares and repudiate his liability for calls.¹³ He must avoid the whole contract to escape this liability.¹⁴ Of course if he ratifies his contract after majority he cannot escape liability.¹⁵ It may undoubtedly be provided by statute that the property of a minor in the hands of his guardian may be taken on his stock-liability; and under such a statute his real estate may be levied on.¹⁶ Of course one subscribing for stock in name of minors, who himself receives the benefit of stock is personally liable for debt.¹⁷

§880. Concealment or misrepresentation of minority.

Mere omission to disclose minority does not estop the infant to avoid the contract, or give to the adversary party any right of action, either in law or equity.¹ No estoppel can arise by reason of matter occurring after the transaction in question. Thus where A conveyed realty to B when a minor, and thereafter brought suit to have such deed set aside on the ground of fraud

¹⁰ *Smith v. Ry. Co.*, 91 Tenn. 221; 18 S. W. 546.

¹¹ *Newry, etc., Ry. v. Coombe*, 3 Ex. 565; *Northwestern Ry. v. McMichael*, 5 Ex. 114.

¹² *Dublin, etc., Ry. v. Black*, 8 Ex. 181.

¹³ *Leed, etc., Ry. v. Fearnley*, 4 Ex. 26.

¹⁴ *Northwestern Ry. v. McMichael*, 5 Ex. 114.

¹⁵ *Cork, etc., Ry. v. Cazenove*, 10 Q. B. 935 (10 Ad. & El.). This case has been criticised, but on the question whether the act of retaining stock after majority was a ratification.

¹⁶ *Mansur v. Pratt*, 101 Mass. 60.

¹⁷ *Castleman v. Holmes*, 4 J. J.

Mar. (Ky.) 1; *Roman v. Fry*, 5 J. Mar. (Ky.) 634.

¹ *Confederation Loan Association v. Kinnear*, 23 Ont. App. 497; *Davidson v. Young*, 38 Ill. 145; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; 17 N. E. 265; *Price v. Jennings*, 62 Ind. 111; *Sewell v. Sewell*, 92 Ky. 500; 36 Am. St. Rep. 606; 18 S. W. 162; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Stack v. Cavanaugh*, 67 N. H. 149; 30 Atl. 350; *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; 6 Atl. 384; *Bible v. Wisecarver* (Tenn. Ch. App.), 50 S. W. 670.

alleging that he was of age when such conveyance was made, he is not estopped to allege thereafter in a subsequent suit that he was a minor.² Where the infant has made false representations as to his age no estoppel can arise where the other party is not in fact deceived thereby.³ So no estoppel can arise out of a representation of infancy made to the agent of the mortgagee and known to him to be false;⁴ or where before his conveyance a minor testified that he was of full age, it not being shown that grantee knew of and relied on such statement.⁵ Even where the adversary party is deceived, no estoppel can arise in an action at law,⁶ except where the Common Law is modified by statute.⁷ So a misrepresentation by an infant that his disability to contract has been removed by decree of court does not estop him from pleading infancy as a defense.⁸ In Kentucky the doctrine of estoppel seems to be applied in such cases, even at law.⁹

² *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040.

³ *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Bradshaw v. Van Winkle*, 133 Ind. 134; 32 N. E. 877; *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; *Charles v. Hastedt*, 51 N. J. Eq. 171; 26 Atl. 564.

⁴ *Charles v. Hastedt*, 51 N. J. Eq. 171; 26 Atl. 564.

⁵ *Bradshaw v. Van Winkle*, 133 Ind. 134; 32 N. E. 877.

⁶ *Burdett v. Williams*, 30 Fed. 697; *Oliver v. McClelland*, 21 Ala. 675; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676; *Vallandingham v. Johnson*, 85 Ky. 288; 3 S. W. 173; *Wilson v. Wilson* (Ky.), 50 S. W. 260; *Merri-man v. Cunningham*, 11 Cush. (Mass.) 40; *Folds v. Allardt*, 35 Minn. 488; 29 N. W. 201; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412; 4 N. W. 695; *Ridgeway v. Her-*

bert, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Houston v. Cooper*, 3 N. J. L. 866; *Studwell v. Shapter*, 54 N. Y. 249; *Conroe v. Birdsall*, 1 Johnson's Cases (N. Y.) 127; 1 Am. Dec. 105; *Carolina, etc., Association v. Black*, 119 N. C. 323; 25 S. E. 975; *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Eliot v. Eliot*, 81 Wis. 295; 15 L. R. A. 259; 51 N. W. 81.

⁷ *Dillon v. Burnham*, 43 Kan. 77; 22 Pac. 1016. Thus in Kansas a minor who by representations that he is of full age, or by engaging in business as an adult, deceives the other party, cannot rescind. *Dillon v. Burnham*, 43 Kan. 77; 22 Pac. 1016.

⁸ *Wilkinson v. Buster*, 124 Ala. 574; 26 So. 940.

⁹ *Damron v. Commonwealth*, 110 Ky. 268; 96 Am. St. Rep. 453; 61 S. W. 459.

In equity, however, an infant, who by representations or by conduct, misleads the other party into believing that the infant is of full age, is estopped to allege his infancy;¹⁰ as where a minor obtained a settlement with his guardian by representing that he was of age,¹¹ or where the infant in order to induce the purchaser to buy, has made affidavit that he was of age.¹² In Minnesota it has been held that a minor is not estopped by his representation that he is of age to avoid a mortgage.¹³ Whether an infant who falsely represents himself as being of full age and thereby induces one to sell him chattels is liable on an action for fraud, is a question on which the authorities are in conflict. In the majority of cases it has been held that he is not liable;¹⁴ but in other cases it has been held that he is liable.¹⁵ It has been held that if the infant has induced the adversary party to enter

¹⁰ *Schmitheimer v. Eiseman*, 7 Bush. (Ky.) 298; *Ferguson v. Bobo*, 54 Miss. 121; *Ryan v. Grownney*, 125 Mo. 474, 484; 28 S. W. 189, 755; *Hayes v. Parker*, 41 N. J. Eq. 630; 7 Atl. 511; *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258; 31 Atl. 280; *Adams v. Fite*, 3 Baxt. (Tenn.) 69; *Harsein v. Cohen* (Tex. Civ. App.), 25 S. W. 977. On rehearing in *Ryan v. Grownney*, 125 Mo. 474; 28 S. W. 189. the court on account of the insufficiency of the record finally on motion for rehearing remanded the case "in order that the lower court may rehear the case, unbound by anything said in the original opinion."

¹¹ *Hayes v. Parker*, 41 N. J. Eq. 630; 7 Atl. 511.

¹² *Schmitheimer v. Eiseman*, 7 Bush. (Ky.) 298; *Ryan v. Grownney*, 125 Mo. 474, 484; 28 S. W. 189, 755.

¹³ *Alt v. Groff*, 65 Minn. 191; 68 N. W. 9. This case was brought at law, but the validity of the mortgage was raised by the answer and

denied by the reply, and raised a question in equity.

¹⁴ *Johnson v. Pie*, 1 Lev. 169; 1 Sid. 258; 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Brown v. Dunham*, 1 Root (Conn.) 272; *Geer v. Hovy*, 1 Root (Conn.) 179; *Burns v. Hill*, 19 Ga. 22; *Slayton v. Barry*, 175 Mass. 513; 78 Am. St. Rep. 510; 49 L. R. A. 560; 56 N. E. 574; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Kilgore v. Jordan*, 17 Tex. 341; *Nash v. Jewett*, 61 Vt. 501; 15 Am. St. Rep. 931; 4 L. R. A. 561; 18 Atl. 47; *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659.

¹⁵ *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; 9 N. E. 420; *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209; *Eaton v. Hill*, 50 N. H. 235; 9 Am. Rep. 189; *Fitts v. Hall*, 9 N. H. 441; *Wallace v. Morss*, 5 Hill (N. Y.) 391.

into the contract by a fraudulent representation as to the age of the infant, he must account for the consideration even if he has wasted it.¹⁶

§881. Ratification.—Who can ratify.

The proposition that an infant's contracts in general are voidable implies that they may be ratified. This cannot be done by an infant before reaching majority as his ratification would have no greater effect than his original contract.¹ In case the infant dies before reaching majority his personal representative may affirm,² even before the infant would have reached majority had he lived.³ Like other agreements, a valid ratification must be made by one who is competent to contract and free from restraint.⁴ Hence a ratification is ineffectual if made after majority by one who has been put under guardianship as a spendthrift, the statute making void his contracts after the appointment of a guardian.⁵ A threat of a civil action does not prevent a ratification from being binding.⁶ By the better reasoning it has been held that a ratification after majority is valid though the former infant did not know that by law infancy was a defense.⁷ The amount of legal knowledge possessed by

¹⁶ Pemberton, etc., Association v. Adams, 53 N. J. Eq. 258; 31 Atl. 280. See obiter in Petty v. Roberts. 7 Bush. (Ky.) 410.

¹ Sanger v. Hibbard, 104 Fed. 455; 43 C. C. A. 635; Dana v. Coombs, 6 Greenleaf (Me.) 89; 19 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117; Corey v. Burton, 32 Mich. 30; Ridgeway v. Herbert, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; Cheshire v. Barrett, 4 McCord. (S. C.) 241; 17 Am. Dec. 735; O'Dell v. Rogers, 44 Wis. 136.

² Bozeman v. Browning, 31 Ark. 364.

³ Shropshire v. Burns, 46 Ala. 108.

⁴ Sims v. Everhardt, 102 U. S.

300; McCarty v. Carter, 49 Ill. 53; 95 Am. Dec. 572.

⁵ Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117.

⁶ Bestor v. Hickey, 71 Conn. 181; 41 Atl. 555.

⁷ American, etc., Co. v. Wright, 101 Ala. 658; 14 So. 399; Bestor v. Hickey, 71 Conn. 18; 41 Atl. 555; Clark v. Van Court, 100 Ind. 113; 50 Am. Rep. 774; Morse v. Wheeler, 4 All. (Mass.) 570; Anderson v. Soward, 40 O. S. 325; 48 Am. Rep. 687. "The contract of a minor, including the power, on coming of age, without any new consideration, to make the contract binding on him, is a transaction *sui generis*, and is not strictly analogous to any other known to the law. The nature and

any one at a given time in the past is a question almost impossible to determine from evidence, as the person himself is usually the only one who knows how much he knew; and the rule just given is a wise and safe one; yet it must be admitted that a considerable number of cases, mostly however, in mere dicta, hold that a ratification is invalid unless made with knowledge that infancy was a defense.⁸

§882. Nature and effect of ratification.

Ratification is not the making of a new contract, but is an election by the infant between his two antagonistic rights of treating a pre-existing contract as void or valid, in favor of treating it as valid.¹ No new consideration is therefore necessary,² and on ratification the contract becomes valid from the

validity of the contract depend on the acts of a minor who has the capacity to assent, but not the capacity to bind himself during minority; the right to enforce the contract depends on the acts of an adult who has no special incapacities nor privileges. When he exercises his option, which results from his contract made while a minor, to bind or not to bind himself by the contract to which he has assented, he stands as every one else stands in the performance of a voluntary act; he is presumed to know the law. So in the present case, the defendant knew he had, while a minor, agreed, for a fair consideration which he had received and enjoyed, to pay the amount in question to the plaintiff, and voluntarily, in specific terms, promised to pay that sum. This promise bound him to make the payment by force of the same law that exempted him from liability until the promise was made. It is immaterial whether he knew or did not know the law;

if such knowledge could affect his act, he is charged with the knowledge, and cannot be permitted to show the contrary." *Bestor v. Hickey*, 71 Conn. 181, 186; 41 Atl. 555.

⁸ *Harmer v. Killing*, 5 Esp. 102; *Tucker v. Moreland*, 10 Pet. (U. S.) 59; *Petty v. Roberts*, 7 Bush. (Ky.) 410; *Owen v. Long*, 112 Mass. 403; *Hinely v. Margaritz*, 3 Pa. St. 428; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Hatch v. Hatch*, 60 Vt. 160; 13 Atl. 791.

¹ The act of an infant in making valid his prior voidable contract is said to be "analogous either to a waiver or a ratification or a new contract. Such a promise is frequently indicated by all these names; they have been indifferently used in several of our decisions as terms of convenience and partial illustration, but it certainly cannot be accurately described by either." *Bestor v. Hickey*, 71 Conn. 181, 187; 41 Atl. 555.

² *American, etc., Co. v. Dykes*, 111

date on which it was made, and not merely from the date of the ratification.³ Hence a deed when ratified prevails over a gratuitous conveyance of the same property made between the original deed and the ratification.⁴ A ratification once made without fraud, duress and the like is final, and the former infant cannot thereafter rescind.⁵ The proposition has been repeatedly advanced that a ratification, after suit was brought, is of no effect. The reason given is that "There must be a subsisting right of action at the time of suing out the plaintiff's writ, which right of action no subsequent promise can give."⁶ Evidently this reasoning misapprehends the real nature of ratification, and rests upon the fallacy that an infant's executory contract is of no effect until ratified.⁷ It is even said that a "promise cannot relate back . . . so as to make the original contract a good foundation for an action from the beginning."⁸ An examination of the cases usually cited in support of this proposition shows that in some it is a dictum, as there was no valid ratification at all, either before or after suit;⁹ while in others it is apparently necessary to the decision.¹⁰ Even in some of the cases last cited it seems from somewhat incomplete statements of fact that the facts relied on as a ratification occurred after a disaffirmance of liability by a plea of infancy.

Ala. 178; 56 Am. St. Rep. 38; 18 So. 292; Conklin v. Ogborn, 7 Ind. 553; Grant v. Beard, 50 N. H. 129.

³ American, etc., Co. v. Dykes, 111 Ala. 178; 56 Am. St. Rep. 38; 18 So. 292; Hall v. Jones, 21 Md. 439; Durfee *ex rel.* Lantz v. Abbott, 61 Mich. 471; 28 N. W. 521; Minock v. Shortridge, 21 Mich. 304; Tibbets v. Gerrish, 25 N. H. 41; 57 Am. Dec. 307; Hoit v. Underhill, 10 N. H. 220; 34 Am. Dec. 148; Harner v. Dipple, 31 O. S. 72; 27 Am. Rep. 496; Cheshire v. Barrett, 4 McCord. (S. C.) 241; 17 Am. Dec. 735.

⁴ Palmer v. Miller, 25 Barb. (N. Y.) 399.

⁵ Voltz v. Voltz, 75 Ala. 555; Mc-

Carthy v. Nicrosi, 72 Ala. 332; 47 Am. Rep. 418; Hastings v. Dollarhide, 24 Cal. 195; Youmans v. Forsyth, 86 Hun (N. Y.) 370; Luce v. Jestrab, — N. D. —; 97 N. W. 848.

⁶ Hale v. Gerrish, 8 N. H. 374. 375.

⁷ See § 872.

⁸ Merriam v. Wilkins, 6 N. H. 432, 433; 25 Am. Dec. 472.

⁹ Thing v. Libbey, 16 Me. 55; Ford v. Phillips, 1 Pick. (Mass.) 202.

¹⁰ Freeman v. Nichols, 138 Mass. 313; Hale v. Gerrish, 8 N. H. 374; Merriam v. Wilkins, 6 N. H. 432; 25 Am. Dec. 472.

§883. What constitutes ratification.

An express promise by the former infant to comply with the terms of the contract¹ or his conduct in keeping realty purchased, and treating it as his own after he comes of age,² or selling it,³ or a suit for, and receipt of purchase price after majority,⁴ is a ratification; even if made after a suit to disaffirm the contract.⁵ Thus a sale of property which an infant bought, subject to liens, and on which the infant gave a mortgage to raise money to discharge the liens, is a ratification of the entire transaction including the mortgage.⁶ So is a recital in a mortgage given after majority, that the realty is subject to the lien of another mortgage given during minority.⁷ Where the property is sold before majority, giving a deed therefor after majority is a ratification.⁸ So is the retention and use of the proceeds after majority.⁹ An oral promise to perform a bond

¹ *Bestor v. Hickey*, 71 Conn. 181; 41 Atl. 555; *Barlow v. Robinson*, 174 Ill. 317; 51 N. E. 1045; *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 103; *Tyler v. Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; 35 N. W. 902; *Houlton v. Mantuffel*, 51 Minn. 185; 53 N. W. 541; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349; *Tibbets v. Gerish*, 25 N. H. 41; 57 Am. Dec. 307; *Hatch v. Hatch*, 60 Vt. 160; 13 Atl. 791.

² *American, etc., Co. v. Dykes*, 111 Ala. 178; 56 Am. St. Rep. 38; 18 So. 292; *Ellis v. Alford*, 64 Miss. 8; 1 So. 155; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429.

³ *Buchanan v. Hubbard*, 119 Ind. 187; 21 N. E. 538; *Leathers v. Ross*, 74 Ia. 630; 38 N. W. 516; *Dana v. Coombs*, 6 Greenl. (Me.) 89; 19 Am. Dec. 194; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; 32 N. W. 583; *Lynde v. Budd*, 2 Paige Ch. (N. Y.) 191; 21 Am. Dec. 84.

⁴ *Lathrop v. Doty*, 82 Ia. 272; 47 N. W. 1089.

⁵ *Buchanan v. Hubbard*, 119 Ind. 187; 21 N. E. 538.

⁶ *Langdon v. Clayson*, 75 Mich. 204; 42 N. W. 805. In this case the infant on reaching majority quit-claimed the land to A, and afterward made a warranty deed to A, reciting therein that it was for the purpose of "expressly revoking all former deeds and mortgages made by me before I became of age."

⁷ *Ward v. Anderson*, 111 N. C. 115; 15 S. E. 933.

⁸ *Wall v. Mines*, 130 Cal. 27; 62 Pac. 386.

⁹ *Waters v. Lyon*, 141 Ind. 170; 40 N. E. 662. In *Owens v. Phelps*, 95 N. C. 286, this was said to be admissible in evidence, though not of itself a ratification. *Contra*, in *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654; retention of the proceeds of the sale of real estate was held not to ratify a mortgage given thereon during minority.

to convey realty and a request for a payment thereon,¹⁰ a promise after majority to pay the note given for land and take the land, if the vendor will remit the accrued interest,¹¹ and an oral statement of satisfaction with a deed executed during minority¹² have each been held to be a ratification. But where A, while a minor, gave notes secured by a real estate mortgage, then married, and after coming of age executed an instrument without any consideration, reciting that she took "pride and pleasure in ratifying, affirming and indorsing the said acts as fully" as if she had been of age, this did not affirm the mortgage, because it was not executed in the method prescribed by the Tennessee statute for the conveyance by married women of their interests in realty.¹³ While good as against the infant, an oral affirmance has, under recording statutes, been held invalid as to subsequent purchasers for value who know of the deed made by the infant, but are ignorant of his ratification.¹⁴ So conduct in keeping personalty and using it as his own after majority,¹⁵ or demanding and receiving it after majority,¹⁶ or selling it,¹⁷ or exchanging it,¹⁸ is a ratification. Thus an infant partner cannot retain partnership property transferred to him on his promise to pay partnership debts and refuse to pay such debts.¹⁹ But retaining possession for three months, notice of rescission being promptly given is not ratification,²⁰ nor is

¹⁰ Barlow v. Robinson, 174 Ill. 317; 51 N. E. 1045.

¹¹ Houlton v. Manteuffel, 51 Minn. 185; 53 N. W. 541.

¹² Ferguson v. Bell, 17 Mo. 347.

¹³ Walton v. Gaines, 94 Tenn. 420; 29 S. W. 458.

¹⁴ Black v. Hills, 36 Ill. 376; 87 Am. Dec. 224.

¹⁵ Lawson v. Lovejoy, 8 Greenl. (Me.) 405; 23 Am. Dec. 526; Delano v. Blake, 11 Wend. (N. Y.) 85; 25 Am. Dec. 617; Cheshire v. Barrett, 4 McCord (S. C.) 241; 17 Am. Dec. 735; Ihley v. Padgett, 27 S. C. 300; 3 S. E. 468; Nanny v. Allen, 77

Tex. 240; *sub nom.*, Manney v. Allen, 13 S. W. 989. *Contra*, Paul v. Smith, 41 Mo. Ap. 275 (retaining property did not amount to ratification in conformity with Missouri statute).

¹⁶ Nanny v. Allen, 77 Tex. 240; *sub nomine*, Manney v. Allen, 13 S. W. 989.

¹⁷ Hilton v. Shepherd, 92 Me. 160; 42 Atl. 387.

¹⁸ Curry v. Plow Co., 55 Ill. App. 82.

¹⁹ Kitchen v. Lee, 11 Paige (N. Y.) 107; 42 Am. Dec. 101.

²⁰ Scott v. Scott, 29 S. C. 414; 7 S. E. 811.

retaining property if claimed by a different title, as where the property in question was partnership property which was attached, sold, bought in by the infant's grandfather, and sold by him to the infant.²¹ Acting as a partner for a few days after majority, by drawing profits has been held not to be a ratification of individual liability if in ignorance of outstanding debts,²² but otherwise it is.²³ By the weight of authority the rule in ratification of an infant's contracts, different from that in waiving the statute of limitations, is that a mere acknowledgment that the obligation has been incurred,²⁴ or even a part payment thereon,²⁵ is not a ratification. Even payment of interest, part payment of principal, and a mere acknowledgment of the debt,²⁶ or a statement, "I owe a debt, and you will get your pay," was held not to be a ratification;²⁷ nor is an acknowledgment of the debt coupled with a statement that he would not pay it,²⁸ or with an offer to compromise, if not accepted.²⁹ A provision in a will directing just debts to be paid, does not authorize the executors to pay debts contracted during infancy.³⁰ If a conditional ratification is made, the offer must be accepted and the condition complied with to make it a valid ratification.³¹

²¹ Todd v. Clapp, 118 Mass. 495.

²² Tobey v. Wood, 123 Mass. 88;
25 Am. Rep. 27.

²³ Salinas v. Bennett, 33 S. C.
285; 11 S. E. 968.

²⁴ Fetrow v. Wiseman, 40 Ind.
148; Martin v. Mayo, 10 Mass. 137;
6 Am. Dec. 103; (obiter) Reed v.
Boshears, 4 Sneed (Tenn.) 118;
Hatch v. Hatch, 60 Vt. 160; 13 Atl.
791.

²⁵ Thrupp v. Fielder, 2 Esp. 628;
Kendrick v. Neisz, 17 Colo. 506; 30
Pac. 245; Catlin v. Haddox, 49
Conn. 492; 44 Am. Rep. 249; Barn-
aby v. Barnaby, 1 Pick. (Mass.)
221; Hinely v. Margaritz, 3 Pa. St.
428; Rapid, etc., Co. v. Sanford
(Tex. Civ. App.), 24 S. W. 587.
But in Little v. Duncan, 9 Rich.
Law (S. C.) 55; 64 Am. Dec. 760, it
was held that admitting that the

transaction was just and giving a
watch to be taken as part payment
if it kept good time was a ratifica-
tion.

²⁶ Kendrick v. Neisz, 17 Colo. 506;
30 Pac. 245.

²⁷ Hale v. Gerrish, 8 N. H. 374.

²⁸ Minoock v. Shortridge, 21 Mich.
304.

²⁹ Bennett v. Collins, 52 Conn. 1.

³⁰ Jackson v. Mayo, 11 Mass. 147;
6 Am. Dec. 167; Smith v. Mayo, 9
Mass. 62; 6 Am. Dec. 28. *Contra*,
Merchants', etc., Ins. Co. v. Grant,
2 Edw. Ch. (N. W.) 544.

³¹ Craig v. Van Beber, 100 Mo.
584; 10 Am. St. Rep. 569; 13 S. W.
906; State *ex rel.* Peacock v. Binder,
57 N. J. L. 374; 31 Atl. 215; Bre-
see v. Stanley, 119 N. C. 278; 25 S.
E. 870.

Thus neither a promise by a minor after coming of age to pay if he was ever to do so without inconvenience,³² nor an offer after majority to execute a deed of confirmation on payment of the balance of the purchase money,³³ is a ratification. So to enforce a contract which the former infant promised to perform if able, it must be shown that he is able.³⁴ If an express promise is relied on as a ratification, it must be made to the adversary party or his agent; not to a stranger.³⁵ Hence it may be made to an attorney with whom the debt is placed for collection,³⁶ or his clerk,³⁷ even if there is nothing to show that the former infant knew of his agency.³⁸ At Common Law an infant's ratification may be made orally;³⁹ but by statutes of certain states this rule is modified and an infant's express ratification must be in writing.⁴⁰ The express promise must be absolute. A conditional promise to pay an open account, contained in a letter written after majority, is not a compliance with the Virginia statute.⁴¹ These statutes do not apply to contracts ratified by the conduct of the infant, as by selling⁴² or retaining possession of the property purchased.⁴³ Mere failure to disaffirm promptly is not a ratification.⁴⁴ Thus, continuing to live with his parents

³² Bresee v. Stanley, 119 N. C. 278; 25 S. E. 870.

³³ Craig v. Van Bebber, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906.

³⁴ Proctor v. Sears, 4 All. (Mass.) 95; Thompson v. Lay, 4 Pick. (Mass.) 48; 16 Am. Dec. 325.

³⁵ Hoit v. Underhill, 9 N. H. 436; 32 Am. Dec. 380; Chandler v. Glover, 32 Pa. St. 509.

³⁶ Hodges v. Hunt, 22 Barb. (N. Y.) 150.

³⁷ Mayer v. McLure, 36 Miss. 389; 72 Am. Dec. 190.

³⁸ Hoit v. Underhill, 10 N. H. 220; 34 Am. Dec. 148.

³⁹ West v. Penny, 16 Ala. 186; Jeffords v. Ringgold, 6 Ala. 544; Vaughan v. Parr, 20 Ark. 600; Phil-

lips v. Green, 5 T. B. Mon. (Ky.) 344; Wheaton v. East, 5 Yerg. (Tenn.) 41; 26 Am. Dec. 251; Stokes v. Brown, 4 Chand. (Wis.) 39; 3 Pinney (Wis.) 311.

⁴⁰ Hartley v. Wharton, 11 Ad. & El. 934; Stern v. Freeman, 4 Met. (Ky.) 309; Neal v. Berry, 86 Me. 193; 29 Atl. 987; Bird v. Swain, 79 Me. 529; 11 Atl. 421; Thurlow v. Gilmore, 40 Me. 378; Ward v. Scherer, 96 Va. 318; 31 S. E. 518.

⁴¹ Ward v. Scherer, 96 Va. 318; 31 S. E. 518.

⁴² Hilton v. Shepherd, 92 Me. 160; 42 Atl. 387.

⁴³ McKamy v. Cooper, 81 Ga. 679; 8 S. E. 312.

⁴⁴ Hill v. Nelms, 86 Ala. 442; 5 So. 796; Hoffert v. Miller, 86 Ky.

after majority is not a ratification by an infant of an application by his father of such infant's wages to the rent.⁴⁵ However, silence, where circumstances impose on the minor the duty of speaking, may operate as a ratification,⁴⁶ as where he stands by, knowing that the grantee,⁴⁷ or the vendee of his grantee,⁴⁸ is making valuable improvements on realty sold by him, in reliance on the title. The mere erection of valuable improvements, unknown to the minor, as where he was absent from the state, does not affect his right to disaffirm.⁴⁹

§884. Who can disaffirm.

The infant may elect the other alternative and rescind the contract. This privilege is personal to himself and his representatives. The adversary party to the contract cannot avoid it.¹ Thus insurance of a property of a minor is enforceable where the party taking insurance had no notice of a rule not to insure property of minors.² So an employer of an infant

572; 6 S. W. 447; *Lynch v. Johnson*, 109 Mich. 640; 67 N. W. 908.

⁴⁵ *Lymanville Co. v. Nieber*, 19 R. I. 398; 36 Atl. 1133. *Contra*, obiter, *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040.

⁴⁶ *Wheaton v. East*, 5 Yerg. (Tenn.) 41; 26 Am. Dec. 251; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589.

⁴⁷ *Davis v. Dudgey*, 70 Me. 236; 35 Am. Rep. 318.

⁴⁸ *Lacy v. Pixler*, 120 Mo. 383; 25 S. W. 206. (In this case the infant also received part of the purchase price after majority.)

⁴⁹ *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381.

¹ *Seaton v. Tohill*, 11 Colo. App. 211; 53 Pac. 170; *Gooden v. Rayl*, 85 Ia. 592; 52 N. W. 506; *Resso v.*

Lehan, 96 Ia. 45; 64 N. W. 689; *Arnous v. Lesassier*, 10 La. 592; 29 Am. Dec. 470; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506; *Willard v. Stone*, 7 Cow. (N. Y.) 22; 17 Am. Dec. 496; *Hunt v. Peake*, 5 Cow. (N. Y.) 475; 15 Am. Dec. 475; *Hicks v. Beam*, 112 N. C. 642; 34 Am. St. Rep. 521; 17 S. E. 490; *Withers v. Ewing*, 40 O. S. 400; *Assignees of Hull v. Connolly*, 3 McCord (S. C.) 6; 15 Am. Dec. 612; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Stringfellow v. Early*, 15 Tex. Civ. App. 597; 40 S. W. 871; *Plate v. Durst*, 42 W. Va. 63; 32 L. R. A. 404; 24 S. E. 580; *Johnson v. Insurance Co.*, 93 Wis. 223; 67 N. W. 416.

² *Johnson v. Insurance Co.*, 93 Wis. 223; 67 N. W. 416.

cannot avoid his contract on the ground of infancy.³ So a vendee of realty cannot disaffirm a contract for the purchase thereof because the vendor is a minor.⁴ A stranger to the contract cannot avoid it.⁵ Thus, an insurance company cannot refuse to pay a policy on the ground that it was assigned to the holder by a minor, the minor having died during minority;⁶ nor can a railroad company plead the infancy of the owner of property which it has destroyed.⁷ So a surety on a note given by an infant for a premium for an insurance policy cannot avoid the insurance policy.⁸ The infant's blood representatives, such as his heirs,⁹ or his personal representatives, such as his executor or administrator,¹⁰ or a beneficiary of insurance taken by a minor,¹¹ may avoid his contracts. Those who have merely acquired the infant's estate by bargain and sale,¹² or by purchase at a foreclosure sale,¹³ cannot avoid the infant's contracts

³ Hicks v. Beam, 112 N. C. 642; 34 Am. St. Rep. 521; 17 S. E. 490.

⁴ Dentler v. O'Brien, 56 Ark. 49; 19 S. W. 111.

⁵ Hooper v. Payne, 94 Ala. 223; 10 So. 431; La Grange College v. Anderson, 63 Ind. 367; 30 Am. Rep. 224; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76; 10 Am. Dec. 709; Beeler v. Bullitt, 3 A. K. Marsh. (Ky.) 280; 13 Am. Dec. 161; Thompson v. Hamilton, 12 Pick. (Mass.) 425; 23 Am. Dec. 619; Nightingale v. Withington, 15 Mass. 272; 8 Am. Dec. 101; Hill v. Taylor, 125 Mo. 331; 28 S. W. 599; Mott v. Purcell, 98 Mo. 247; 11 S. W. 564; Bordentown v. Wallace, 50 N. J. L. 13; 11 Atl. 267; Grogan v. Insurance Co., 90 Hun (N. Y.) 521; Curtiss v. McDougal, 26 O. S. 66; Blankenship v. Ry. Co., 43 W. Va. 135; 27 S. E. 355.

⁶ Grogan v. United States, etc., Insurance Co., 90 Hun (N. Y.) 521.

⁷ Blankenship v. Ry. Co., 43 W. Va. 135; 27 S. E. 355.

⁸ Union Central Life Ins. Co. v.

Hilliard, 63 O. S. 478; 81 Am. St. Rep. 644; 53 L. R. A. 462; 59 N. E. 230.

⁹ Bozeman v. Browning, 31 Ark. 364; Illinois, etc., Co. v. Bonner, 75 Ill. 315; Gillenwater v. Campbell, 142 Ind. 529; 41 N. E. 1041; Hill v. Keyes, 10 All. (Mass.) 258; Harris v. Ross, 86 Mo. 89; 56 Am. Rep. 411; Ihley v. Padgett, 27 S. C. 300; 3 S. E. 468; Walton v. Gaines, 94 Tenn. 420; 29 S. W. 458.

¹⁰ Shropshire v. Burns, 46 Ala. 108; Vaughn v. Parr, 20 Ark. 600; Hill v. Keyes, 10 All. (Mass.) 258; Hussey v. Jewett, 9 Mass. 100; Parsons v. Hill, 8 Mo. 135; Roberts v. Wiggin, 1 N. H. 73; 8 Am. Dec. 38; Tillinghast v. Holbrook, 7 R. I. 230; Person v. Chase, 37 Vt. 647; 88 Am. Dec. 630.

¹¹ O'Rourke v. Ins. Co., 23 R. I. 457; 91 Am. St. Rep. 643; 57 L. R. A. 496; 50 Atl. 834.

¹² Curtiss v. McDougal, 26 O. S. 66.

¹³ Harris v. Ross, 112 Ind. 314; 13 N. E. 873.

with reference to such property. An infant's guardian appointed on the ground of infancy, cannot avoid a contract of the infant;¹⁴ but a guardian appointed after majority on the ground that the former minor is a spendthrift may avoid a conveyance made by the infant.¹⁵ So it has been held that neither an infant's assignee in insolvency,¹⁶ nor his trustee,¹⁷ can avoid his contract. A parent cannot avoid a contract of employment made by the infant.¹⁸ An infant cannot avoid a contract for his employment made by his father.¹⁹

§885. When infant can disaffirm.

An infant can disaffirm any contract during minority,¹ except a contract executed by the conveyance of real estate, which can be disaffirmed only after he reaches majority.² On reaching

¹⁴ *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134. In this case the above proposition was limited to contracts beneficial to the infant. So in case of a mortgage of realty. *Shreeves v. Caldwell*, — Mich. —; 97 N. W. 764.

¹⁵ *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117.

¹⁶ *Mansfield v. Gordon*, 144 Mass. 168; 10 N. E. 773.

¹⁷ *Des Moines Insurance Co. v. McIntire*, 99 Ia. 50; 68 N. W. 565.

¹⁸ *Ping, etc., Co. v. Grant*, — Kan. —; 75 Pac. 1044.

¹⁹ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154; 30 Am. St. Rep. 865; 15 L. R. A. 211; 18 S. W. 262.

¹ *Carpenter v. Carpenter*, 45 Ind. 142; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; 4 N. E. 891; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; 9 N. E. 420; 7 West. 68; *Shirk v. Shultz*, 113 Ind. 571; 15 N. E. 12; *Childs v. Dobbins*, 55 Ia. 205; 7 N. W. 496; *Bailey v. Barn-*

berger, 11 B. Mon. (Ky.) 113; *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; 8 Atl. 664; *Bloomington v. Chittenden*, 74 Mich. 698; 42 N. W. 166; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Grace v. Hale*, 2 Humph. (Tenn.) 27; 36 Am. Dec. 296; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194. *Contra*, as to a compromise of personal injuries which cannot be avoided by the infant during minority. *Lansing v. R. R.*, 126 Mich. 663; 86 Am. St. Rep. 567; 86 N. W. 147 (citing *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Widoe*, 36 Mich. 124; *Osburn v. Farr*, 42 Mich. 134; 3 N. W. 299).

² *Prout v. Cock* (1896), 2 Ch. 808; *Welch v. Bunce*, 83 Ind. 382; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7; 13 Am. Dec. 124; *Ridge-way v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; *Shipley v. Bunn*, 125 Mo. 445; 23 S. W. 754; *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939; 20 Atl. 625; *Scott*

majority he can disaffirm a deed given by him during minority.³ His right to disaffirm contracts concerning personalty during minority has been limited to cases where such a course was evidently necessary to protect his interests,⁴ but this rule has been abandoned and he can now disaffirm such contracts at any time before minority that he sees fit.⁵ Rescission of property made during minority is final and the infant or his representatives cannot thereafter rescind such rescission. Thus if an infant surrenders a life insurance policy taken out by him and accepts cash therefor, his administrator cannot avoid such surrender and enforce payment of the policy, since the surrender is a rescission by the infant.⁶ So stringent is the rule that conveyances of realty cannot be avoided during minority that a minor cannot redeem realty mortgaged by his father and devised to himself and his mother, of which the mortgagee has obtained possession by acquiring the widow's estate.⁷ But an infant at majority may avoid a deed of his interest in remainder, though the life estate has not expired.⁸ With reference to his executed contracts for conveying realty, it has been held that he could at least enter during minority and take the rents and profits,⁹ but this view seems illogical and has been stoutly denied.¹⁰ With reference to the rule as to the length of time allowed to an infant in which to disaffirm his contracts and conveyances after reaching majority, it must be admitted that the decisions are sharply at variance. The English courts, followed by a very considerable number of American courts, hold that the infant must rescind within a reasonable time after majority;¹¹

v. Buchanan, 11 Humph. (Tenn.) 468. *Contra*, Harrod v. Myers, 21 Ark. 592; 76 Am. Dec. 409 (obiter).

³ Shroyer v. Pittinger, 31 Ind. App. 158; 67 N. E. 475.

⁴ Farr v. Sumner, 12 Vt. 28; 36 Am. Dec. 327.

⁵ See cases cited in third preceding note. And see Shipley v. Smith, — Ind. —; 70 N. E. 803.

⁶ Phippen v. Ins. Co., 130 N. C.

23; 57 L. R. A. 505; 40 S. E. 822.

⁷ Prout v. Cock (1896), 2 Ch. 808.

⁸ Ihley v. Padgett, 27 S. C. 300; 3 S. E. 468.

⁹ Bool v. Mix, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; Cummings v. Powell, 8 Tex. 80.

¹⁰ Shipley v. Bunn, 125 Mo. 445; 28 S. W. 754.

¹¹ Edwards v. Carter (1893), A. C. 360; Viditz v. O'Hagan (1899),

and this conclusion is in some states the result of specific statutory provisions.¹² This rule is insisted on with especial force in contracts relating to personalty.¹³ What a reasonable time is, is a question of fact, depending on the circumstances of each case. It may be said at the outset that if any acts of ratification have taken place, the question of the lapse of time becomes wholly immaterial. Where there are no circumstances to show a ratification, a delay of thirty-two days,¹⁴ of three and a half months,¹⁵ of four months,¹⁶ or of eighteen months,¹⁷ has in each case been held reasonable. Delay for a much greater time has been held not to be unreasonable where there are circumstances to explain the delay. Thus where coverture prevents the wife from suing without the consent of her husband, a delay after majority, if due to coverture, of nineteen years,¹⁸ of twenty-

2 Ch. 569; 68 L. J. Ch. N. S. 553; McDonald v. Salmon Club, 33 N. B. 472; Watson v. Billings, 38 Ark. 278; 42 Am. Rep. 1; Hastings v. Dollarhide, 24 Cal. 195; Kline v. Beebe, 6 Conn. 494; Wallace v. Lewis, 4 Harr. (Del.) 75; Tunnison v. Chamberlin, 88 Ill. 378; Buchanan v. Hubbard, 96 Ind. 1; Stringer v. Ins. Co., 82 Ind. 100; Petty v. Roberts, 7 Bush. (Ky.), 410; Boody v. McKenney, 23 Me. 517; Amey v. Cockey, 73 Md. 297; 20 Atl. 1071; Goodnow v. Lumber Co., 31 Minn. 468; 47 Am. Rep. 798; 18 N. W. 283; Dolph v. Hand, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114; Walton v. Gaines, 94 Tenn. 420; 29 S. W. 458; Searcy v. Hunter, 81 Tex. 614; 26 Am. St. Rep. 837; 17 S. W. 372; Askey v. Williams, 74 Tex. 294; 5 L. R. A. 176; 11 S. W. 1101; Bingham v. Barley, 55 Tex. 281; 40 Am. Rep. 801; Simkins v. Searcy, 10 Tex. Civ. App. 406; 32 S. W. 849; Richardson v. Boright, 9 Vt. 368; Thormaehlen v.

Kaepfel, 86 Wis. 378; 56 N. W. 1089.

¹² Bentley v. Greer, 100 Ga. 35; 27 S. E. 974; Green v. Wilding, 59 Ia. 679; 44 Am. Rep. 696; 13 N. W. 761; Englebert v. Troxell, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; O'Brien v. Gaslin, 20 Neb. 347; 30 N. W. 274.

¹³ McKamey v. Cooper, 81 Ga. 679; 8 S. E. 312; Deason v. Boyd, 1 Dana (Ky.) 45; Robinson v. Hoskins, 14 Bush. (Ky.) 393; Delano v. Blake, 11 Wend. (N. Y.) 85; 25 Am. Dec. 617.

¹⁴ Leacox v. Griffith, 76 Ia. 89; 40 N. W. 109.

¹⁵ Thormaehlen v. Kaepfel, 86 Wis. 378; 56 N. W. 1089.

¹⁶ Rapid, etc., Co. v. Sanford (Tex. Civ. App.), 24 S. W. 587.

¹⁷ Johnson v. Storie, 32 Neb. 610; 49 N. W. 371.

¹⁸ Richardson v. Pate, 93 Ind. 423; 47 Am. Rep. 374.

eight years,¹⁹ of thirty-two years,²⁰ or of thirty-five years,²¹ has in each case been held reasonable. Where there are no special circumstances to explain the delay, a delay of forty years after executing a deed, and five years after the disability of coverture is removed;²² a delay for fifteen years after majority, with the erection of improvements and the appreciation of the value of the realty;²³ a delay of fourteen years;²⁴ a delay of six years, together with treating the property purchased by him as his own;²⁵ a delay of four years;²⁶ a delay of three years and a half;²⁷ and in extreme cases, where the facts pointed strongly to a ratification, a delay of two months,²⁸ or one,²⁹ has in each case been held an unreasonable delay. The other rule, which is followed by an equal number of American states, is that an infant has the time fixed by the statute of limitations for bringing an action to recover real property, after reaching majority before his failure to disaffirm will bar his right so to do.³⁰ So

¹⁹ *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629.

²⁰ *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709. But in Virginia the infant has the entire period fixed by the statute of limitations in which to disaffirm. See cases cited in note 30, this section.

²¹ *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263.

²² *Amey v. Cockey*, 73 Md. 297; 20 Atl. 1071.

²³ *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; 27 Atl. 114.

²⁴ *Ihley v. Padgett*, 27 S. C. 300; 3 S. E. 468.

²⁵ *Land Co. v. Nixon* (Tenn. Ch. App.), 48 S. W. 405.

²⁶ *Carter v. Silber* (1892), 2 Ch. 278; reversing (1891) 3 Ch. 553.

²⁷ *Goodnow v. Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798; 18 N. W. 283.

²⁸ *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; 1 N. W. 923.

²⁹ *Forsyth v. Hastings*, 27 Vt. 646.

³⁰ *Sims v. Everhardt*, 102 U. S. 300; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Gilkinson v. Miller*, 74 Fed. 131; *Hill v. Nelms*, 86 Ala. 442; 5 So. 796; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418; *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Stull v. Harris*, 51 Ark. 294; 2 L. R. A. 741; 11 S. W. 104; *Kountz v. Davis*, 34 Ark. 590; *Hoffert v. Miller*, 86 Ky. 572; 6 S. W. 447; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Donovan v. Ward*, 100 Mich. 601; 59 N. W. 254; *Shipp v. McKee*, 80 Miss. 741; 92 Am. St. Rep. 616; 32 So. 281; 31 So. 197; *Allen v. Poole*, 54 Miss. 323; *Wallace v. Latham*, 52 Miss. 291; *Peterson v. Laik*, 24 Mo. 541; *Huth v. Ry.*, 56 Mo. 292; *Thomas v. Pullis*, 56 Mo. 211; *Lacy v. Pixler*, 120 Mo. 383; 25 S. W. 206; *Emmons v. Murray*, 16 N. H. 385; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Cresinger v. Welch*, 15 Ohio 156; 45

where an infant delayed disaffirming a deed for eighteen years,³¹ or twenty years and seven months,³² he was still allowed to disaffirm. A compromise rule has been suggested in Illinois, where it was held that the minor would have a reasonable time to avoid his deed, and that the court would by analogy adopt the time fixed by the statute of limitations for one under disability when his cause of action accrued to bring an action after his disability was removed by statute, three years.³³ Equity will compel an infant on reaching majority to adopt or abandon an agreement for quieting title to realty.³⁴

§886. What constitutes disaffirmance.

The modern rule is that no set form of disaffirmance is necessary, but that the infant's intention to disaffirm together with any conduct on his part which makes this intention clear constitutes a sufficient disaffirmance.¹ It was once held that a Common Law conveyance such as feoffment, could be avoided only by an act of equal notoriety;² but this rule has no application to modern forms of conveyances.³ Undoubtedly, re-entry with intent to hold land adversely will avoid a deed,⁴ or a grant of an easement, as a right to construct a sewer across his land.⁵ However, the act of an executor in taking possession of realty does not bind a minor heir to avoid the deed.⁶

Am. Dec. 565; *Drake v. Ramsay*, 5 Ohio 252; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

³¹ *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381.

³² *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565.

³³ *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434.

³⁴ *Overbach v. Heermance*, 1 Hopk. Ch. (N. Y.) 337; 14 Am. Dec. 546.

¹ *Bagley v. Fletcher*, 44 Ark. 153; *Long v. Williams*, 74 Ind. 115; *Shroyer v. Pittinger*, 31 Ind. App.

158; 67 N. E. 475; *Cogley v. Cushman*, 16 Minn. 397; *Chapin v. Shafer*, 49 N. Y. 407.

² *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Bool v. Mix*, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285.

³ *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463.

⁴ *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409 (obiter).

⁵ *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418.

⁶ *Cardwell v. Rogers*, 76 Tex. 37; 12 S. W. 1006 (the deed was made by the donee of an invalid power given by the testator who devised the land to the infant).

An executed conveyance of realty may also be avoided by an action of ejectment;⁷ or by a suit to cancel the deed;⁸ or by an answer in an ejectment suit, where the infant or one claiming under him is in possession of the realty;⁹ or by a deed executed by the former infant after majority, and inconsistent with the deed executed by him before majority.¹⁰ Thus, an infant can disaffirm a mortgage by giving notice on the day of the foreclosure sale that her interest cannot be sold and by conveying her land by warranty deed.¹¹ A deed to an infant may be disaffirmed by him at majority by a letter demanding back the installment of the purchase price already paid in.¹² An executed contract for the sale or mortgage of personal property may also be avoided by an act inconsistent with the former act such as a second conveyance.¹³ As a sale of property mortgaged by an infant is a disaffirmance of the mortgage it is hence not a crime.¹⁴ A purchase of personalty by an infant may be avoided by notice of disaffirmance;¹⁵ or by suit for the purchase price;¹⁶ or by delivering the chattel bought to the vendor, and

⁷ *Cole v. Pennoyer*, 14 Ill. 158; *Haynes v. Bennett*, 53 Mich. 15; 18 N. W. 539; *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; *Harris v. Ross*, 86 Mo. 89; 56 Am. Rep. 411; *Drake v. Ramsay*, 5 Ohio 252; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381.

⁸ *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

⁹ *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040.

¹⁰ *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Scott v. Brown*, 106 Ala. 604; 17 So. 731; *Hastings v. Dollarhide*, 24 Cal. 195; *Loscy v. Bond*, 94 Ind. 67; *Long v. Williams*, 74 Ind. 115; *Estep v. Estep* (Ky.), 73 S. W. 777; *Moore v. Baker*, 92 Ky. 518; 18 S. W. 363; *Vallandigham v. Johnson*, 85 Ky. 288; 3 S. W. 173; *Corbett v. Spencer*, 63

Mich. 731; 30 N. W. 385; *Haynes v. Bennett*, 53 Mich. 15; 18 N. W. 539; *Dawson v. Helmes*, 30 Minn. 107; 14 N. W. 462; *Ridgeway v. Herbert*, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Bool v. Mix*, 17 Wend. (N. Y.) 119; 31 Am. Dec. 285; *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565.

¹¹ *Scott v. Brown*, 106 Ala. 604; 17 So. 731.

¹² *McCarty v. Iron Co.*, 92 Ala. 463; 12 L. R. A. 136; 8 So. 417.

¹³ *Chapin v. Shafer*, 49 N. Y. 407.

¹⁴ *State v. Plaisted*, 43 N. H. 413; *Jones v. State*, 31 Tex. Crim. Rep. 252; 20 S. W. 578.

¹⁵ *Stack v. Cavanaugh*, 67 N. H. 149; 30 Atl. 350.

¹⁶ *Lemmon v. Beeman*, 45 O. S. 505; 15 N. E. 476.

acquiescing in a suit by his next friend to recover the money paid for it.¹⁷ So a mortgage may be disaffirmed by a plea of infancy in a suit to enforce it. Thus, a minor mortgaged a steamboat. At the time the mortgage became due the court appointed a receiver and granted an injunction. Both orders were set aside on motion, it appearing that the mortgagor had not affirmed the mortgage after reaching majority and now disaffirmed it by plea.¹⁸ An executory contract may be disaffirmed by notice or its equivalent,¹⁹ or by interposing infancy as a defense to a suit thereon.²⁰ An infant should offer to rescind to the adversary party—not to a purchaser from the adversary.²¹

§887. Partial disaffirmance impossible.

The infant cannot, without the consent of the adversary party, affirm that part of the transaction which is advantageous to him and disaffirm the rest; but he must treat the entire transaction as a unit.¹ Thus, an infant cannot avoid a contract made by both herself and her father, by which it is agreed that she shall draw her wages subject to the conditions of the

¹⁷ *Pyne v. Wood*, 145 Mass. 558; 14 N. E. 775.

¹⁸ *Sparr v. Ry. Co.*, 25 Fla. 185; 6 So. 60.

¹⁹ *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; 76 Am. Dec. 209 (as where a minor avoided a contract to sell land by selling the property to another after majority).

²⁰ *Sparr v. Ry.*, 25 Fla. 185; 6 So. 60; *Fetrow v. Wiseman*, 40 Ind. 148; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Freeman v. Nichols*, 138 Mass. 313.

²¹ *Downing v. Stone*, 47 Mo. App. 144.

¹ *Peers v. McLaughlin*, 88 Cal. 294; 22 Am. St. Rep. 306; 26 Pac. 119; *Howard v. Cassels*, 105 Ga. 412; 70 Am. St. Rep. 44; 31 S. E.

562; *Biederman v. O'Connor*, 117 Ill. 493; 57 Am. Rep. 876; 4 West. 152; 7 N. E. 463; *Carpenter v. Carpenter*, 45 Ind. 142; *Robinson v. Berry*, 93 Me. 320; 45 Atl. 34; *White v. Mount Pleasant, etc., Corp.*, 172 Mass. 462; 52 N. E. 632; *Strong v. Ehle*, 86 Mich. 42; 48 N. W. 868; *Ladd v. Wiggin*, 35 N. H. 428; *Henry v. Root*, 33 N. Y. 526; *Overbach v. Heermance*, 1 Hopk. Ch. (N. Y.) 337; 14 Am. Dec. 546; *Kitchen v. Lee*, 11 Paige (N. Y.) 107; 42 Am. Dec. 101; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141; *Curtiss v. McDougal*, 26 O. S. 66; *Tennessee, etc., Co. v. James*, 91 Tenn. 154; 30 Am. St. Rep. 865; 15 L. R. A. 211; 18 S. W. 262.

contract, and recover the wages unconditionally.² A minor bought stock from a corporation. Subsequently such corporation transferred its business to another under a contract that upon repayment to such other of the purchase price of such plant it would issue certificates of its own stock. The infant sued such other corporation to recover the price paid for the stock. It was held that he could not recover.³ In another case a contract was made by infants for the purchase of lands, which lands were deeded to them, and paid for in part by cash and the rest by notes given by their guardian in his official capacity. Subsequently suit was brought on the notes and a judgment was obtained, on which the realty was sold. It was held that the infants could not demand that the vendors make title on payment to them of the balance of the purchase price.⁴ So a minor cannot adopt the acts of his agent in part and repudiate them in part.⁵ The infant cannot claim the benefit of a conditional contract, and refuse to be bound by the condition.⁶ So a minor purchasing goods by conditional sale cannot, after condition broken, interpose infancy as a defense.⁷ So, an infant cannot retain property purchased by him, whether realty,⁸ or personalty,⁹ and avoid a purchase-money mortgage given therefor, or a vendor's lien reversed in the deed,¹⁰ or refuse to pay therefor on the ground of infancy,¹¹ even if the mortgage was given to a third person who advanced the purchase money.¹²

² Tennessee, etc., Co. v. James, 91 Tenn. 154; 30 Am. St. Rep. 865; 15 L. R. A. 211; 18 S. W. 262.

³ White v. Mount Pleasant, etc., Corp., 172 Mass. 462; 52 N. E. 632.

⁴ Howard v. Cassels, 105 Ga. 412; 70 Am. St. Rep. 44; 31 S. E. 562.

⁵ State v. New Orleans, 105 La. 768; 30 So. 97.

⁶ Biedermann v. O'Connor, 117 Ill. 493; 57 Am. Rep. 876; 7 N. E. 463; Lowry v. Drake, 1 Dana (Ky.) 46.

⁷ Robinson v. Berry, 93 Me. 320; 45 Atl. 34.

⁸ Strong v. Ehle, 86 Mich. 42; 48 N. W. 868; Uecker v. Koehn, 21 Neb. 559; 59 Am. Rep. 849; 32 N. W. 583; Bigelow v. Kinney, 3 Vt. 353; 21 Am. Dec. 589.

⁹ Heath v. West, 28 N. H. 101; Curtiss v. McDougal, 26 O. S. 66; Knaggs v. Green, 48 Wis. 601; 33 Am. Rep. 838; 4 N. W. 760.

¹⁰ Smith v. Henkel, 81 Va. 524.

¹¹ Thomason v. Phillips, 73 Ga. 140.

¹² Ready v. Pinkham, 181 Mass. 351; 63 N. E. 887. So Thurston v. Building Society (1902), 1 Ch. 1.

An advance to an infant to enable him to purchase land forms an entire transaction with the purchase of such land, and the infant cannot prevent the lender from being subrogated to the rights of the vendor and enforcing a vendor's lien, though a mortgage given by the infant to secure such debt in part is not valid,¹³ while an advance to an infant to enable him to erect buildings on land purchased is not an entire transaction with the purchase, and the infant may retain such land and repudiate liability for such advances.¹⁴ This view is not, however, entertained in all cases. Thus where A borrowed money from B to enable him to pay X for certain realty, and A gave to B a mortgage on such realty, it was held that A could repudiate the mortgage while retaining the realty.¹⁵ So if an infant repudiates a sale, one claiming under him cannot enforce a chattel mortgage given as part of the transaction.¹⁶ But where A, a minor, sold a horse which he warranted sound, and after majority the note given in part payment therefor was paid and A endorsed "The note being paid, I discharge property thereby secured," it was held that this did not ratify the warranty.¹⁷ In a recent case, however, the infant's representative has been allowed to avoid a contract in part.¹⁸ The infant had secured a life insurance policy by an application in which he warranted certain facts which were not true. The policy of an adult could have been avoided by the insurance company for such false warranties, but it was held that the beneficiary could avoid such warranties and enforce the rest of the policy. The court based its decision on the rule that an infant was not liable on his warranty collateral to an executed contract of sale.¹⁹ This latter rule is absolutely correct,²⁰ but it does not apply to the case at bar. In a warranty collateral to a sale, the infant

¹³ *Thuston v. Building Society* (1902), 1 Ch. 1.

¹⁴ *Thurston v. Building Society* (1902), 1 Ch. 1.

¹⁵ *Citizens', etc., Association v. Arvin*, 207 Pa. St. 293; 56 Atl. 870.

¹⁶ *Hyde v. Courtwright*, 14 Ind. App. 106; 42 N. E. 647.

¹⁷ *Bird v. Swain*, 79 Me. 529; 11 Atl. 421.

¹⁸ *O'Rourke v. Ins. Co.*, 23 R. I. 457; 91 Am. St. Rep. 643; 57 L. R. A. 496; 50 Atl. 834.

¹⁹ *Citing West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235.

²⁰ See § 872 *et seq.*

is merely resisting the enforcement of a contract, executory as to himself. The adversary party might possibly have rescinded the contract for fraud or for breach, but he has elected to affirm it and enforce the executory contract. In *O'Rourke v. Ins. Co.* the infant's representative is seeking to enforce that part of a contract favorable to herself and to avoid the part unfavorable to her.

§888. Restoration of consideration on disaffirmance.

It is difficult to state a general rule which will in every case operate fairly between the infant who disaffirms a contract and the adversary party. It is evident, however, that if the infant is in every case bound to return the consideration which he has received, or its equivalent, his disability will amount to little except in executory contracts, and in cases where the infant is so prudent and careful in his management of the property which he receives under the contract, that he really does not need the protection of the law. After some conflict, it has finally been held by the weight of judicial opinion, that an infant is bound to restore so much of the consideration as he has when he disaffirms the contract, if during minority; or when he comes of age, if he disaffirms when his minority ends.¹

¹ *MacGreal v. Taylor*, 167 U. S. 688; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *American, etc., Co. v. Dykes*, 111 Ala. 178; 56 Am. St. Rep. 38; 18 So. 292; *Jenkins v. Jenkins*, 12 Ia. 195; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Shirk v. Shultz*, 113 Ind. 571; 15 N. E. 12; *Sanger v. Hibbard*, 2 Ind. Ter. 547; 53 S. W. 330; *Burgett v. Barrick*, 25 Kan. 527; *Morse v. Ely*, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577; *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228; 6 L. R. A. 146; 23 N. E. 222; *Dawson v. Helmes*, 30 Minn. 107; 14 N. W. 462; *Brantley v. Wolf*, 60 Miss. 429; *Harvey v. Briggs*, 68 Miss. 60; 10 L. R. A. 62; 8 So. 274; *Craig v.*

Van Bebber, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; *Betts v. Carroll*, 6 Mo. App. 518; *Bloomer v. Nolan*, 36 Neb. 51; 38 Am. St. Rep. 690; 53 N. W. 1039; *Hamblett v. Hamblett*, 6 N. H. 339; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Lane v. Coal Co.*, 101 Tenn. 581; 48 S. W. 1094; *Grace v. Hale*, 2 Humph. (Tenn.) 27; 36 Am. Dec. 296; *Bullock v. Sprowls*, 93 Tex. 188; 77 Am. St. Rep. 849; 47 L. R. A. 326; 54 S. W. 661; *Abernathy v. Phillips*, 82 Va. 769; 1 S. E. 113; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Young v. Ry. Co.*, 42 W. Va. 112; 24 S. E. 615; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

If before this time he has wasted or lost the property received by him under the contract, he is not bound to return its equivalent.² By statute in Indiana a minor married woman who has joined with her husband in conveying realty must first restore the consideration before repudiating the sale.³ Even if the property has depreciated in value,⁴ as through the misuse thereof by the infant,⁵ or if the infant has consumed the property,⁶ or sold it,⁷ he need not account for the loss. If the consideration for the contract of the infant was money paid not to him but to some other person,⁸ as where it is paid to the infant's husband,⁹

² Fox v. Drewry, 62 Ark. 316; 35 S. W. 533; Reynolds v. McCurry, 100 Ill. 356; Featherstone v. Betlejewski, 75 Ill. App. 59; United States, etc., Co. v. Harris, 142 Ind. 226; 40 N. E. 1072; 41 N. E. 451; Gillenwaters v. Campbell, 142 Ind. 529; 41 N. E. 1041; Shipley v. Smith, — Ind. —; 70 N. E. 803; White v. Cotton-Waste Corporation, 178 Mass. 20; 59 N. E. 642; Walsh v. Young, 110 Mass. 396; Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117; Corey v. Burton, 32 Mich. 30; Miller v. Smith, 26 Minn. 248; 37 Am. Rep. 407; 2 N. W. 942; Ridgeway v. Herbert, 150 Mo. 606; 73 Am. St. Rep. 464; 51 S. W. 1040; Craig v. Van Bebber, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490; Clark v. Tate, 7 Mont. 171; 14 Pac. 761; Englebert v. Troxell, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; Bloomer v. Nolan, 36 Neb. 51; 38 Am. St. Rep. 690; 53 N. W. 1039; Green v. Green, 69 N. Y. 553; 25 Am. Rep. 233; Petrie v. Williams, 68 Hun (N. Y.) 589; Kincaid v. Kincaid, 85 Hun (N. Y.) 141; Youmans v. Forsythe, 86 Hun (N. Y.) 370; Lemmon v. Beeman, 45 O. S. 505;

15 N. E. 476; Lane v. Dayton, etc., Co., 101 Tenn. 581; 48 S. W. 1094; Bullock v. Sprowls, 93 Tex. 188; 77 Am. St. Rep. 849; 47 L. R. A. 326; 54 S. W. 661; Wiser v. Lockwood, 42 Vt. 720; Price v. Furman, 27 Vt. 268; 65 Am. Dec. 194; Thormaehlen v. Kaepfel, 86 Wis. 378; 56 N. W. 1089.

³ Blair v. Whitaker (Ind. App.), 69 N. E. 182.

⁴ Whitcomb v. Joslyn, 51 Vt. 79; 31 Am. Rep. 678.

⁵ White v. Branch, 51 Ind. 210.

⁶ Nichol v. Steger, 6 Lea (Tenn) 393; affirming 2 Tenn. Ch. 328.

⁷ Beickler v. Guenther, 121 Ia. 419; 96 N. W. 895.

⁸ Law v. Long, 41 Ind. 586; Wade v. Love, 69 Tex. 522; 7 S. W. 225; Vogelsang v. Null, 67 Tex. 465; 3 S. W. 451; Thormaehlen v. Kaepfel, 86 Wis. 378; 56 N. W. 1089.

⁹ Fox v. Drewry, 62 Ark. 316; 35 S. W. 533; Stull v. Harris, 51 Ark. 294; 2 L. R. A. 741; 11 S. W. 104; Richardson v. Pate, 93 Ind. 423; 47 Am. Rep. 374; Bradshaw v. Van Valkenburg, 97 Tenn. 316; 37 S. W. 88; Smith v. Evans, 5 Humph. (Tenn.) 70; Thormaehlen v. Kaepfel, 86 Wis. 378; 56 N. W. 1089.

or father,¹⁰ or agent,¹¹ and the infant never in fact receives it, he is not bound to restore an equivalent. So if an infant has not received anything under his contract he is not bound to restore anything.¹² The earlier cases tend to require an infant to return the consideration received by him, or its equivalent if he has squandered it; but these cases have for the most part been overruled or limited by later cases.¹³ Where the infant has sold the property received by him, or changed its form in some other way, it becomes a difficult question to determine how far the fund or property may be traced in order to compel its return by the infant. Where the money received was in part spent on necessities, it has been held that the infant is not bound to repay the value of the necessities thus obtained.¹⁴ It seems only fair that if the infant has expended

¹⁰ *Clark v. Tate*, 7 Mont. 171; 14 Pac. 761; *Griffis v. Younger*, 41 N. C. 520; 51 Am. Dec. 438.

¹¹ *Vogelsang v. Null*, 67 Tex. 465; 3 S. W. 451.

¹² *Shroyer v. Pittinger*, 31 Ind. App. 158; 67 N. E. 475.

¹³ *St. Louis, etc., Ry. v. Higgins*, 44 Ark. 293; overruling *Bozeman v. Browning*, 31 Ark. 364; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; not following *Bartlett v. Cowles*, 15 Gray (Mass.) 445; *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569; 13 S. W. 906; limiting *Kerr v. Bell*, 44 Mo. 120; *Highley v. Barron*, 49 Mo. 103; *Baker v. Kennett*, 54 Mo. 82, in which it had been said, without making any exception, that an infant must restore the consideration on disaffirmance; *Bullock v. Sprowls*, 93 Tex. 188; 77 Am. St. Rep. 849; 47 L. R. A. 326; 54 S. W. 661; limiting the general language used in *Cummings v. Powell*, 8 Tex. 93; *Womack v. Womack*, 8 Tex. 397; 58 Am. Dec. 119; *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bing-*

ham v. Barley, 55 Tex. 281; 40 Am. Rep. 801; *Graves v. Hickman*, 59 Tex. 383; *Harris v. Musgrove*, 59 Tex. 403; *Vogelsang v. Null*, 67 Tex. 465; 3 S. W. 451; *Wade v. Love*, 69 Tex. 522; 7 S. W. 225; *Ferguson v. Ry.*, 73 Tex. 344; 11 S. W. 347; *Houston, etc., Ry. v. Ferguson*, 73 Tex. 349; 13 S. W. 57; *Whitecomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; modifying the views expressed in *Farr v. Sumner*, 12 Vt. 28; 36 Am. Dec. 327; *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228.

¹⁴ *Featherstone v. Betlejewski*, 75 Ill. App. 59; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857. In *Bullock v. Sprowls*, 93 Tex. 188; 77 Am. St. Rep. 849; 47 L. R. A. 326; 54 S. W. 661, the court allowed a writ of error, on the authority of *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837; 17 S. W. 372; it being stated by the court of civil appeals that part of the consideration was used to buy supplies and clothing, and the court at the outset being under the impression that he should account for the value of such neces-

the consideration received by him for necessities which he has consumed or for property which he still has, that he should account for the reasonable value of the necessities, or return the property thus acquired by him. In some cases this view has been enforced.¹⁵ Thus where money borrowed was spent in paying off valid liens and making valuable improvements on the infant's realty, the infant was obliged to account therefor.¹⁶ In some states it has been held that unless the identical money is under the control of the minor he need not return it;¹⁷ and property for which the consideration has been exchanged need not be returned as a condition of rescission.¹⁸ Where the purchase money for an infant's realty was paid to her husband, and with it he bought other land in which she had a dower interest, she was not required to repay the purchase money in order to disaffirm;¹⁹ and a similar view was taken where an infant sold land, and the price was paid to his father who invested the proceeds in a piano for the infant.²⁰ Where an infant bought goods on credit, intermingled them with his own goods so as to be indistinguishable, and transferred the entire

saries; but this point was not decided, as it was not raised by the record.

¹⁵ If the consideration received consisted in part of necessities the infant must account for such necessities. *Stull v. Harris*, 51 Ark. 294; 2 L. R. A. 741; 11 S. W. 104.

¹⁶ *United States Investment Corporation v. Ulrickson*, 84 Minn. 14; 87 Am. St. Rep. 326; 86 N. W. 613. " . . . To say that the consideration paid to Mrs. M. for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property, is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it

simply as a shield to protect the infant from injustice and wrong." *McGreal v. Taylor*, 167 U. S. 688, 701.

¹⁷ *Hawes v. Burlington, etc., Ry. Co.*, 64 Ia. 315; 20 N. W. 717; citing and following *Jenkins v. Jenkins*, 12 Ia. 194.

¹⁸ *Leacox v. Griffith*, 76 Ia. 89; 40 N. W. 109; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852; *Walsh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654.

¹⁹ *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374.

²⁰ *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852. The cases last cited really limit the question to whether the return of the property thus acquired was a condition precedent to disaffirmance.

stock to his father in fraud, it was held that the entire stock or the proceeds thereof could be subjected to the debt.²¹ In Indiana the earlier cases denied the duty of the infant to return the purchase price as a condition precedent to disaffirming a sale of realty.²² A later case has gone farther and taken the position that the infant was not liable to return the purchase money at all, even after rescission.²³

Local statutes in some states modify the Common Law rules. In Iowa a minor must restore "all money or property received by him by virtue of the contract and remaining within his control at any time after he has attained his majority."²⁴ In California a minor must return the property received by him in consideration of the conveyance "or its equivalent," by force of which statute he must return the equivalent of what he has wasted.²⁵ In Indiana an infant may disaffirm a sale of realty without returning the price unless he has falsely represented himself an adult.²⁶ Since a mortgage is a conveyance an infant *feme covert* cannot disaffirm a mortgage in which her husband, who is of full age, has joined, without returning the consideration.²⁷ If two infants contract with each other, the one

²¹ Evans v. Morgan, 69 Miss. 328; 12 So. 270; and to substantially the same effect is Sanger v. Hibbard, 2 Ind. Ter. 547; 53 S. W. 330.

²² Towell v. Pence, 47 Ind. 304; Miles v. Lingeman, 24 Ind. 385; Pitcher v. Laycock, 7 Ind. 398.

²³ Dill v. Bowen, 54 Ind. 204. "Having disaffirmed the contract, the law imposes on her no legal obligation to repay the purchase money. . . If an infant disaffirm a contract after coming of age he must do it *in toto*; that is to say, if he has property in his hands acquired by the contract the other party may reclaim it. But if the property has passed from his hands or if he has received money, the law imposes no obligation upon

him to account for the property or repay the money upon his disaffirmance of the contract. It is not necessary that the other party should be placed in *statu quo*." Dill v. Bowen, 54 Ind. 204, 208.

²⁴ Statute quoted in Stout v. Merrill, 35 Ia. 47; and see Hawes v. Burlington Ry. Co., 64 Ia. 315; 20 N. W. 717; Leacox v. Griffith, 76 Ia. 89; 40 N. W. 109.

²⁵ Whyte v. Rosenerantz, 123 Cal. 634; 69 Am. St. Rep. 90; 56 Pac. 436.

²⁶ Gillenwater v. Campbell, 142 Ind. 529; 41 N. E. 1041.

²⁷ United States, etc., Co. v. Harris, 142 Ind. 226; 40 N. E. 1072; 41 N. E. 451.

who seeks to disaffirm the contract is not liable for what he has spent before disaffirmance.²⁸

§889. When restoration of consideration must be made.

Whether restoration of consideration by an infant is on the one hand a condition precedent to disaffirmance or concurrent with it, or, on the other, it is not a condition precedent, but on disaffirmance the adversary party has merely a right of action against the infant for so much of the consideration as he is bound to return is a question on which there is a hopeless division of authority. There is a tendency not to insist on restoration as a condition precedent at law, as the infant is either resisting enforcement of the contract, if defendant; or, if plaintiff, has avoided the contract by his own conduct without the aid of the court and is suing to regain possession of what he has parted with or to obtain judgment for its equivalent.¹ There is a tendency in equity to insist on restoration as a condition precedent to the right of disaffirmance or concurrent with it, on the principle that he who seeks equity must do equity.² Some courts suggest the distinction that an infant must return the consideration to rescind an executed contract but not to rescind one executory as to him;³ but this rule has been said to exist only in equity.⁴ This distinction reconciles many of the cases but by no means all. Thus a return of the consideration has been treated as a condition precedent to allow infancy to be interposed as a defense to a promissory note.⁵ To work out

²⁸ *Drude v. Curtis*, 183 Mass. 317; 62 L. R. A. 755; 67 N. E. 317.

¹ *Shuford v. Alexander*, 74 Ga. 293; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503.

² *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

³ *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Bailey v.*

Barnberger, 11 B. Mon. (Ky.) 113; *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Craighead v. Wells*, 21 Mo. 404; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; 76 Am. Dec. 209.

⁴ *Smith v. Evans*, 5 Humph. (Tenn.) 70.

⁵ At law. *Philpot v. Mfg. Co.*, 18 Neb. 54; 24 N. W. 428. In equity. *Pemberton, etc., Association v. Adams*, 53 N. J. Eq. 258; 31 Atl. 280.

this distinction: if the contract has been executed by the infant and he is suing to recover what he has parted with, restoration is not a condition precedent at law.⁶ At equity, however, restoration is a condition precedent to relief if the infant is asking affirmative relief,⁷ or restoration is decreed in the same action in which the infant seeks relief.⁸ In a suit in equity to recover realty conveyed by the infant, restoration of the consideration seems to be at least a concurrent condition.⁹

If the contract is executory as to the infant and he is resisting the enforcement of it at law, he need not restore the consideration as a condition precedent.¹⁰ If he is defending in equity he need not restore the consideration as a condition precedent to avoiding the contract.¹¹

In some jurisdictions an attempt has been made to reconcile authorities by holding that an infant need not repay the consideration still held by him as to condition precedent to avoiding a conveyance of realty;¹² but that he must do so to avoid an executed sale by him of personalty.¹³ Other courts have held that

⁶ *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; 2 N. W. 942. (His ability to restore was not shown, however.) *Ruchizky v. De Haven*, 97 Pa. St. 202; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309; 9 Am. Dec. 368. The court, in speaking of the proposition that restoration is a condition precedent, said: "As a general rule it is unsound." *Ruchizky v. De Haven*, 97 Pa. St. 202. *Contra*, *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345.

⁷ *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Utermehle v. McGreal*, 1 D. C. App. 359; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

⁸ *Smith v. Evans*, 5 Humph. (Tenn.) 70.

⁹ *Bozeman v. Browning*, 31 Ark. 364; *Bryant v. Pottinger*, 6 Bush. (Ky.) 473.

¹⁰ *Craighead v. Wells*, 21 Mo. 404. *Contra*, *Philpot v. Mfg. Co.*, 18 Neb. 54; 24 N. W. 428.

¹¹ *Petty v. Roberts*, 7 Bush. (Ky.) 410. *Contra*, that the infant cannot defend against his note and mortgage without restoring the consideration received by him. *Pember-ton, etc., Association v. Adams*, 53 N. J. Eq. 258; 31 Atl. 280. (The infant had, however, made a false representation as to his age.)

¹² *Carpenter v. Carpenter*, 45 Ind. 142; *Moore v. Baker*, 92 Ky. 518; 18 S. W. 363; *Dawson v. Helmes*, 30 Minn. 107; 14 N. W. 462; *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565.

¹³ *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Philpot v. Mfg. Co.*, 18 Neb. 54; 24 N. W. 428; *Stack v. Cavanaugh*, 67 N. H. 149; 30 Atl. 350.

an infant is obliged to return the purchase price as to condition precedent to avoiding a conveyance of realty.¹⁴ If the infant after coming of age has conveyed to a *bona fide* purchaser and has thereby rescinded a prior deed made during infancy, the second purchaser may recover the realty from the first without restoring to the latter the consideration paid by him.¹⁵ It has been held that equity will not enjoin an infant from disaffirming a sale of land without returning the purchase money;¹⁶ but in other jurisdictions equity will enjoin an infant from enforcing a judgment in ejectment before he restores the money paid for the land to his guardian and by him paid to the infant.¹⁷

Even where restoration is a condition concurrent or precedent, it must be shown that the infant actually received the consideration,¹⁸ and that he has it.¹⁹ If he has wasted it, he is not bound to restore it at all.²⁰ Even where the return of the consideration is said to be a condition precedent, if the infant in his petition to recover realty offers to pay whatever has been expended by grantee in behalf of the infant, alleges that he does not know what the amount is and asks for an accounting, this is sufficient without an actual tender.²¹

§890. Results of disaffirmance.

On disaffirmance of the contract by the infant, the rights of the parties are to be determined without any reference to the provisions of the contract.¹ Thus, an infant agreeing to work

¹⁴ *Hobbs v. R. R.*, 122 Ala. 602; 82 Am. St. Rep. 103; 26 So. 139; *Stout v. Merrill*, 35 Ia. 47; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801.

¹⁵ *Moore v. Baker*, 92 Ky. 518; 18 S. W. 363; *Vallandigham v. Johnson*, 85 Ky. 288; 3 S. W. 173; *Cresinger v. Welch*, 15 Ohio 156; 45 Am. Dec. 565.

¹⁶ *Brawner v. Franklin*, 4 Gill (Md.) 463; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329; 76 Am. Dec. 209.

¹⁷ *Hobs v. R. R.*, 122 Ala. 602;

82 Am. St. Rep. 103; 26 So. 139.

¹⁸ At law. *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732. In equity. *Monumental, etc., Association v. Herman*, 33 Md. 128.

¹⁹ *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; 2 N. W. 942.

²⁰ *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233. See § 888.

²¹ *Graves v. Hickman*, 59 Tex. 381.

¹ *Myers v. Rehkopf*, 30 Ill. App. 209; *Danville v. Mfg. Co.*, 62 N. H. 133.

for necessities may repudiate his contract and recover a reasonable compensation.² If he repudiates the contract of employment he can recover the difference between the reasonable value of his services and what has been paid him.³ So a minor who works for five months under a contract for two years, and is paid for four months and then avoids his contract cannot recover more than a fair value for his work less what he has received.⁴ In an action by a minor for his wages it is no defense that he agreed to forfeit wages by leaving without two weeks' notice.⁵ So an infant lessee who avoids the lease at majority is not liable for a breach of conditions.⁶ So on avoiding a sale by the infant's recovering mortgaged property and vendor's recovering property sold, no liability remains.⁷ The better view, therefore, is that on repudiating a contract the infant cannot be held for damages caused by the breach of his contract;⁸ though the contrary view has been expressed.⁹ Since an infant who repudiates his contract cannot be held for damages, directly, the same result cannot be accomplished indirectly by allowing a lien to be enforced against his property.¹⁰ A minor on rescinding a purchase of realty is chargeable with the rents and profits from the time of taking possession.¹¹ He has a lien on the realty to

² Meredith v. Crawford, 34 Ind. 399; Wheatly v. Miscal, 5 Ind. 142; Van Pelt v. Corwine, 6 Ind. 363; overruling Harney v. Owen, 4 Blackf. (Ind.) 337; 30 Am. Dec. 662; Morse v. Ely, 154 Mass. 458; 26 Am. St. Rep. 263; 28 N. E. 577; Tower-Doyle Commission Co. v. Smith, 86 Mo. App. 490.

³ Hagerty v. Lock Co., 62 N. H. 576 (if his services at first were worth less than he was paid, this fact must be considered); Hoxie v. Lincoln, 25 Vt. 206.

⁴ Hagerty v. Lock Co., 62 N. H. 576.

⁵ Danville v. Manufacturing Co., 62 N. H. 133; and see Dearden v. Adams, 19 R. I. 217; 36 Atl. 3.

⁶ Harrison v. Burns, 84 Ia. 446; 51 N. W. 165.

⁷ Stotts v. Leonhard, 40 Mo. App. 336.

⁸ Derocher v. Mills, 58 Me. 217; 4 Am. Rep. 286; Widrig v. Taggart, 51 Mich. 103; 16 N. W. 251.

⁹ Moses v. Stevens, 2 Pick. (Mass.) 332; Lowe v. Sinklear, 27 Mo. 308; Thomas v. Dike, 11 Vt. 273; 34 Am. Dec. 690.

¹⁰ McCarty v. Carter, 49 Ill. 53; 95 Am. Dec. 572; Alvey v. Reed, 115 Ind. 148; 7 Am. St. Rep. 418; 17 N. E. 265; Bloomer v. Nolan, 36 Neb. 51; 38 Am. St. Rep. 690; 53 N. W. 1039.

¹¹ Scott v. Scott, 29 S. C. 414; 7 S. E. 811.

secure the return of the purchase money paid in by him,¹² but the infant cannot recover money paid in under the contract by another. Thus, land was deeded to A, an infant *feme covert*, under contract with B, A's husband, to build a house thereon. B furnished some money to complete the house. On rescinding, A cannot recover the money paid by B.¹³ His mere disaffirmance of the sale of realty to him does not re-vest the legal title in the vendor, but a suit in equity to cancel the conveyance is an appropriate remedy.¹⁴ On rescinding a sale of realty, the infant may be held liable for the value of the improvements erected upon the realty by the purchaser,¹⁵ though it has been held that his liability is limited to the increased rental value of the property.¹⁶ While as we have seen the adversary party may be subrogated to the rights of the lien-holders whom he has paid, the facts which entitle him to subrogation must be alleged by him.¹⁷ His mere disaffirmance of a conveyance made by him is now held to re-vest the legal title in him, so as to allow him to sue in ejectment.¹⁸ In sales of personalty to the infant, the title is re-vested in the vendor on disaffirmance and he may recover the specific chattel if in the infant's possession,¹⁹ or its value if he has had it in his possession or under his control after rescinding.²⁰

¹² Scott v. Scott, 29 S. C. 414; 7 S. E. 811; Morris v. Holland, 10 Tex. Civ. App. 474; 31 S. W. 690.

¹³ Jennings v. Hare, 47 S. C. 279; 25 S. E. 198; distinguishing Scott v. Scott, 29 S. C. 414; 7 S. E. 811; in which the minor had furnished the money and was allowed to recover it on rescinding.

¹⁴ McCarty v. Iron Co., 92 Ala. 463; 12 L. R. A. 136; 8 So. 417.

¹⁵ Runale v. Spencer, 67 Mich. 189; 34 N. W. 548.

¹⁶ Sewell v. Sewell, 92 Ky. 500; 36 Am. St. Rep. 606; 18 S. W. 162.

¹⁷ Bradshaw v. Van Valkenburg, 97 Tenn. 316; 37 S. W. 88.

¹⁸ See §§ 873, 886.

¹⁹ Bennett v. McLaughlin, 13 Ill. App. 349; Shirk v. Shultz, 113 Ind. 571; 15 N. E. 12; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Badger v. Phinney, 15 Mass. 359; 8 Am. Dec. 105; Heath v. West, 28 N. H. 101; Kitchen v. Lee, 11 Paige (N. Y.) 107; 42 Am. Dec. 101; Lynde v. Budd, 2 Paige Ch. (N. Y.) 191; 21 Am. Dec. 84; Farr v. Sumner, 12 Vt. 28; 36 Am. Dec. 327.

²⁰ Shuford v. Alexander, 74 Ga. 293; Strain v. Wright, 7 Ga. 568; Jefford v. Ringgold, 6 Ala. 544; Briggs v. McCabe, 27 Ind. 327; 89 Am. Dec. 503; Carpenter v. Carpenter, 45 Ind. 142; Shirk v. Shultz, 113 Ind. 571; 15 N. E. 12; Badger v. Phinney, 15 Mass. 359; 8 Am.

§891. Other theory of infant's contracts.

There is another theory of the nature and effect of an infant's voidable contract, which is inconsistent with the operation of the principles already laid down, and often gives, in particular cases, the opposite result from that which they would indicate. This theory is that a contract of an infant, if fair and reasonable, cannot be rescinded as far as it is executed unless the adversary party is placed substantially *in statu quo*.¹ The list of cases cited might be greatly increased by adding cases which involve this general principle, but which have been overruled on the specific point decided. The operation of this principle places an infant's contracts on much the same footing as a contract for necessities, that is, they are to be enforced if fair and reasonable, as far as they are executed, though the reasonable value rather than the contract price controls. This principle is enforced to its fullest extent in New Hampshire, where the adversary party must be put *in statu quo*,² at least to the full extent of the benefit received by the infant.³ Thus an agreement by a minor to apply certain chattels to a debt due to him can be repudiated to the extent that only the value of the chattels need be applied on the debt.⁴ In other jurisdictions it has been applied to special cases rather than broadly and generally. Thus, it has been held that an infant lessee who avoids his lease cannot recover the rent paid for the time that he used the premises.⁵ So beneficial legal services may be en-

Dec. 105; Walker v. Davis, 1 Gray (Mass.) 506; Taft v. Pike, 14 Vt. 405; 39 Am. Dec. 228; Mustard v. Wohlford, 15 Gratt. (Va.) 329; 76 Am. Dec. 209.

¹ Valentini v. Canali, L. R. 24 Q. B. D. 166; Adams v. Beall, 67 Md. 53; 1 Am. St. Rep. 379; 8 Atl. 664; Johnson v. Insurance Co., 56 Minn. 372; 45 Am. St. Rep. 473; 26 L. R. A. 187; 59 N. W. 992; 57 N. W. 934; Epperson v. Nugent, 57 Miss. 45; 34 Am. Rep. 434; Clark v. Tate, 7 Mont. 171; 14 Pac. 761; Hall v. Butterfield, 59 N. H. 354;

47 Am. Rep. 209; Heath v. Stevens, 48 N. H. 251; Rice v. Butler, 160 N. Y. 578; 73 Am. St. Rep. 703; 47 L. R. A. 303; 55 N. E. 275; Searcy v. Hunter, 81 Tex. 644; 26 Am. St. Rep. 837; 17 S. W. 372.

² Heath v. Stevens, 48 N. H. 251; Locke v. Smith, 41 N. H. 346.

³ Bartlett v. Bailey, 59 N. H. 408; Hall v. Butterfield, 59 N. H. 354; 47 Am. Rep. 209.

⁴ Kimball v. Bruce, 58 N. H. 327.

⁵ Valentini v. Canali, L. R. 24 Q. B. D. 166.

forced against the infant's estate.⁶ So a minor cannot recover premiums paid by him for insurance,⁷ at least, where not in excess of a fair value of the risk actually incurred by the company; though where an additional sum is added thereto to form an accumulating fund, as is generally done under modern methods of insurance, he may recover this additional sum.⁸ So, in order to avoid a minor's assignment of a life insurance policy on his father's life he must repay the premiums paid by the assignee before the assignment was avoided, to keep the policy up.⁹ So an infant who buys goods, not necessities, must account for the benefit derived therefrom.¹⁰ Thus where an infant bought a bicycle on the installment plan, paid for it in part, used it awhile, and then returned it and sued to rescind, it was held that she must account for a reasonable value for its use, which in this case, equaled what she had paid in.¹¹ While this theory may in some cases be reconciled with the one generally received, it cannot be so reconciled in others, and it had better be classed as a divergent holding; nor can it be classed as an

⁶ Epperson v. Nugent, 57 Miss. 45; 34 Am. Rep. 434; Searcy v. Hunter, 81 Tex. 644; 26 Am. St. Rep. 837; 17 S. W. 372. In the case last cited it was said that they might be considered as necessities.

⁷ Metropolitan Life Ins. Co. v. Bowser, 20 Ind. App. 557; 50 N. E. 86. "We do not assent to the view that as a further consequence of his disability, he may recover back the dues and assessments he may have already paid." Chicago, etc., Association v. Hunt, 127 Ill. 257, 277; 2 L. R. A. 549; 20 N. E. 55.

⁸ Johnson v. Ins. Co., 56 Minn. 372; 45 Am. St. Rep. 473; 26 L. R. A. 187; 59 N. W. 992; 57 N. W. 934 (note the modification on rehearing, in accordance with the text). *Contra*, under general theory of infancy. Simpson v. Ins. Co., 184 Mass. 348; 68 N. E. 673.

⁹ City Savings Bank v. Whittle, 63 N. H. 587; 3 Atl. 645.

¹⁰ Hall v. Butterfield, 59 N. H. 354; 47 Am. Rep. 209; Rice v. Butler, 160 N. Y. 578; 73 Am. St. Rep. 703; 47 L. R. A. 303; 55 N. E. 275.

¹¹ "The plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and fairness, to account for its reasonable use or deterioration in value, otherwise she would be making use of the privilege of infancy as a sword, and not as a shield." Rice v. Butler, 160 N. Y. 578, 583; 73 Am. St. Rep. 703; 47 L. R. A. 303; 55 N. E. 275; criticising Pyne v. Wood, 145 Mass. 558; 14 N. E. 775; McCarthy v. Henderson, 138 Mass. 310. *Contra*, as to a sale of a bicycle on the installment plan. Gillis v. Goodwin, 180 Mass. 140; 91 Am. St. Rep. 265; 61 N. E. 813.

obsolete theory. It must be reckoned with at Modern Law as a principle that still shows evidences of vitality. Even where the theory discussed in this section is in force, an infant may avoid any contract which is not fair and reasonable, without making any compensation beyond returning so much of the consideration received by him as he has left.¹²

§892. Infant as bankrupt.

Under the United States bankruptcy act it has been held that an infant cannot be made a bankrupt,¹ even as a member of a firm,² on the ground that he might avoid his contracts at majority. The English cases took the same view,³ except where the infant had estopped himself, under the equitable principles controlling a court of bankruptcy, by a false representation that he was of age.⁴ Under the present English statute making an infant's contracts void except for necessities he cannot be made a bankrupt for his general debts,⁵ and it has been doubted if he can be forced into involuntary bankruptcy even for necessities.⁶

§893. Infant's torts arising out of contract.

While an infant is as a general rule liable for his torts, yet if the tort is so connected with contract that without the contract no cause of action in tort could exist, the infant cannot be held in tort.¹ Thus if an infant makes a fraudulent warranty of

¹² *Braucht v. Graves-May Co.*, — Minn. —; 99 N. W. 417.

¹ *In re Derby*, Fed. Cas. 3815 (where this rule was said to apply to voluntary and involuntary proceedings alike). Apparently *contra*, *In re Book*, 3 McLean 317.

² *In re Duguid*, 100 Fed. 274 (a case of involuntary bankruptcy).

³ *Belton v. Hodges*, 9 Bing. 365; *O'Brien v. Currie*, 3 Car. & P. 283; *Ex parte Layton*, 6 Ves. 434; *Ex parte Barwis*, 6 Ves. 601.

⁴ *Ex parte Watson*, 16 Ves. 265;

Ex parte Bates, 2 Mont. D. & D. 337; *In re Unity, etc., Association*, 3 De Gex & J. 63.

⁵ *Ex parte Kibble*, L. R. 10 Ch. 373; *Ex parte Jones*, L. R. 18 Ch. Div. 109.

⁶ *In re Solytkoff* (1891), 1 Q. B. 413.

¹ *Burns v. Smith*, 29 Ind. App. 181; 94 Am. St. Rep. 268; 64 N. E. 94; *Lowery v. Cate*, 108 Tenn. 54; 91 Am. St. Rep. 744; 57 L. R. A. 673; 64 S. W. 1068; *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235.

goods sold by him,² or makes a fraudulent representation as to its ownership,³ he cannot be held liable thereon. So an infant employer cannot be held liable for damages caused by the negligence of her servant.⁴ So an infant cannot be held liable for his own negligence if it amounts merely to improper performance of a contract. Thus where an infant agreed to thresh certain wheat, and performed the contract in a negligent manner so that the wheat and the barn in which it was stored were burned, no recovery can be had against him for such negligence.⁵ If the infant by word or act repudiates the contract and is then guilty of a tort with reference to the subject-matter he is liable in damages, although the contract afforded him the means of committing the tort. Thus if an infant hires a horse for a specified journey and drives to another place,⁶ or drives beyond the place to which he had agreed to go,⁷ he is liable for any damage suffered by such horse, on the theory that he has converted it to his own use. While an infant is not liable for breach of a promise to marry,⁸ he is liable for seduction accomplished by means of such promise.⁹ So an infant caused an old man to become intoxicated and then induced him to sell a cow for the infant's note. It was held that the vendor could recover the cow in the action of trover.¹⁰

² Morrill v. Aden, 19 Vt. 505.

³ Doran v. Smith, 49 Vt. 353.

⁴ Burns v. Smith, 29 Ind. App. 181; 94 Am. St. Rep. 268; 64 N. E. 94.

⁵ Lowery v. Cate, 108 Tenn. 54; 91 Am. St. Rep. 744; 57 L. R. A. 673; 64 S. W. 1068.

⁶ Churchill v. White, 58 Neb. 22; 76 Am. St. Rep. 64; 78 N. W. 369.

⁷ Homer v. Thwing, 3 Pick. (Mass.) 492; Freeman v. Boland, 14 R. I. 39; 51 Am. Rep. 340; Towne

v. Wiley, 23 Vt. 355; 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688; 28 Am. Rep. 519.

⁸ See § 861.

⁹ Hawk v. Harris, 112 Ia. 543; 84 Am. St. Rep. 352; 84 N. W. 664. Suit by parent. Fry v. Leslie, 87 Va. 269; 12 S. E. 671. By the woman who was seduced. Becker v. Mason, 93 Mich. 336; 53 N. W. 361.

¹⁰ Walker v. Davis, 1 Gray (Mass.) 506.

CHAPTER XXXIX.

CONTRACTS OF INSANE.

§894. Nature of insanity in contract law.

In order to affect the power of a person to bind himself by contract, it is now held that there must be such a degree of mental weakness at the time of making the contract as will materially affect his ability to contract. Slight departure from the normal type is insufficient to affect his legal status.¹ A person may be absent-minded,² or ill, infirm and subject to the influence of others,³ without being insane in this sense. It is not necessary that he should be at his best, mentally.⁴ Impairment of mental power is not necessarily incapacity;⁵ and old age and weakness of mind do not necessarily incapacitate.⁶ Nor is it insanity where a grantor is so worried over financial troubles as to make a foolish contract.⁷ So the fact that one has been deaf and dumb from birth does not conclusively establish his

¹ Mann v. Bank, 86 Fed. 51; White v. Farley, 81 Ala. 563; 8 So. 215; Waterman v. Higgins, 28 Fla. 660; 10 So. 97; Richardson v. Adams, 110 Ga. 425; 35 S. E. 648; Kelly v. Perrault, 5 Ida. 221; 48 Pac. 45; Shea v. Murphy, 164 Ill. 614; 56 Am. St. Rep. 215; 45 N. E. 1021; Hall v. Ins. Co. (Ky.); 43 S. W. 194; Frush v. Green, 86 Md. 494; 39 Atl. 863; Cutler v. Zollinger, 117 Mo. 92; 22 S. W. 895; Swank v. Swank, 37 Or. 439; 61 Pac. 846.

² Galer v. Galer, 108 Ia. 496; 79 N. W. 257.

³ Nance v. Stockburger, 111 Ga.

821; 36 S. E. 100; Seward v. Seward, 59 Kan. 387; 53 Pac. 63; Paine v. Aldrich, 133 N. Y. 544; 30 N. E. 725; Chadd v. Moser, 25 Utah 369; 71 Pac. 870.

⁴ Ralston v. Turpin, 129 U. S. 663.

⁵ Harrison v. Otley, 101 Ia. 652; 70 N. W. 724; Paine v. Aldrich, 133 N. Y. 544; 30 N. E. 725.

⁶ Wheatley v. Wheatley, 102 Ia. 737; 70 N. W. 689; Trimbo v. Trimbo, 47 Minn. 389; 50 N. W. 350; Delaplain v. Grubb, 44 W. Va. 612; 67 Am. St. Rep. 788; 30 S. E. 201.

⁷ De Witt v. Mattison, 26 Neb. 655; 42 N. W. 742.

insanity;⁸ and a belief in spiritualism is compatible with capacity to convey realty.⁹ On the other hand, a person may be so insane as to affect his capacity to make a valid contract without being totally devoid of reason.¹⁰

The test now adopted by the weight of authority is that in order to affect contractual power, the insanity must be of such a sort that it renders the victim incapable of understanding with reasonable clearness what he is doing; what is the nature and effect of the transaction in which he is engaging.¹¹ This rule recognizes that a man may have full power to make contracts without being able to manage his own affairs in a reasonable and prudent manner.¹² The statement of the rule further shows that in order to affect contractual capacity, the mental derangement must be such as not merely can prevent this fair and reasonable understanding on his part of some of his acts; but it must further be such as does in fact prevent his understanding the nature and result of the act under judicial investigation.¹³ As expressed in a recent Massachusetts case, an in-

⁸ *Christmas v. Mitchell*, 3 Ired. Eg. (N. C.) 535.

⁹ *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84; 14 Pac. 306; *Lewis v. Arbuckle*, 85 Ia. 335; 16 L. R. A. 677; 52 N. W. 237.

¹⁰ *Dominick v. Randolph*, 124 Ala. 557; 27 So. 481; *Hay v. Miller*, 48 Neb. 156; 66 N. W. 1115; *Dewey v. Algire*, 37 Neb. 6; 40 Am. St. Rep. 468; 55 N. W. 276.

¹¹ *Griffith v. Godey*, 113 U. S. 89; *Allore v. Jewell*, 94 U. S. 506; *Sands v. Potter*, 165 Ill. 397; 56 Am. St. Rep. 253; 46 N. E. 282; affirming 59 Ill. App. 206; *Lindsey v. Lindsey*, 50 Ill. 79; 99 Am. Dec. 489; *Teegården v. Lewis*, 145 Ind. 98; 40 N. E. 1047; 44 N. E. 9; *Raymond v. Wathen*, 142 Ind. 367; 41 N. E. 815; *Elwood v. O'Brien*, 105 Ia. 239; 74 N. W. 740; *Milks v. Milks*, 129 Mich. 164; 88 N. W. 402; *Jamison v. Culligan*, 151 Mo.

410; 52 S. W. 224; *Bogges v. Bogges*, 127 Mo. 305; 29 S. W. 1018; *State v. Grand Lodge*, 78 Mo. App. 546; *Dennett v. Dennett*, 44 N. H. 531; 84 Am. Dec. 97; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Kastell v. Hillman*, 53 N. J. Eq. 49; 30 Atl. 535; *Wilkinson v. Shernian*, 45 N. J. Eq. 413; 18 Atl. 228; *Aldrich v. Bailey*, 132 N. Y. 85; 30 N. E. 264; *Valentine v. Lunt*, 115 N. Y. 496; 22 N. E. 209; *Riggs v. Tract Society*, 95 N. Y. 503; *Whitaker v. Hamilton*, 126 N. C. 465; 35 S. E. 815; *Carnegie v. Diven*, 31 Or. 366; 49 Pac. 891; *Miller v. Rutledge*, 82 Va. 863; 1 S. E. 202; *Buckey v. Buckey*, 38 W. Va. 168; 18 S. E. 383; *Wright v. Jackson*, 59 Wis. 569; 18 N. W. 486.

¹² *Moffitt v. Witherspoon*, 10 Ired. (N. C.) 185.

¹³ *Wetter v. Habersham*, 60 Ga.

sane delusion must be the "moving cause" of a deed or a contract in order to invalidate it,¹⁴ and one may be sane enough to transact simple business and yet too insane for complicated matters.¹⁵ Accordingly, though it has been said that it requires a higher degree of capacity to exchange lands than to make a will,¹⁶ the better view is that capacity to contract and capacity to make a will are so different in many points that they should not be compared. Since the condition of the contracting party at the time of making the contract determines its validity, the contract of one ordinarily insane is valid if made during a lucid interval.¹⁷ The earlier authorities do not always recognize the rules just given. In some cases apparently any degree of insanity was held to destroy contractual capacity;¹⁸ in others, nothing short of a total lack of reason would have that effect.¹⁹ Weakness of mind not caused by technical insanity may avoid a contract. A judgment note given by one dying of meningitis, who is in such physical and mental condition that he does not understand the nature of the act is invalid.²⁰ If a person not technically in the class of the insane or imbecile, but below the normal type of mental capacity is subjected to fraud or duress, and he is thereby misled or coerced, relief is given against contracts into which he is induced to enter by such means. This

184; *Emery v. Hoyt*, 46 Ill. 258; *Burgess v. Pollock*, 53 Ia. 273; 36 Am. Rep. 218; 5 N. W. 179; *Meigs v. Dexter*, 172 Mass. 217; 52 N. E. 75; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; 16 Am. Dec. 372; *Benoist v. Murrin*, 58 Mo. 307; *Concord v. Rumney*, 45 N. H. 423; *Loder v. Loder*, 34 Neb. 824; 52 N. W. 814; *Wilkinson v. Sherman*, 45 N. J. Eq. 413; 18 Atl. 228; *Pidcock v. Potter*, 68 Pa. St. 342; 8 Am. Rep. 181; *Mays v. Prewett*, 98 Tenn. 474; 40 S. W. 483.

¹⁴ *Meigs v. Dexter*, 172 Mass. 217; 52 N. E. 75.

¹⁵ *Seerley v. Sater*, 68 Ia. 375; 27 N. W. 262.

¹⁶ *Turner v. Haupt*, 53 N. J. Eq. 526; 33 Atl. 28.

¹⁷ *Lilly v. Waggoner*, 27 Ill. 395; *Jones v. Perkins*, 5 B. Mon. (Ky.) 222; *Richardson v. Smart*, 152 Mo. 623; 75 Am. St. Rep. 488; 54 S. W. 542; *Gangwere's Estate*, 14 Pa. St. 417; 53 Am. Dec. 554; *Wright v. Bank* (Tenn. Ch. App.), 60 S. W. 623.

¹⁸ *Owing's Case*, 1 Bland Ch. (Md.) 370; 17 Am. Dec. 311.

¹⁹ *Stewart v. Lispenhard*, 26 Wend. (N. Y.) 255; *Jackson v. King*, 4 Cow. (N. Y.) 207; 15 Am. Dec. 354.

²⁰ *Kedward v. Campbell*, 166 Pa. St. 365; 31 Atl. 114.

topic does not involve any technical consideration of capacity and is discussed elsewhere.²¹

§895. Validity of contracts of an insane person.— Before adjudication.

At early law it was laid down that a party should not "disable himself" by alleging his insanity. By this view of the law, his contracts generally were absolutely valid, unless a guardian were appointed to represent him, or he had died leaving his heirs and personal representatives to avoid the contract. At Modern Law this rule has been repeatedly rejected,² and under proper circumstances insanity may be interposed as a defense by the insane person himself.³ In some cases the conveyances and contracts of an insane person have been said to be void as a class;⁴ but in most of the cases cited below, it was not necessary to hold the contract void *ab initio*, as the record showed that proper steps had been taken to avoid it; and accordingly it had become void, whether originally void or voidable. Still it has recently been held that the only liability of an insane person is for the consideration, on common counts.⁵ At Modern Law the contracts of an insane person are to be divided into two general classes, those entered into before the insane person was adjudicated insane in a proceeding instituted for that purpose; and those entered into after such adjudication.

²¹ See Ch. XI and XII.

¹ Co. Litt. 247b; Beverly's Ease., 4 Coke 123b.

² Grant v. Thompson, 4 Conn. 203; 10 Am. Dec. 119; Mitchell v. Kingman, 5 Pick. (Mass.) 431; Rice v. Pett, 15 Johns. (N. Y.) 503; Bensell v. Chancellor, 5 Whart. (Pa.) 370.

³ See cases cited in this section.

⁴ Parker v. Marco, 76 Fed. 510; German, etc., Society v. De Lashmutt, 67 Fed. 399 (as to a *bona fide*

purchaser from grantor); Sullivan v. Flynn, 9 Mack. (D. C.) 396; Van Patton v. Beals, 46 Ia. 62; Corbit v. Smith, 7 Ia. 60; 71 Am. Dec. 431; Owing's Case, 1 Bland. Ch. (Md.) 370; 17 Am. Dec. 311; Seaver v. Phelps, 11 Pick. (Mass.) 304; 22 Am. Dec. 372; Brown v. Miles, 61 Hun (N. Y.) 453; Lee v. Lee, 4 McCord (S. C.) 183; 17 Am. Dec. 722.

⁵ Milligan v. Pollard, 112 Ala. 465; 20 So. 620.

§896. Void contracts.

Of the contracts entered into before adjudication some are still said to be void. A power of attorney is the best example of a void act of a lunatic.¹ While in some of these cases it does not appear where the power was void originally, or whether it has been avoided, in others it clearly appears that the power is void. Thus a third person may raise the question of the validity of the power.² Appointment of agents by means less formal than by power of attorney are generally held to be merely voidable.³

§897. Valid contracts.

The valid contracts of an insane person are those whereby he agrees to do whatever the law would compel him to do. Thus the release of a ground rent inherited from an ancestor, upon the happening of the conditions on which under the terms of the deed accepted by such ancestor, it should be released,¹ is not made voidable by the insanity of the releasor. So a sale by a trustee is not affected by the insanity of the owner of the equity of redemption who bought the land subject to the mortgage.² So where the vendor was sane when contract was made for the sale of realty, but was insane when the deed was delivered, the deed was held valid.³ The renewal by an insane person of an accommodation note given by him when sane is binding when the payee takes the new note *bona fide* and surrenders the old;⁴ and the insanity of a maker of notes given as a subscription to buy a

¹ Dexter v. Hart, 15 Wall. (U. S.) 9; Plaster v. Rigney, 97 Fed. 12; 38 C. C. A. 25; Rigney v. Plaster, 88 Fed. 686; McClun v. McClun, 176 Ill. 376; 52 N. E. 928, where it is said to be "wholly void"; Smith v. Smith, 106 N. C. 498; 11 S. E. 188; *In re Misselwitz*, 177 Pa. St. 359; 35 Atl. 722, where it is said to be "of no avail"; Elias v. Loan Association, 46 S. C. 188; 24 S. E. 102, where it is said to be "null and void."

² Plaster v. Rigney, 97 Fed. 12; 38 C. C. A. 25.

³ Arthurs v. Gas Co., 171 Pa. St. 532; 33 Atl. 88.

⁴ Hirst's Estate, 147 Pa. St. 319; 23 Atl. 455.

² Bensieck v. Cook, 110 Mo. 173; 33 Am. St. Rep. 422; 19 S. W. 642.

³ Brown v. Miles, 61 Hun (N. Y.) 453.

⁴ Bank v. Sneed, 97 Tenn. 120; 56 Am. St. Rep. 788; 34 L. R. A. 274; 36 S. W. 716.

site for a school library, occurring after expenses were incurred in reliance on the subscription, but before the site was bought, does not revoke the subscription.⁵ So an insane person is liable for a breach, committed during insanity, of a contract made while sane.⁶ The most important topic under this head is necessities. An insane person like an infant is liable for a reasonable value for such necessities as are furnished to him,⁷ or to his wife and family.⁸ This liability is measured, not by the terms of the contract but by the pre-existing legal liability, and does not need any express promise.⁹ In the case of necessities, the question of adjudication is immaterial. An insane person, after adjudication, may bind himself by a contract for necessities if his guardian fails to provide them.¹⁰ By statute in some jurisdictions the estate of an insane person is liable for his support in an asylum.¹¹ The rules determining what necessities are, are much the same as in the case of infants. In most of the cases already cited, food and clothing were the necessities in question. The services of a physician,¹² or

⁵ *School District v. Stocking* (also cited as *School District v. Scheidley*), 138 Mo. 672; 60 Am. St. Rep. 576; 37 L. R. A. 406; 40 S. W. 656.

⁶ *Baldrick v. Garvey*, 66 Ia. 14; 23 N. W. 156; *Williams v. Hays*, 143 N. Y. 442; 42 Am. St. Rep. 743; 26 L. R. A. 153; 38 N. E. 449; *In re Strasburger*, 132 N. Y. 128; 30 N. E. 379.

⁷ *In re Rhodes*, L. R. 44 Ch. D. 94; *Borum v. Bell*, 132 Ala. 85; 31 So. 454; *Ex parte Northington*, 37 Ala. 496; 79 Am. Dec. 67; *Henry v. Fine*, 23 Ark. 417; *Miller v. Hart*, 135 Ind. 201; 34 N. E. 1003; *Sawyer v. Lufkin*, 56 Me. 308; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *Kendall v. May*, 10 All. (Mass.) 59; *Reando v. Misplay*, 90 Mo. 251; 59 Am. Rep. 13; 2 S. W. 405; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Van Horn v. Hann*, 39 N. J. L. 207; *Richardson v. Strong*, 13 Ired. (N. C.) 106; 55 Am. Dec. 430;

Beals v. See, 10 Pa. St. 56; 49 Am. Dec. 573; *La Rue v. Gilkyson*, 4 Pa. St. 375; 45 Am. Dec. 700; *Stannard v. Burn*, 63 Vt. 244; 22 Atl. 460.

⁸ *Booth v. Cottingham*, 126 Ind. 431; 26 N. E. 84; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; 20 Am. Dec. 199; *Shaw v. Thompson*, 16 Pick. (Mass.) 198; 26 Am. Dec. 655.

⁹ *Palmer v. Hospital*, 10 Kan. App. 98; 61 Pac. 506.

¹⁰ *Creagh v. Tunstall*, 98 Ala. 249; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; 22 Am. Dec. 372; *Darby v. Cabanne*, 1 Mo. App. 126; *Maughan v. Burns*, 64 Vt. 316; 23 Atl. 583; *Stannard v. Burns*, 63 Vt. 244; 22 Atl. 460.

¹¹ *Board of Chosen Freeholders of Camden County v. Ritson*, 68 N. J. L. 666; 54 Atl. 839.

¹² *Booth v. Cottingham*, 126 Ind. 431; 26 N. E. 84.

nurse,¹³ have been held necessities; as have the services of an attorney where rendered in good faith to obtain the removal of a guardian and an adjudication of sanity.¹⁴ Where no personal liability has been held to exist in such cases, as on a contract for attorney's fees and expert witnesses in a hearing on lunacy, it is because under the procedure then in force allowance out of the estate of the insane person should be awarded as costs by the court before which the hearing is had.¹⁵ One who lends money to an insane person is subrogated to claims for necessities and the like to the payment of which such money is devoted.¹⁶

§898. Voidable contracts.

The remaining contracts of an insane person are voidable in the sense that by taking proper steps the insane person or his representatives may disaffirm them. This includes ordinary executory contracts,¹ and executed conveyances of property,² as a bill of sale by an insane person to his father in consideration of his paying debts of the son which were not incurred for neces-

¹³ Richardson v. Strong, 13 Ired. L. (N. C.) 106; 55 Am. Dec. 430.

¹⁴ Carter v. Beckwith, 128 N. Y. 312; 28 N. E. 582.

¹⁵ Freeman's Appeal (Pa.), 13 Atl. 552; 22 W. N. C. 173.

¹⁶ First National Bank v. McGinty, 29 Tex. Civ. App. 539; 69 S. W. 495.

¹ Luffboro v. Foster, 92 Ala. 477; 9 So. 281; Bunn v. Postell, 107 Ga. 490; 33 S. E. 707; Schuff v. Ransom, 79 Ind. 458; Copenrath v. Kienby, 83 Ind. 18; Boyer v. Berryman, 123 Ind. 451; 24 N. E. 249; Louisville, etc., Ry. Co. v. Herr, 135 Ind. 591; 35 N. E. 556; Aetna, etc., Co. v. Sellers, 154 Ind. 370; 77 Am. St. Rep. 481; 56 N. E. 97; Allen v. Berryhill, 27 Ia. 534; Hovey v. Hobson, 53 Me. 451; 89 Am. Dec. 705; Allis v. Billings, 6 Met. (Mass.)

415; 39 Am. Dec. 744; Arnold v. Iron Works, 1 Gray (Mass.) 434; Carrier v. Sears, 4 All. (Mass.) 336; 81 Am. Dec. 707; Campbell v. Kuhn, 45 Mich. 513; 40 Am. Rep. 479; 8 N. W. 523; Bates v. Hyman (Miss.), 28 So. 567; Nicholas, etc., Co. v. Hardman, 62 Mo. App. 153; Eaton v. Eaton, 37 N. J. L. 108; 18 Am. Rep. 716; Ingraham v. Baldwin, 9 N. Y. 45; Hanley v. Loan Co., 44 W. Va. 450; 29 S. E. 1002.

² Luhrs v. Hancock, 181 U. S. 567; Woolley v. Gaines, 114 Ga. 122; 88 Am. St. Rep. 22; 39 S. E. 892; Burnham v. Kidwell, 113 Ill. 425; Copenrath v. Kienby, 83 Ind. 18; Fay v. Burditt, 81 Ind. 433; 42 Am. Rep. 142; Sedgwick v. Jack, 111 Ia. 745; 82 N. W. 1027; Brown v. Cory, 9 Kan. App. 702; 59 Pac.

saries,³ mortgages,⁴ the forfeiture of a mortgage for non-payment of installments due before the mortgagor was adjudged insane,⁵ a sale of realty after insanity under a power of sale in a mortgage given before insanity,⁶ and the release of a mortgage.⁷ So the lunacy of a partner makes the deed of the firm voidable.⁸ Thus a conveyance by an insane person is "voidable; that is, it may be confirmed or set aside."⁹ In some states a conveyance by an insane person is said to be invalid until it is ratified,¹⁰ but the better view is that such deed is valid until set aside.¹¹ "Until disaffirmed the voidable executed contract in respect to the property or benefits conveyed passes the right or title as fully as an unimpeachable contract. By ratification it becomes impervious; by disaffirmance, a nullity."¹² However, in some cases it has been said that such deeds were void.¹³ The fact that the property has been sold,¹⁴ or mort-

1097; *Gribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; 7 Pac. 584; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; 19 Am. Dec. 71; *Riley v. Carter*, 76 Md. 581; 35 Am. St. Rep. 443; 19 L. R. A. 489; 25 Atl. 667; *Reason v. Jones*, 119 Mich. 672; 78 N. W. 899; *Thorpe v. Hanscom*, 64 Minn. 201; 66 N. W. 1; *McAnaw v. Tiffin*, 143 Mo. 667; 45 S. W. 656; *Hay v. Miller*, 48 Neb. 156; *Riggan v. Green*, 80 N. C. 236; 30 Am. Rep. 77; *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766; *Wille v. Wille*, 57 S. C. 413; 35 S. E. 804; *Pearson v. Cox*, 71 Tex. 246; 10 Am. St. Rep. 740; 9 S. W. 124; *French Lumbering Co. v. Theriault*, 107 Wis. 627; 51 L. R. A. 910; 83 N. W. 927.

³ *Wilkins v. Wilkins*, 35 Neb. 212; 52 N. W. 1109.

⁴ *Fay v. Burditt*, 81 Ind. 433; 42 Am. Rep. 142; *Creekmore v. Baxter*, 121 N. C. 31; 27 S. E. 994.

⁵ *Helbreg v. Schumann*, 150 Ill. 12; 41 Am. St. Rep. 339; 37 N. E. 99.

⁶ *Encking v. Simmons*, 28 Wis. 272.

⁷ *Aetna, etc., Co. v. Sellers*, 154 Ind. 370; 77 Am. St. Rep. 481; 56 N. E. 97.

⁸ *Riley v. Carter*, 76 Md. 581; 35 Am. St. Rep. 443; 19 L. R. A. 489; 25 Atl. 667.

⁹ *Luhrs v. Hancock*, 181 U. S. 567, 574.

¹⁰ *Brigham v. Fayerweather*, 144 Mass. 48; 10 N. E. 735; *Valpey v. Rea*, 130 Mass. 384.

¹¹ *Downham v. Holloway*, 158 Ind. 626; 92 Am. St. Rep. 330; 64 N. E. 82.

¹² *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 372; 77 Am. St. Rep. 481; 56 N. E. 97.

¹³ *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Galloway v. McLain*, 131 Ala. 280; 31 So. 603; *Van Deusen v. Sweet*, 51 N. Y. 378; *Farley v. Parker*, 6 Or. 105; 25 Am. Rep. 504; *In re Desilver*, 5 Rawle (Pa.) 111; 28 Am. Dec. 645.

¹⁴ *Elder v. Schumacher*, 18 Colo. 433; 33 Pac. 175; *Gray v. Turley*,

gaged¹⁵ to a *bona fide* purchaser or mortgagee, does not deprive the insane grantor of the right to disaffirm,¹⁶ even where part of the money raised by the mortgage was applied to the support of the insane person.¹⁷ The contrary view is held by a few courts, however.¹⁸ Insanity avoids a contract and also a decree of foreclosure taken in pursuance thereof.¹⁹ So a judgment confessed by an insane person and sales thereunder are voidable.²⁰ Thus if an insane person buys chattels on credit, giving a note for the purchase price secured by a deed of trust on such chattels and on certain land, and containing a provision for the payment of attorney fees, no relief can be given other than a decree for the sale of the chattels.²¹ A waiver of rights in a legal proceeding is always voidable.²² But in Louisiana it seems to be held that the contract of an insane person before adjudication of insanity can be avoided only if the adversary party knew or must have known of such insanity.²³ It is sometimes said that negotiable instruments, executed by an insane person, are void.²⁴ If the word "void" is not used carelessly for voidable, this holding is then based on the theory that these instruments must be either negotiable in the technical sense, and therefore valid in the hands of *bona fide* holders, or else void. The true rule is intermediate between these extreme positions. It is that in a negotiable contract of an insane person, "the quality of negotiability does not attach to it, though made nego-

110 Ind. 254; 11 N. E. 40; McKenzie v. Donnell, 151 Mo. 461; 52 S. W. 222.

¹⁵ German, etc., Society v. De Lashmutter, 67 Fed. 399; Hull v. Louth, 109 Ind. 315; 58 Am. Rep. 405; 10 N. E. 270.

¹⁶ Hovey v. Hobson, 53 Me. 451; 89 Am. Dec. 705; Chew v. Bank, 14 Md. 299; Rogers v. Blackwell, 49 Mich. 192; 13 N. W. 512; Dewey v. Allgire, 37 Neb. 6; 40 Am. St. Rep. 468; 55 N. W. 276.

¹⁷ German, etc., Society v. De Lashmutter, 67 Fed. 399.

¹⁸ Myers v. Knabe, 51 Kan. 720; 33 Pac. 602; Odom v. Riddick, 104

N. C. 515; 17 Am. St. Rep. 686; 7 L. R. A. 118; 10 S. E. 609.

¹⁹ Lockwood v. Mitchell, 7 O. S. 387; 70 Am. Dec. 78.

²⁰ Crawford v. Thomson, 161 Ill. 161; 43 N. E. 617.

²¹ Bates v. Hyman (Miss.), 28 So. 567.

²² North v. Joslin, 59 Mich. 624; 26 N. W. 810.

²³ Martinez v. Moll, 46 Fed. 724; Wolf v. Edwards, 106 La. 477; 31 So. 58.

²⁴ Van Patton v. Beals, 46 Ia. 62; Seaver v. Phelps, 11 Pick. (Mass.) 304; 22 Am. Dec. 372.

liable in form,"²⁵ and it is therefore voidable, not only in the hands of the payee, but in those even of an indorsee for value, without notice and before maturity.²⁶ This is especially true as to a holder with notice of insanity but not of guardianship.²⁷ By analogy, the indorsement of an insane person should be voidable only, and valid against the maker unless avoided, and it has been so held.²⁸ The decided weight of authority, it must be admitted, however, is the other way.²⁹ Some authorities have even held that a contract with one known to be insane is absolutely void.³⁰ In Georgia it has been said to be "a general rule of universal law that the contracts of a lunatic, idiot or other person *non compos mentis* from age or other infirmity are utterly void."³¹ The Georgia case is affected by the Georgia statute and by the fact that the insane person had been adjudicated insane in a state where he was domiciled. The cases cited do not bear out the general proposition, which does not seem to be adhered to even in Georgia.³² A grantee who accepts a deed from a grantor whom he knows to be insane is "guilty of meditated fraud,"³³ but while such deed is voidable it was, in this case, not necessary to decide if it was not absolutely void.³⁴ Other states have held that a contract cannot be

²⁵ *Hosler v. Beard*, 54 O. S. 398; 56 Am. St. Rep. 720; 35 L. R. A. 161; 43 N. E. 1040.

²⁶ *McClain v. Davis*, 77 Ind. 419; *Hosler v. Beard*, 54 O. S. 398; 56 Am. St. Rep. 720; 35 L. R. A. 161; 43 N. E. 1040; *Wireback v. Bank*, 97 Pa. St. 543; 39 Am. Rep. 821; *Moore v. Hershey*, 90 Pa. St. 196. This point was queried in *Milligan v. Pollard*, 112 Ala. 465; 20 So. 620.

²⁷ *Bradbury v. Place (Mc.)*, 10 Atl. 461.

²⁸ *Carrier v. Sears*, 4 All. (Mass.) 336; 81 Am. Dec. 707.

²⁹ *Jeneson v. Jeneson*, 66 Ill. 259; *Hannahs v. Sheldon*, 20 Mich. 278; *Burke v. Allen*, 29 N. H. 106; 61 Am. Dec. 642.

³⁰ *Fecel v. Guinault*, 32 La. Ann.

91. *Contra*, *Louisville, etc., Ry. v. Herr*, 135 Ind. 591; 35 N. E. 556.

³¹ *American, etc., Co. v. Boone*, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182; quoting 1 *Daniel on Negot. Inst.* § 209 (4th ed.), and citing *Dexter v. Hall*, 15 Wall. (U. S.) 9; *Anglo-Californian Bank v. Ames*, 27 Fed. 727; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; 22 Am. Dec. 372; *Rogers v. Blackwell*, 49 Mich. 192; 13 N. W. 512.

³² *Bunn v. Postle*, 107 Ga. 490; 33 S. E. 707; *Orr v. Mortgage Co.*, 107 Ga. 499; 33 S. E. 708.

³³ *Clay v. Hammond*, 199 Ill. 370, 93 Am. St. Rep. 146; 65 N. E. 352.

³⁴ *Clay v. Hammond*, 199 Ill. 370; 93 Am. St. Rep. 146; 65 N. E. 352.

avoided where the contract was fair and the adversary neither know nor had any reason to know of the insanity.³⁵ Thus it has been held that a partnership contract with a third person who does not know that one of the partners is insane, is valid,³⁶ but otherwise if such person knows of the insanity.³⁷ Other states have insisted that good faith, fair dealing and ignorance of the insanity do not prevent the insane person from disaffirming.³⁸ "The fairness of defendant's conduct cannot supply the plaintiff's want of capacity."³⁹ The better view at Modern Law seems to be that the knowledge or ignorance of the insanity possessed by the adversary party does not affect the validity of the contract, but does determine the rule as to the return of the consideration.⁴⁰

§899. Disaffirmance.

The insane person,¹ or his guardian,² or his heirs,³ or the personal representative of a lunatic may avoid his contracts.⁴ But the adversary party cannot avoid them;⁵ nor can a third person. Thus, where A, who was insane, telegraphed to B to send money to C, A's attorney, to whom it was due for services, and B sent it, it was held that B could not recover from C.⁶ Any conduct

³⁵ *Stockmeyer v. Tobin*, 139 U. S. 176; *Rhoades v. Fuller*, 139 Mo. 179; 40 S. W. 760. So of a conveyance. *Gingrich v. Rogers*, — Neb —; 96 N. W. 156.

³⁶ *Jurgens v. Ittman*, 47 La. Ann. 367; 16 So. 952.

³⁷ *Schmidt v. Ittman*, 46 La. Ann. 888; 15 So. 310.

³⁸ *Wooley v. Gaines*, 114 Ga. 122; 88 Am. St. Rep. 22; 39 S. E. 892; *Gibson v. Soper*, 6 Gray (Mass.) 279; 66 Am. Dec. 414; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705.

³⁹ *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 306; 22 Am. Dec. 372; quoted in *Brigham v. Fayerweather*, 144 Mass. 48, 52; 10 N. E. 735.

⁴⁰ See § 901.

¹ *Luffboro v. Foster*, 92 Ala. 477; 9 So. 281.

² *Hull v. Louth*, 109 Ind. 315; 58 Am. Rep. 405; 10 N. E. 270; *Reason v. Jones*, 119 Mich. 672; 78 N. W. 899.

³ *Downham v. Holloway*, 158 Ind. 626; 92 Am. St. Rep. 330; 64 N. E. 82; (conveyance of realty).

⁴ *Orr v. Equitable Mortgage Co.*, 107 Ga. 499; 33 S. E. 708.

⁵ *Harmon v. Harmon*, 51 Fed. 113; *Allen v. Berryhill*, 27 Ia. 534; 1 Am. Rep. 309; *Atwell v. Jenkins*, 163 Mass. 362; 47 Am. St. Rep. 463; 28 L. R. A. 694; 40 N. E. 178.

⁶ *Atwell v. Jenkins*, 163 Mass. 362; 47 Am. St. Rep. 463; 28 L. R. A. 694; 40 N. E. 178.

which clearly shows an intention to avoid is sufficient. Thus an ejectment suit,⁷ or an equity suit to quiet title,⁸ or to relieve against forfeiture,⁹ or a conveyance to another grantee, made after grantor has regained his sanity,¹⁰ are sufficient to operate as a disaffirmance.

§900. Ratification.

Since the contract of an insane person is voidable, it may be ratified. This may be effected by an express promise to perform the contract. Thus a conveyance may be ratified by reacknowledging the deed and having it signed by another attesting witness.¹ Conduct may also amount to a ratification if unequivocal.² Thus knowingly retaining property received under the contract,³ especially if it has meanwhile depreciated greatly,⁴ or receiving the benefit of the contract,⁵ may amount to a ratification. However, a guardian's entering every room in the house or bringing a suit, which abates by the death of the ward and is never revived, is not ratification.⁶ The insane person on recovering his reason,⁷ or his personal representatives on his death,⁸ may ratify his contract. However, neither the insane person while insane, nor his guardian, nor the county court, nor all of them together, can affirm a conveyance made by him

⁷ *Jackson v. King*, 4 Cowen (N. Y.) 207; 15 Am. Dec. 354.

⁸ *Owing's Case*, 1 Bland Ch. (Md.) 370; 17 Am. Dec. 311.

⁹ *Helbreg v. Schumann*, 150 Ill. 12; 41 Am. St. Rep. 339; 37 N. E. 99.

¹⁰ *Clay v. Hammond*, 199 Ill. 370; 93 Am. St. Rep. 146; 65 N. E. 352.

¹ *Doran v. McConlogue*, 150 Pa. St. 98; 24 Atl. 357.

² *Beasley v. Beasley*, 180 Ill. 163; 54 N. E. 187.

³ *Barry v. Hospital* (Cal.), 48 Pac. 68; *Stodder v. Granite Co.*, 99 Ga. 595; 27 S. E. 174.

⁴ *Bunn v. Postell*, 107 Ga. 490; 33 S. E. 707.

⁵ *Allis v. Billings*, 6 Met. (Mass.)

415; 39 Am. Dec. 744; *Gibson v. R. Co.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; 30 Atl. 308.

⁶ *McAnaw v. Tiffin*, 143 Mo. 667; 45 S. W. 656.

⁷ *Barry v. Hospital* (Cal.), 48 Pac. 68; *Stroder v. Granite Co.*, 99 Ga. 595; 27 S. E. 174; *Beasley v. Beasley*, 180 Ill. 163; 54 N. E. 187; *Louisville, etc., Ry. v. Herr*, 135 Ind. 591; 35 N. E. 556; *Whitcomb v. Hardy*, 73 Minn. 285; 76 N. W. 29; *Allis v. Billings*, 6 Met. (Mass.) 415; 39 Am. Dec. 744; *Gibson v. R. Co.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; 30 Atl. 308.

⁸ *Bunn v. Postell*, 107 Ga. 490; 33 S. E. 707; *Bullard v. Moor*, 158 Mass. 418; 33 N. E. 928.

while insane.⁹ A ratification precludes subsequent disaffirmance.¹⁰

§901. Restoration of consideration.

The widest divergence between the voidable contracts of an infant and those of an insane person consists in the duty to restore the consideration on disaffirmance. If the contract is a fair and reasonable one and the insane person has received the consideration, and the adversary party did not know of the insanity, the insane person cannot disaffirm without putting the adversary party in *statu quo* by restoring to him the consideration which he has received or its equivalent.¹ It follows that in such a case if the insane person does not or cannot place the adversary party in *statu quo* the contract is binding upon the insane person; since though it was originally voidable he has not taken the proper steps to avoid it.² This is said to be the

⁹ *Gingrich v. Rogers*, — Neb. —; 96 N. W. 156.

¹⁰ *Bunn v. Postell*, 107 Ga. 490; 33 S. E. 707.

¹ *Molton v. Camroux*, 4 Exch. 17; *Imperial Loan Co. v. Stone (C. A.)* (1892) 1 Q. B. 599; *Cockrill v. Cockrill*, 79 Fed. 143; *Parker v. Marco*, 76 Fed. 510; *More v. Calkins*, 85 Cal. 177; 24 Pac. 729; *Strodder v. Granite Co.*, 99 Ga. 595; 27 S. E. 174; *Eldredge v. Palmer*, 185 Ill. 618; 76 Am. St. Rep. 59; 57 N. E. 770; *Ronan v. Bluhm*, 173 Ill. 277; 50 N. E. 694; *Boyer v. Berryman*, 123 Ind. 451; 24 N. E. 249; *Thrash v. Starbuck*, 145 Ind. 673; 44 N. E. 543; *Alexander v. Haskins*, 68 Ia. 73; 25 N. W. 935; *Harrison v. Otley*, 101 Ia. 652; 70 N. W. 724; *Behrens v. McKenzie*, 23 Ia. 333; 92 Am. Dec. 428; *Gribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; 7 Pac. 584; *Leavitt v. Files*, 38 Kan. 26; 15 Pac. 891; *Brown v. Cory*, 9 Kan. App. 702; 59 Pac. 1097; *Riley v. Carter*, 76

Md. 581; 35 Am. St. Rep. 443; 19 L. R. A. 489; 25 Atl. 667; *Flach v. Gottschalk Co.*, 88 Md. 368; 71 Am. St. Rep. 418; 42 L. R. A. 745; 41 Atl. 908; *Gibson v. Soper*, 6 Gray (Mass.) 279; 66 Am. Dec. 414; *Morris v. Ry. Co.*, 67 Minn. 74; 69 N. W. 628; *Schaps v. Lehner*, 54 Minn. 208; 55 N. W. 911; *McKenzie v. Donnell*, 151 Mo. 431; 52 S. W. 214; *Dewey v. Allgire*, 37 Neb. 6; 40 Am. St. Rep. 468; 55 N. W. 276; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Matthiessen, etc., Co. v. McMahon*, 38 N. J. L. 536; *Memphis, etc., Bank v. Sneed*, 97 Tenn. 120; 56 Am. St. Rep. 788; 34 L. R. A. 274; 36 S. W. 716; *Lincoln v. Buckmaster*, 32 Vt. 652.

² *Burnham v. Kidwell*, 113 Ill. 425; *Scanlon v. Cobb*, 85 Ill. 296; *Alexander v. Haskins*, 68 Ia. 73; 25 N. W. 935; *Gribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; 7 Pac. 584; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Matthiessen v. McMahon*, 38 N. J. L. 536; *Yau-*

rule "not so much upon the idea that (the transaction) possesses the legal essential of consent, but rather because, by means of an apparent contract he has secured an advantage or benefit which cannot be restored to the other party, and therefore it would be inequitable to permit him or those in privity with him to repudiate it."³ Thus a compromise with an insane person before adjudication of insanity can be avoided only on his placing the adversary *in statu quo*.⁴ It has even been held that a fair deed will not be set aside where the grantee cannot be placed in *statu quo* and had no knowledge of the insanity of the grantor except that he had once been sent to an insane asylum.⁵ But if the vendor has a mortgage upon the property conveyed by him to the vendee and also on other property, the vendee if insane may avoid without offer to return the property sold to him as a condition precedent.⁶

But where the *prima facie* rule of law is that the services rendered or property furnished are rendered gratuitously, as where a daughter renders services for her father,⁷ or a husband pays money for the support of his wife and step-daughter,⁸ and the party rendering the services claims that it was done under a contract, no return need be made in such cases for the consideration furnished if the party receiving the services is shown to have been insane. Where the consideration was furnished not to the insane person, but to another, as where money was loaned to a husband secured by a mortgage on his insane wife's property,⁹ or where an education was furnished to a nephew and

ger v. Skinner, 14 N. J. Eq. 382; Insurance Co. v. Hunt, 79 N. Y. 541; Riggan v. Green, 80 N. C. 236; 30 Am. Rep. 77; Lancaster Bank v. Moore, 78 Pa. St. 407; 21 Am. Rep. 24; Beals v. See, 10 Pa. St. 56; 49 Am. Dec. 573; Sims v. McLure, 8 Rich. Eq. (S. C.) 286; 70 Am. Dec. 196.

³ Flach v. Gottschalk Co., 88 Md. 368, 375; 71 Am. St. Rep. 418; 42 L. R. A. 745; 41 Atl. 908.

⁴ Morris v. Ry. Co., 67 Minn. 74; 69 N. W. 628.

⁵ Schaps v. Lehner, 54 Minn. 208; 55 N. W. 911.

⁶ Bates v. Hyman (Miss.), 28 So. 567. (The vendor's right in the property sold being fully secured by mortgage.)

⁷ Kostuba v. Miller, 137 Mo. 161; 38 S. W. 946.

⁸ Natcher v. Clark, 151 Ind. 368; 51 N. E. 468.

⁹ North Western, etc., Co. v. Blankenship, 94 Ind. 535; 48 Am. Rep. 185.

niece of an insane grantor,¹⁰ the insane person is not required to place the adversary party in *statu quo*.¹¹ But where one indorsed a note while sane, and renewed his liability after becoming insane, and the time for protesting the original note had passed, he was held bound to pay the note even though he was originally an accommodation indorser.¹² Where the parties are in personal communication, the fact that the adversary party is ignorant of the insanity implies that the insane person was not clearly and evidently insane. If the parties are not in personal communication the rather peculiar view has been expressed that the adversary party had no reason for thinking that the other was sane, and hence was not misled though he was insane.¹³ Conversely, if the adversary party knew of the insanity or had such knowledge and information as would arouse inquiry in the mind of an ordinarily prudent man which would result in his learning of such insanity, the contract may be avoided without replacing such adversary party in *statu quo*,¹⁴ and a similar rule obtains where the contract is harsh and oppressive.¹⁵ Thus specific performance was refused where the contract was oppressive, and the defendant was given to an excessive use of intoxicating liquors, was predisposed to insanity and was unable to understand the transaction intelligently;¹⁶

¹⁰ Physio-Medical College v. Wilkinson, 108 Ind. 314; 9 N. E. 167.

¹¹ Musselman v. Cravens, 47 Ind. 1; Van Patton v. Beals, 46 Ia. 62.

¹² Bank v. Sneed, 97 Tenn. 120; 56 Am. St. Rep. 788; 34 L. R. A. 274; 36 S. W. 716.

¹³ Chew v. Bank, 14 Md. 299, as explained in Flach v. Gottschalk Co., 88 Md. 368; 71 Am. St. Rep. 418; 42 L. R. A. 745; 41 Atl. 908.

¹⁴ Allore v. Jewell, 94 U. S. 506; Harding v. Wheaton, 2 Mason (U. S.) 278; Henry v. Fine, 23 Ark. 417; Thrash v. Starbuck, 145 Ind. 673; 44 N. E. 543; Hale v. Kobbert, 109 Ia. 128; 80 N. W. 308; Clark v. Lopez, 75 Miss. 932; 23 So. 648; rehearing denied, 23 So. 957; Mat-

thiessen, etc., Co. v. McMahon, 38 N. J. L. 536; Creekmore v. Baxter, 121 N. C. 31; 27 S. E. 994; Hosler v. Beard, 54 O. S. 398; 56 Am. St. Rep. 720; 35 L. R. A. 161; 43 N. E. 1040; Crawford v. Scovell, 94 Pa. St. 48; 39 Am. Rep. 766.

¹⁵ Hale v. Kobbert, 109 Ia. 128; 80 N. W. 308; Halley v. Troester, 72 Mo. 73; Wager v. Wagoner, 53 Neb. 511; 73 N. W. 937; Crawford v. Scovell, 94 Pa. St. 48; 39 Am. Rep. 766; Garrow v. Brown, Winst. Eq. (N. C.) 46; 86 Am. Dec. 450; Sims v. McLure, 8 Rich. Eq. (S. C.) 286; 70 Am. Dec. 196.

¹⁶ Mulligan v. Albertz, 103 Wis. 140; 78 N. W. 1093.

and if false representations were made, it is no defense that the party to whom they were made was in such mental condition that he could not understand them.¹⁷ So if A conveyed realty situated on a river bank to B in exchange for other realty, the exchange being greatly in A's favor, and A knowing of B's insanity, B's heirs can rescind although a change in the bed of the river has washed away the greater part of the land so conveyed to B.¹⁸ A contract is not, however, unfair merely because there is some advantage in it to the adversary party.¹⁹ What the insane person should return in the two classes of cases last given is not clear from the authorities, while it has been said that he need not make restitution,²⁰ this probably means that restitution is not a condition precedent.²¹ The best view seems to be that as in the case of infants, so much of the consideration as remains must be restored;²² though a fair rule not necessarily inconsistent is that one who makes advances on a mortgage given by one whom he knows to be insane can hold him only for benefits actually received by him.²³ In any case if the benefit received from the rents and profits equals the value of the consideration parted with, no further restitution is necessary.²⁴ Where the proceeds of the sale have been used to pay valid debts, and the purchaser has made valuable improvements on the realty, he has been held to be subrogated to the rights of the creditors and entitled to retain possession until paid.²⁵ So if money lent to an insane person and secured by a mortgage given by him is, under the contract of loan, used in

¹⁷ *Kramer v. Williamson*, 135 Ind. 655; 35 N. E. 388.

¹⁸ *Hale v. Kobbert*, 109 Ia. 128; 80 N. W. 308.

¹⁹ *Eldredge v. Palmer*, 185 Ill. 618; 76 Am. St. Rep. 59; 57 N. E. 770, where there was a profit of about \$500 in an exchange of valuable real estate.

²⁰ *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766.

²¹ *Thrash v. Starbuck*, 145 Ind. 673; 44 N. E. 543; *Wager v. Wagoner*, 53 Neb. 511; 73 N. W. 937.

²² *Helbreg v. Schumann*, 150 Ill. 12; 41 Am. St. Rep. 339; 37 N. E. 99; *Encking v. Simmons*, 28 Wis. 272.

²³ *Creckmore v. Baxter*, 121 N. C. 31; 27 S. E. 994.

²⁴ *Physio-Medical College v. Wilkinson*, 108 Ind. 314; 9 N. E. 167; *Alexander v. Haskins*, 68 Ia. 73; 25 N. W. 935.

²⁵ *Cathcart v. Sugenheimer*, 18 S. C. 123. (In this case the sale was made by the committee, not by the insane person.) But in German,

part to pay off a prior mortgage on the same property, the second mortgagee is subrogated to the rights of the first mortgagee.²⁶ In some states the right to rescind seems to be recognized even where the adversary party cannot be placed in *statu quo*.²⁷

§902. Contracts made after adjudication.

In many, if not all, jurisdictions, the statutes provide for a proceeding to determine directly the question of the sanity or insanity of the person against whom such proceeding is instituted, and for appointing a guardian for him in case it is decided that he is insane. While the test of insanity for the appointment of a guardian on adjudication is in some respects different from the test for contractual capacity, such an adjudication binds the world,¹ though the party instituting the proceedings is not bound more than others.² The effect of such an adjudication, where a guardian has been appointed and has taken control of the estate of his ward, is to render all contracts and conveyances of the ward during such guardianship void.³ So after such adjudication a check given by the lunatic is void and the

etc., *Society v. De Lashmutt*, 67 Fed. 399, a grantee was not allowed subrogation as to the amount of the purchase money spent on necessities for the insane person.

²⁶ *McCracken v. Levi*, 24 Ohio C. C. 584.

²⁷ *Orr v. Equitable, etc., Co.*, 107 Ga. 499; 33 S. E. 708; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705. To the same effect is *Seaver v. Phelps*, 11 Pick. (Mass.) 304; 22 Am. Dec. 372. Where a pledge of a note was rescinded without placing the adversary party in *statu quo*.

¹ *American, etc., Co. v. Boone*, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182.

² *Hughes v. Jones*, 116 N. Y. 67; 15 Am. St. Rep. 386; 5 L. R. A. 632; 22 N. E. 446; *Gangwere's Estate*, 14 Pa. St. 417; 53 Am. Dec. 554.

³ *American, etc., Co. v. Boone*, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182; *Burnham v. Kidwell*, 113 Ill. 425; *New England, etc., Co. v. Spitler*, 54 Kan. 560; 38 Pac. 799; *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658; 20 Am. Dec. 199; *Bradbury v. Place (Me.)*, 10 Atl. 461; *Lynch v. Dodge*, 130 Mass. 458; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; *White v. Palmer*, 4 Mass. 147; *Payne v. Burdette*, 84 Mo. App. 332; *Carter v. Beckwith*, 128 N. Y. 312; 28 N. E. 582; *Wadsworth v. Sherman*, 14 Barb. (N. Y.) 169; *Fitzhugh v. Wilcox*, 12 Barb. (N. Y.) 235; *McCreight v. Aiken*, Rice (S. C.) 56; *Elston v. Jasper*, 45 Tex. 409; *Hanley v. Loan Co.*, 44 W. Va. 450; 29 S. E. 1002.

bank on which it is drawn is not protected in paying it, even if in ignorance of such adjudication.⁴ The rule itself is an old Common Law rule. The reason for the rule is that the adjudication is intended to determine the question of status once and for all; that it is notice to the world; and that the guardian should not be driven to the perpetual litigation that would be necessary if the sanity of the ward could be retried whenever he made a contract or a conveyance. Accordingly where there has been an adjudication of insanity but no guardian has been appointed,⁵ or where the guardianship has been in fact abandoned,⁶ the contract or conveyance cannot be treated as void; and whether no guardian was appointed,⁷ or one was appointed but never took charge of the estate,⁸ if the insane person recovers, his subsequent contracts are valid. So where the guardian who was appointed to enable the insane person to draw his pension, refused to take charge of a valuable mill on which repairs were needed, it was held that the insane person might bind himself by a fair contract, at least to the extent of paying a reasonable compensation for the repairs needed, though they were not technical necessities.⁹ Where the guardian was removed by an appellate court as an unsuitable person, the cause remanded to the court of probate powers, and a petition for the appointment of another guardian dismissed, it was held that after this the former adjudication ceased to be conclusive, as it was not intended to fix "permanently the status of the party affected by it."¹⁰ So where an adjudication of insanity was set aside, a sale made thereafter by such alleged insane person was held not to be void, even though the adjudication of insanity was subsequently reinstated.¹¹ Normal status may in some

⁴ *American, etc., Co. v. Boone*, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182.

⁵ *McCormick v. Littler*, 85 Ill. 62; 28 Am. Rep. 610; *Water, etc., Co. v. Root*, 56 Kan. 187; 42 Pac. 715. *Contra*, *Kiehne v. Wessell*, 53 Mo. App. 667.

⁶ *Thorpe v. Hanscom*, 64 Minn. 201; 66 N. W. 1.

⁷ *Water, etc., Co. v. Root*, 53 Kan. 187; 42 Pac. 715.

⁸ *Lower v. Schumacher*, 61 Kan. 625; 60 Pac. 538.

⁹ *Kimball v. Bumgardner*, 16 Ohio C. C. 587; 9 Ohio C. D. 409.

¹⁰ *Willwerth v. Leonard*, 156 Mass. 277; 31 N. E. 299.

¹¹ In this case, however, the decree reinstating the adjudication

jurisdictions be restored by a discharge from an asylum as cured, without formal adjudication of restoration of sanity.¹² Thus a physician's discharge from an asylum restores capacity to sue;¹³ and a similar view of the effect of a discharge from an asylum as cured was taken in a divorce suit,¹⁴ and in a suit on an insurance policy involving the question of the sanity of the insured when he met his death.¹⁵ The adjudication has been held binding though made in another state, and one in which the person adjudged insane was not domiciled, but in which he had been appointed the administrator of an estate.¹⁶ There is some authority for holding in opposition to the majority view that adjudication and guardianship make only a *prima facie* case of incapacity to make subsequent contracts and conveyances.¹⁷ But in most of the cases cited in support of this proposition, the contract or conveyance was made before the adjudication but within the time during which insanity has been found to exist.¹⁸ In such case the effect of the adjudication is "no more than *prima facie* evidence as to the past condition of

was held to be erroneous, and further the trial court was held never to have acquired jurisdiction. *Mitchell v. Spaulding*, 206 Pa. St. 220; 55 Atl. 968.

¹² *Clay v. Hammond*, 199 Ill. 370; 93 Am. St. Rep. 146; 65 N. E. 352; *Topeka, etc., Co. v. Root*, 56 Kan. 187; 42 Pac. 715.

¹³ *Kellogg v. Cochran*, 87 Cal. 192; 12 L. R. A. 104; 25 Pac. 677.

¹⁴ *Rodgers v. Rodgers*, 56 Kan. 483; 43 Pac. 779.

¹⁵ *Mutual, etc., Co. v. Wisvell*, 56 Kan. 765; 35 L. R. A. 258; 44 Pac. 996.

¹⁶ *American, etc., Co. v. Boone*, 102 Ga. 202; 66 Am. St. Rep. 167; 40 L. R. A. 250; 29 S. E. 182. In this case A, after becoming insane, and being adjudged insane by the Florida courts, where he was acting as administrator, drew a check on a Georgia bank, which paid the

check without any notice of his condition or of the adjudication. The check was on a fund held by A as administrator, but deposited by him to his personal account with knowledge of the bank. Suit was brought by A's successor as administrator against the bank, for the amount of the original deposit. He recovered the amount of the check drawn by A while insane, on the theory that the check was void and the bank paid at its peril; but he also recovered checks drawn before insanity, on the theory that the deposit was a trust fund to the knowledge of the bank.

¹⁷ *Field v. Lucas*, 21 Ga. 447; 68 Am. Dec. 465; *Armstrong v. Short*, 1 Hawks. (N. C.) 11.

¹⁸ *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296 (where the sale was 16 years before the inquisition); *Kern v. Kern*, 51 N. J. Eq. 574; 26 Atl.

the person,"¹⁹ a proposition supported by ample authority.²⁰ A note given by a person as surety, pending an inquisition of lunacy is said to be *prima facie* made while insane.²¹ In the suit for an adjudication as to sanity, the court has no power to pass upon the validity of past transfers of property.²² Possibly contracts for necessities are an exception to the general rule concerning contracts after adjudication. If, however, the guardian of the insane person has contracted with one person for the support of the insane ward, and such support is furnished a third person who renders services as nurse, not under contract with the guardian, cannot recover therefor on the theory that such services were necessities.²³

837; Mott v. Mott, 49 N. J. Eq. 192; 22 Atl. 997; Reeves v. Morgan, 48 N. J. Eq. 415; 21 Atl. 1040; Hart v. Deamer, 6 Wend. (N. Y.) 497 (two months before); Rip-
py v. Gant, 4 Ired. Eq. (N. C.) 443 (thirteen months before); Noel v. Kerper, 53 Pa. St. 97; Gang-
were's Estate, 14 Pa. St. 417; 53 Am. Dec. 554 (about six months be-
fore).

¹⁹ Hopson v. Boyd, 6 B. Mon. (Ky.) 296, 297.

²⁰ Sergeson v. Sealy, 2 Atk. 412;

Titcomb v. Vantyle, 84 Ill. 317; Wall v. Hill, 1 B. Mon. (Ky.) 290; 36 Am. Dec. 578.

²¹ Moore v. Hershey, 90 Pa. St. 196.

²² Hughes v. Jones, 116 N. Y. 67; 15 Am. St. Rep. 386; 5 L. R. A. 632; 22 N. E. 446.

²³ Further the services were rendered by a nephew of the insane person, apparently without intent at the time to charge therefor. Schramek v. Shepeck, — Wis. —; 98 N. W. 213.

CHAPTER XL.

CONTRACTS OF DRUNKARDS.

§903. Nature of drunkenness in contract law.

Drunkenness in contract law is treated in almost the same way as insanity. Before adjudication as an habitual drunkard, a person cannot escape his liability on a contract on the mere ground that he was intoxicated when he executed it, unless he can show that at the very moment of execution he was so intoxicated that he was unable to understand the nature and consequences of the transaction.¹ Where this degree of intoxication exists, the contract is voidable, even if the intoxication is voluntary and not produced by the adversary party.² A less degree

¹Matthews v. Baxter, L. R. 8 Ex. 132; Taylor v. Purcell, 60 Ark. 606; 31 S. W. 567; Hale v. Stery, 7 Colo. App. 165; 42 Pac. 598; Watson v. Doyle, 130 Ill. 415; 22 N. E. 613; Schramm v. O'Connor, 98 Ill. 539; Bates v. Ball, 72 Ill. 108; Davidge v. Crandall, 23 Ill. App. 360; Harbison v. Lemon, 3 Blackf. (Ind.) 51; 23 Am. Dec. 376; Willecox v. Jackson, 51 Ia. 208; 1 N. W. 513; Byrne v. Long (Ky.), 15 S. W. 778; Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; 28 N. W. 156; Newell v. Fisher, 11 Sm. & M. (Miss.) 431; 49 Am. Dec. 66; Rogers v. Warren, 75 Mo. App. 271; French v. French, 8 Ohio 214; 31 Am. Dec. 441; Bush v. Breinig, 113 Pa. St. 310; 57 Am. Rep. 469; 6 Atl. 86; Birdsong v. Birdsong, 2 Head. (Tenn.) 289; Morris v. Nixon, 7

Humph. (Tenn.) 579; Belcher v. Belcher, 10 Yerg. (Tenn.) 121; Reynolds v. Dechaums, 24 Tex. 174; 76 Am. Dec. 101; Wells v. Houston, 23 Tex. Civ. App. 629; 57 S. W. 584; Barrett v. Buxton, 2 Aikens (Vt.) 167; 16 Am. Dec. 691; Wigglesworth v. Steers, 1 H. & M. (Va.) 70; 3 Am. Dec. 602; Loftus v. Maloney, 89 Va. 576; 16 S. E. 749. The degree of intoxication has been especially insisted on in Johns v. Fritchey, 39 Md. 258, where the proof was required to be clear and convincing; and in Caulkins v. Fry, 35 Conn. 170, where it was held that one who could remember on the next day that he had made a contract was not drunk enough to escape liability.

²Bush v. Breinig, 113 Pa. St. 310; 57 Am. Rep. 469; 6 Atl. 86; Barrett v. Buxton, 2 Aikens (Vt.)

of intoxication,³ even though causing exhilaration and excitement,⁴ or preventing him from acting as carefully as if he were sober,⁵ does not affect his contractual capacity. So where one is often intoxicated, but makes a contract while sober he is bound as absolutely as though he were never drunk.⁶

§904. Legal effect of intoxication.

At early Common Law it was held, or at least asserted, that a contract entered into by one who was then intoxicated was absolutely binding.¹ A reaction from this early strictness resulted in holding such contracts void.² At Modern Law, however, the weight of authority is clearly to hold such contracts voidable.³ The note of one voluntarily intoxicated is not ab-

167; 16 Am. Dec. 691; Wigglesworth v. Steers, 1 H. & M. (Va.) 70; 3 Am. Dec. 602.

³ Davidge v. Crandall, 23 Ill. App. 360; Armstrong v. Breen, 101 Ia. 9; 69 N. W. 1125; Belcher v. Belcher, 10 Yerg. (Tenn.) 121.

⁴ Byrne v. Long (Ky.), 15 S. W. 778; Johnson v. Phifer, 6 Neb. 401.

⁵ Wright v. Waller, 127 Ala. 557; 54 L. R. A. 440; 29 So. 57; Taylor v. Purcell, 60 Ark. 606; 31 S. W. 567. "One may sufficiently understand a contract and the nature and effect of his entering into it to be fully bound by it although he be capable of a very much less consideration of it than would be bestowed by a man of ordinary prudence." Wright v. Waller, 127 Ala. 557, 562; 54 L. R. A. 440; 29 So. 57.

⁶ Ralston v. Turpin, 129 U. S. 663; Watson v. Doyle, 130 Ill. 415; 22 N. E. 613; Coombe v. Carthew, 59 N. J. Eq. 638; 43 Atl. 1057.

¹ Yates v. Boen, 2 Stra. 1104. "As for a drunkard, who is *voluntarius Dæmon*, he hath (as hath been said) no privilege thereby; but

what hurt or ill soever he doeth, his drunkenness doth aggravate it." Co. Litt. 247a; a remark which should be limited to certain branches of the law of torts and crimes.

² Wade v. Colvert, 2 Mill. (S. C.) 27; 12 Am. Dec. 652, where a bill of sale was avoided by the assignee for creditors.

³ Pickett v. Sutter, 5 Cal. 412; Bates v. Ball, 72 Ill. 109; Joest v. Williams, 42 Ind. 565; 13 Am. Rep. 377; Hawley v. Howell, 60 Ia. 79; Franks v. Jones, 39 Kan. 236; 17 Pac. 663; Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; 28 N. W. 156; Wright v. Fisher, 65 Mich. 275; 8 Am. St. Rep. 886; 32 N. W. 605; Van Wyck v. Brasher, 81 N. Y. 260; French v. French, 8 Ohio 214; Baird v. Howard, 51 O. S. 57; 22 L. R. A. 846; 36 N. E. 732; Bush v. Breinig, 113 Pa. St. 310; 57 Am. Rep. 469; 6 Atl. 86; Birdsong v. Birdsong, 2 Head. (Tenn.) 289; Barrett v. Buxton, 2 Aikens (Vt.) 167; 16 Am. Dec. 691; Wigglesworth v. Steers, 1 H. & M. (Va.) 70; 3 Am. Dec. 602. But in Hunter v. Tolbard, 47 W.

solutely void.⁴ It is therefore error to charge so as to eliminate the question whether there had been a rescission or ratification by charging that the former was unnecessary and the latter impossible.⁵ In some jurisdictions it seems to be held that intoxication is of no legal effect unless the adversary party either procured it, or took an unfair advantage of it.⁶ Whether it is necessary, in order to make the contract voidable, that the adversary party should know of the intoxication is in some dispute on the authorities. It has been said not to be necessary,⁷ but in a recent case it was assumed apparently that drunkenness unknown to the adversary party would be ineffectual. In that case a written guaranty was obtained from an illiterate man who was drunk, and sent to one who did not know how it was obtained, and who extended credit thereon. The Court of Appeals decided the case solely on the question of the negligence of the maker.⁸ Drunkenness is ordinarily apparent to those in personal communication with the drunken man, long before it reaches that stage where it affects contractual capacity. Probably for this reason the effect of the knowledge of the adversary has rarely been decided. Analagous to this is the question of the right of the drunken person to avoid where the contract has passed into the hands of a *bona fide* purchaser for value. If the instrument is negotiable it has been held that in such case the right to avoid the contract is lost.⁹ In principle it is distinguished from the case of the infant or the insane person by the fact that the disqualification of drunkenness is one voluntarily assumed.¹⁰ In Michigan a somewhat different view seems

Va. 258; 34 S. E. 737, a contract of a person is *held* void if executed when he is so drunk as not to know its true intent or meaning.

⁴ Wright v. Waller, 127 Ala. 557; 54 L. R. A. 440; 29 So. 57.

⁵ Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; 28 N. W. 156.

⁶ Rottenburgh v. Fowl (N. J. Eq.), 26 Atl. 338; Burroughs v. Richman, 13 N. J. L. 233; 23 Am. Dec. 717.

⁷ Hawkins v. Bone, 4 F. & F. 311.

⁸ Page v. Krekey, 137 N. Y. 307; 33 Am. St. Rep. 731; 21 L. R. A. 409; 33 N. E. 311.

⁹ State Bank v. McCoy, 69 Pa. St. 204; 8 Am. Rep. 246; McSparan v. Neeley, 91 Pa. St. 17; Smith v. Williamson, 8 Utah 219; 30 Pac. 753.

¹⁰ "If a man voluntarily deprives himself of the use of his reason by strong drink, why should

to have been taken, holding that drunkenness must either extend to such total incapacity that no assent at all could be given or else be complicated with fraud in order to amount to a defense against a *bona fide* holder. But these remarks are in the nature of an obiter as the record did not disclose any such evidence and a judgment in favor of the makers of the note was reversed for want of evidence to support it.¹¹

§905. Intoxication as affected by unfair conduct of adversary.

A less degree of intoxication than that described may serve as a basis for avoiding contracts if the drunkenness was caused by the adversary party,¹ or if without causing the intoxication he took an unfair advantage of it.² In such cases, it is sufficient ground for avoiding the contract if the intoxication was the means by which the drunken person was deceived or misled to his prejudice. These cases do not involve questions of capacity but of fraud and undue influence.³

§906. Contracts for necessities.

A drunkard even after adjudication is liable for the reasonable value of necessities furnished to himself or his family.¹

he not be responsible to an innocent party for the acts which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it." *State Bank v. McCoy*, 69 Pa. St. 204, 208; 8 Am. Rep. 246.

¹¹ *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306.

¹ *Newell v. Fisher*, 11 Sm. & M. (Miss.) 431; 49 Am. Dec. 66; *Warneck v. Campbell*, 25 N. J. Eq. 485; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Burroughs v. Richman*, 13 N. J. L. 233; 23 Am. Dec. 717; *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.)

67; *Woodson v. Gordon*, Peek (Tenn.) 196; 14 Am. Dec. 743; *Dunn v. Amos*, 14 Wis. 106.

² *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595; *Crane v. Conklin*, 1 N. J. Eq. 346; 22 Am. Dec. 519; *Baird v. Howard*, 51 O. S. 57; 46 Am. St. Rep. 550; 22 L. R. A. 846; 36 N. E. 732; *Jones v. McGruder*, 87 Va. 360; 12 S. E. 792. And see cases cited in last note.

³ See Chs. XL, XII.

¹ *Kandall v. May*, 10 All. (Mass.) 59; *Hallett v. Oakes*, 1 Cush. (Mass.) 296; *McCrillis v. Bartlett*, 8 N. H. 569; *Van Horn v. Hann*, 39 N. J. L. 207; *Parker v. Davis*, 8 Jones (N. C.) 460.

The term necessities includes not only food and clothing,² but also nursing³ and the services of an attorney in resisting the adjudication.⁴ Where an oral contract is made for the purchase of realty, which can not be proved under the statute of frauds, it is held that a subsequent written agreement entered into when one of the parties is drunk may be avoided by him when he becomes sober, and he may recover whatever he has paid thereon while drunk.⁵

§907. Ratification and disaffirmance.

Since the contract is voidable it may be ratified by the drunken person on becoming sober.¹ Ratification may be affected either by express agreement or by conduct which necessarily shows an intention consistent only with the validity of the contract. Thus exchanging the property received under the contract,² or selling it,³ operates as a ratification. But where A, who owned property worth one thousand six hundred dollars, was induced by B, who knew of his intoxication, to transfer it while in such condition for one thousand dollars it was held that A's condition in keeping the one thousand dollars, treating B's conduct as a wrongful conversion and suing for the difference of six hundred dollars was not a ratification but a disaffirmance.⁴ The drunken person may disaffirm the contract if he acts within a reasonable time after he becomes sober.⁵ What constitutes disaffirmance is not always clear from the authorities. It seems to be held that some act of disaffirmance,⁶ such as a return of the consideration,⁷ is

² Parker v. Davis, 8 Jones (N. C.) 460.

³ Brockway v. Jewell, 52 O. S. 187; 39 N. E. 470.

⁴ Hallett v. Oakes, 1 Cush. (Mass.) 296.

⁵ Bush v. Breinig, 113 Pa. St. 310; 57 Am. Rep. 469; 6 Atl. 86.

¹ Strickland v. Orendorf Co., 118 Ga. 213; 44 S. E. 997; Taylor v. Patrick, 1 Bibb. (Ky.) 168; Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; 28 N. W. 156.

² Smith v. Williamson, 8 Utah 219; 30 Pac. 753.

³ Oakley v. Shelley, 129 Ala. 467; 29 So. 385.

⁴ Baird v. Howard, 51 O. S. 57; 46 Am. St. Rep. 550; 22 L. R. A. 846; 36 N. E. 732.

⁵ Cummings v. Henry, 10 Ind. 109.

⁶ Carpenter v. Rodgers, 61 Mich. 384; 1 Am. St. Rep. 595; 28 N. W. 156.

⁷ Williams v. Inabuct, 1 Bailey L. (S. C.) 343.

necessary before bringing suit based on such disaffirmance. While this is a proper rule where the return of the consideration is a condition precedent to rescission, yet if the circumstances dispense with such return, no formal rescission before bringing suit would be necessary.⁸

§908. Restoration of consideration.

In the absence of fraud, the drunken person must restore as a condition precedent to disaffirmance whatever he has received under the contract.¹ This rule, however, must undoubtedly be qualified by providing that the drunken person need not account for whatever he may have lost or wasted during the same period of intoxication in which he made the contract. If fraud co-exists with intoxication, the return of the consideration is not a condition precedent, at least in equity, but provision will be made in the decree for a fair compensation.² In any event, on disaffirmance the consideration may be recovered in assumpsit from the drunken person.³

§909. Effect of adjudication as habitual drunkard.

Many jurisdictions provide for a proceeding resembling an inquisition in lunacy, by which one who is given over to constant indulgence in alcoholic stimulants whereby intoxication is produced, may be adjudged an habitual drunkard and placed under guardianship.¹ The effect of such adjudication upon contractual capacity depends upon the provisions of the statutes controlling. In general all contracts, conveyances and the like made after such adjudication are void.² Under the Alabama statute this adjudication is solely for the preservation of the

⁸ Baird v. Howard, 51 O. S. 57; 46 Am. St. Rep. 550; 22 L. R. A. 846; 36 N. E. 732.

¹ Joest v. Williams, 42 Ind. 565; 13 Am. Rep. 377.

² Thackrah v. Haas, 119 U. S. 499.

³ Haneklau v. Felchlin, 57 Mo. App. 602.

¹ Menkins v. Lightner, 18 Ill. 282; Brockway v. Jewell, 52 O. S. 187; 39 N. E. 470.

² Pinkston v. Semple, 92 Ala. 564; 9 So. 329; Redden v. Baker, 86 Ind. 191; Devin v. Scott, 34 Ind. 67; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658; 20 Am. Dec. 199; Leonard v. Leonard, 14 Pick. (Mass.)

estate described in the bill filed for the adjudication. Over property not therein described, the drunkard has full power;³ over property described, he has no power even with the consent of his trustee.⁴ But in a case where A was found on inquisition to be an habitual drunkard and subsequently carried on his business in the ordinary manner, and B paid a debt to A, taking A's receipt therefor, such receipt was held to discharge B's debt.⁵ Upon the discharge of the guardian and termination of the guardianship, contractual capacity is restored so that a conveyance the next day is valid; and is not invalidated by a subsequent re-adjudication.⁶

§910. Effect of drugs.

The same principles apply to the mental effects of morphine,¹ or of anæsthetics,² as to the use of alcohol though such effect is not technically drunkenness. Thus a release given by one who was so under the influence of opiates that he did not know what he was doing is voidable.³ He may thereafter avoid⁴ or ratify⁵ such release. Thus one who agreed to release a railroad from liability for accidents for two hundred forty dollars and his hospital bills has affirmed such contract even if he was under the influence of opiates when he entered into it, by keeping the money after recovering his senses, and remaining at the

283; *Wait v. Maxwell*, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; 59 Am. Dec. 499; *Clark v. Caldwell*, 6 Watts (Pa.) 139.

³ *Jones v. Semple*, 91 Ala. 182; 8 So. 557.

⁴ *Pinkston v. Semple*, 92 Ala. 564; 9 So. 329.

⁵ *Black's Appeal*, 132 Pa. St. 134; 19 Atl. 31.

⁶ *Cockrill v. Cockrill*, 92 Fed. 811; 79 Fed. 143.

¹ *Swank v. Swank*, 37 Or. 439; 61 Pac. 846.

² *Gibson v. R. R. Co.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; 30 Atl. 308.

³ *Union Pacific Ry. v. Harris*, 158 U. S. 326 (effect of morphine and whiskey given for medicinal purposes); *Chicago, etc., R. R. v. Doyle*, 18 Kan. 58; *Buford v. R. R.*, 82 Ky. 286; *Alabama, etc., Ry. v. Jones*, 73 Miss. 110; 55 Am. St. Rep. 488; 19 So. 105; *Gibson v. R. R.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; 30 Atl. 308 (effect of chloroform and ether).

⁴ *Alabama, etc., Ry. v. Jones*, 73 Miss. 110; 55 Am. St. Rep. 488; 19 So. 105.

⁵ *Gibson v. R. R.*, 164 Pa. St. 142; 44 Am. St. Rep. 586; 30 Atl. 308.

hospital for several weeks at the company's expense.⁶ It has been held in some courts that ratification by one who does not know that he has the right in law to avoid is not binding.⁷ But one who understands the nature of the transaction cannot avoid a contract though "not in possession of full mental powers."⁸ If the adversary party does not know of the condition of the party seeking relief, no rescission can be had unless such adversary party can be placed in *statu quo*.⁹

⁶ Gibson v. R. R., 164 Pa. St. 142;
44 Am. St. Rep. 586; 30 Atl. 308.

⁷ Alabama, etc., Ry. v. Jones, 73
Miss. 110; 55 Am. St. Rep. 488; 19
So. 105.

⁸ Cooney v. Lincoln, 21 R. I. 246;
79 Am. St. Rep. 799; 42 Atl. 867.

⁹ Cooney v. Lincoln, 21 R. I. 246;
79 Am. St. Rep. 799; 42 Atl. 867.

CHAPTER XLI.

CONTRACTS OF MARRIED WOMEN.

§911. *Contracts of married women at common law.*

At Common Law, subject to certain exceptions, it was well settled that an executory contract entered into by a married woman was void, and even now no contract is enforceable against her at law unless under the provisions of some statute.¹ Thus a

¹Johnson v. Gallagher, 3 De G. F. & J. 515; Smith v. Plorner, 15 East. 607; Threefoot v. Hillman, 130 Ala. 244; 89 Am. St. Rep. 39; 30 So. 513; Dobbin v. Hubbard, 17 Ark. 189; 65 Am. Dec. 425; Butler v. Buckingham, 5 Day (Conn.) 492; 5 Am. Dec. 174; Ross v. Singleton, 1 Del. Ch. 149; 12 Am. Dec. 86; Snell v. Snell, 123 Ill. 403; 5 Am. St. Rep. 526; 14 N. E. 684; Stevens v. Parish, 29 Ind. 260; 95 Am. Dec. 636; Graham v. Graham (Ky.), 56 S. W. 708; Brown v. Dalton, 105 Ky. 669; 88 Am. St. Rep. 325; 49 S. W. 443; Robinson v. Robinson, 11 Bush. (Ky.) 174; Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236; 19 Am. Dec. 71; Burton v. Marshall, 4 Gill (Md.) 487; 45 Am. Dec. 171; Shaw v. Thompson, 16 Pick. (Mass.) 198; 26 Am. Dec. 655; Palmer v. Oakley, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; Porterfield v. Butler, 47 Miss. 165; 12 Am. Rep. 329; Stephenson v. Osborne, 41 Miss. 119; 90 Am. Dec. 358; Macfarland v. Heim, 127 Mo. 327; 48 Am. St. Rep. 629; 29 S. W. 1030; Musick v. Dodson, 76 Mo. 624; 43 Am. Rep. 780; Citizens' State Bank v. Smout, 62 Neb. 223; 86 N. W. 1068; Wadleigh v. Glines, 6 N. H. 17; 23 Am. Dec. 705; Brick v. Campbell, 122 N. Y. 337; 10 L. R. A. 259; 25 N. E. 493; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167; 8 Am. Dec. 378; Martin v. Dwelly, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245; Terry v. Robbins, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470; Dorrance v. Scott, 3 Whart. (Pa.) 309; 31 Am. Dec. 509; Mackinley v. McGregor, 3 Whart. (Pa.) 369; 31 Am. Dec. 522; First National Bank v. Shaw, 109 Tenn. 237; 59 L. R. A. 498; 70 S. W. 807; Harris v. Taylor, 3 Sneed (Tenn.) 536; 67 Am. Dec. 576; Hollis v. Francois, 5 Tex. 195; 51 Am. Dec. 760; Sherwin v. Sanders, 59 Vt. 499; 59 Am. Rep. 750; 9 Atl. 239; Stewart v. Conrad, 100 Va. 128; 40 S. E. 624; Pickens v. Kniseley, 36 W. Va. 794; 15 S. E. 997; Weisbrod v. Ry., 18 Wis. 35; 86 Am. Dec. 743. See Haggett v. Hurley, 91 Me. 542; 41 L. R. A. 362; 40 Atl. 561, for a discussion of the Teutonic theory of the family.

contract by a married woman to surrender her child is void,² and cannot be ratified.³ So her assignments,⁴ covenants of warranty,⁵ agreements to assume debts,⁶ and notes⁷ are void. So a bond given by her is not payment of a pre-existing debt of her husband's.⁸ To such an extreme is this view carried that a note purporting on its face to be executed by a married woman cannot be the subject of forgery.⁹ A married woman's lack of capacity is not affected by the fact that the adversary party did not know that she was married.¹⁰

§912. Exceptions to Common Law rule.

By certain local customs, as in the city of London, a married woman might contract as a sole trader if her business was in fact free from her husband's control.¹ These customs were not generally adopted in this country except possibly to a modified extent in South Carolina.² The remaining classes of cases were said to arise out of necessity, though it will be seen that there is not absolute uniformity as to when it is necessary to allow a married woman to make contracts as if single. If the husband was an alien and had never been in the jurisdiction of the wife's residence,³ or if whether an alien or not he had left such jurisdiction under such circumstances as would preclude

² *Stapleton v. Poynter* (Ky.), 53 L. R. A. 784; 62 S. W. 730.

³ *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890.

⁴ As of notes owned by her. *Brewer v. Hobbs* (Ky.), 30 S. W. 605.

⁵ *Threefoot v. Hillman*, 130 Ala. 244; 89 Am. St. Rep. 39; 30 So. 513.

⁶ *Brown v. Dalton*, 105 Ky. 669; 88 Am. St. Rep. 325; 49 S. W. 443.

⁷ *Boughner v. Laughlin* (Ky.), 64 S. W. 856.

⁸ *Terry v. Robbins*, 128 N. C. 140; 83 Am. St. Rep. 663; 38 S. E. 470.

⁹ *King v. State*, 42 Tex. Cr. App.

108; 96 Am. St. Rep. 792; 57 S. W. 840.

¹⁰ *Collins v. Hall*, 55 S. C. 336; 33 S. E. 466; *Stewart v. Conrad*, 100 Va. 128; 40 S. E. 624.

¹ *Lavie v. Phillips*, 3 Burr. 1776; *Newbiggin v. Pillans*, 2 Bay (S. C.) 162.

² *Jacobs v. Featherstone*, 6 W. & S. (Pa.) 346.

³ *Derry v. Mazarine*, 1 Ld. Raym. 147; *Walford v. Pienne*, 2 Esp. 554; *Gaillon v. L'Aigle*, 1 Bos. & P. 357; *Gregory v. Paul*, 15 Mass. 31; *Gregory v. Pierce*, 4 Met. (Mass.) 478; *Troughton v. Hill*, 3 N. C. 406; *Levi v. Marsha*, 122 N. C. 565; 29 S. E. 832; *Wagg v. Gibbons*, 5 O. S. 580; *Bean v. Morgan*,

his return, as where he abjured the realm,⁴ or was banished,⁵ she might contract as a *feme sole*. A similar holding has been made where the husband has left the state as a fugitive from justice.⁶ If the husband abandons his wife, leaves the state in which they were residing and takes up his residence elsewhere permanently, the English authorities hold that the married woman has not the power to make contracts,⁷ even if he is an alien.⁸ American authorities hold that such facts confer capacity to contract.⁹ Indeed if the abandonment is absolute and the husband leaves the state without the intention of returning, it seems immaterial whether he is permanently domiciled in any specific foreign jurisdiction.¹⁰ If the husband abandons the wife and is absent and unheard of for so long a time that the presumption of death arises (a length of time often held to be seven years,) the wife has power to contract.¹¹ But where the husband has abandoned the wife, but has neither left the state permanently nor has been absent and unheard of, the weight of authority seems to be that such facts do not remove the disability of the married woman, even though the contract is for

⁴ McCord (S. C.) 148; Robinson v. Reynolds, 1 Aiken (Vt.) 174; 15 Am. Dec. 673.

⁴ Carrol v. Blencow, 4 Esp. 27. "An Abjuration, that is, a Deportation forever into a foreign Land like to a Profession . . . is a Civil Death; and that is the reason that the wife may bring an Action or be impleaded during the natural life of her Husband." Co. Litt. 133a.

⁵ Co. Litt. 132b, 133a; *Ex parte* Franks, 7 Bing. 762.

⁶ Cheek v. Bellows, 17 Tex. 613; 67 Am. Dec. 686. But in Texas, permanent separation gives the wife the powers of a *feme sole*.

⁷ Marsh v. Hutchinson, 2 Bos. & P. 226; Williamson v. Dawes, 9 Bing. 292.

⁸ Kay v. De Pienne, 3 Campb. 123.

⁹ Rhea v. Renner, 1 Pet. (U. S.) 105; Krebs v. O'Grady, 23 Ala. 726; 58 Am. Dec. 312; Mead v. Hughes, 15 Ala. 141; 50 Am. Dec. 123; Roland v. Logan, 18 Ala. 307; Arthur v. Broadnax, 3 Ala. 557; 37 Am. Dec. 707; Cornwall v. Hoyt, 7 Conn. 420; Love v. Moynehan, 16 Ill. 277; 63 Am. Dec. 306; Gregory v. Pierce, 4 Met. (Mass.) 478; Abbott v. Bayley, 6 Pick. (Mass.) 89; Gallagher v. Delargy, 57 Mo. 29; Rose v. Bates, 12 Mo. 30; Starrett v. Wynn, 17 Serg. & R. 130; 17 Am. Dec. 654; Buford v. Adair, 43 W. Va. 211; 64 Am. St. Rep. 854; 27 S. E. 260.

¹⁰ See cases cited in last note.

¹¹ Rosenthal v. Mayhugh, 33 O. S. 155.

necessaries.¹² Still less of course does capacity to contract arise where the husband is often away for long periods of time, but does not abandon his wife.¹³

§913. Contracts of married women in equity.

By a species of judicial legislation, the Courts of Equity had by the end of the seventeenth century,¹ established the doctrine that with reference to property held to the separate use of a married woman, free from her husband's control, she had in many ways the power of a *feme sole*.² Legislation in the nineteenth century created separate estates of married women in property which before such statutes was her general estate, subject to the Common Law rights of her husband. Where such statutory estates were created without adding statutory provisions conferring upon the owner the power to contract at law, the rules of equity determined the married woman's power to contract with reference thereto. It is not the province of this work to discuss what property was included in equitable or statutory separate estates, or the rights of a married woman or her husband in such estates except in so far as the contracts of a married woman with reference thereto are concerned. In equity a married woman could not bind herself personally any more than she could at law.³ But her promises upon valuable consideration were enforced rather as obligations resembling contracts than as contracts, by compelling performance out of the separate estate owned by her at the time of making the

¹² Marshall v. Rutton, 8 T. R. 545; Musick v. Dodson, 76 Mo. 624; 43 Am. Rep. 780; Hayward v. Barker, 52 Vt. 429; 36 Am. Rep. 762. *Contra*, Rariden v. Mason, 30 Ind. App. 425; 65 N. E. 554.

¹³ Rogers v. Phillips, 8 Ark. 366; 47 Am. Dec. 727.

¹ Drake v. Storr, 2 Freem. 205.

² Kloke v. Martin, 55 Neb. 554; 76 N. W. 168; Elliott v. Lawhead, 43 O. S. 171; 1 N. E. 577; Elliott v. Gower, 12 R. I. 79; 34 Am. Rep. 600.

³ Johnson v. Gallagher, 3 De G. F. & J. 494; Aylett v. Ashton, 1 Myl. & C. 105; Ankeney v. Hannon, 147 U. S. 118; Canal Bank v. Pardee, 99 U. S. 325; Prentiss v. Paisley, 25 Fla. 927; 7 L. R. A. 640; 7 So. 56; Rodemeyer v. Rodman, 5 Ia. 426; Bell v. Kellar, 13 B. Mon. (Ky.) 381; Kocher v. Cornell, 59 Neb. 315; 80 N. W. 911; Pierson v. Lum, 25 N. J. Eq. 390; Fallis v. Keys, 35 O. S. 265; Pilcher v. Smith, 2 Head. (Tenn.) 208.

promise.⁴ Property acquired by her afterward could not be held for her contracts to use the customary and convenient but rather inaccurate term,⁵ nor her property which was her general estate when the contract was made, but which was afterwards by statute made her separate estate.⁶ The claim against the separate estate of the married woman is therefor somewhat in the nature of a lien. It is not a specific lien however. Property sold or disposed of by the married woman before judgment is not subject to her debts contracted while she owned it.⁷ So adding to a note "for the payment of which I bind my separate estate," is not a mortgage in equity, giving the holder of such notes priority over the holders of notes enforceable only at law by statute.⁸ Where there is a restraint on anticipation, the income cannot be made liable to a judgment rendered before it came due.⁹ While the liability of a married woman's estate in equity for her contracts is *sui generis*, it is an instructive analogy to regard her separate estate as a legal entity, liable itself for her contracts. "It is not the woman, as a woman, who becomes a debtor but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement."¹⁰

§914. Extent of power over separate estate.

The questions that generally arose in determining the liability of a married woman's separate estate, may be grouped under two

⁴ *Deering v. Boyle*, 8 Kan. 525; 12 Am. Rep. 480.

⁵ *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454; *Sykes's Trusts*, 2 Johns. & H. 415; *Ankeney v. Hannon*, 147 U. S. 118; *Mendenhall v. Leivy*, 45 Mo. App. 20; *Koehler v. Cornell*, 59 Neb. 315; 80 N. W. 911; *Sticken v. Schmidt*, 64 O. S. 354; 60 N. E. 561; *Manahan v. Hart*, 24 Ohio C. C. 527; *Flanagan v. Grocery Co.*, 98 Tenn. 599; 40 S. W. 1079; *Filler v. Tyler*, 91 Va. 458; 22 S. E. 235.

⁶ *Fallis v. Keys*, 35 O. S. 265.

⁷ *D. M. Osborne & Co. v. Graham*,

46 Mo. App. 28; *Flanagan v. Grocery Co.*, 98 Tenn. 599; 40 S. W. 1079.

⁸ *Western, etc., Bank v. Bank*, 91 Md. 613; 46 Atl. 960.

⁹ *Hood Barrs v. Cathcart (C. A.)* (1894), 2 Q. B. 559.

¹⁰ *Ex parte Jones*, L. R. 12 Ch. Div. 484, 490. To the same effect are *Shattock v. Shattock*, L. R. 2 Eq. 182; *London, etc., Bank v. Lempriere*, L. R. 4 P. C. 572; *Warren v. Freeman*, 85 Tenn. 513; 3 S. W. 513.

general classes: first, to what extent a married woman had the power to bind her separate estate by contract; and second, what contracts within the scope of her power had the effect of binding her separate estate. The weight of authority on the first question is that a married woman is empowered to bind her separate estate by contract except in so far as she is restrained by the instrument creating the estate, or by the statute which made the estate a separate statutory estate.¹ In other jurisdictions, however, a married woman has only such power to charge her separate estate as is specifically conferred on her by the instrument creating it.²

§915. Presumptive intent to charge separate estate.

Upon the question of what contracts within the scope of a married woman's power do in fact bind her separate estate there is even less harmony of judicial decision. Undoubtedly the general rule is that the intention of the parties, to be ascertained according to the rules of equity determines whether the contract binds the separate estate. The divergence of decisions arises in applying this rule to specific states of fact.

¹ Taylor v. Meads, 4 De G. J. & S. 597; Pride v. Bubbs, L. R. 7 Ch. 64; Cooper v. McDonald, L. R. 7 Ch. Div. 288; Steed v. Knowles, 79 Ala. 446; Bradford v. Greenway, 17 Ala. 797; 52 Am. Dec. 203; Dobbin v. Hubbard, 17 Ark. 189; 65 Am. Dec. 425; Smith v. Thompson, 2 McArt. (D. C.) 291; 29 Am. Rep. 621; Zeust v. Staffan, 14 App. D. C. 200; Miner v. Pearson, 16 Kan. 27; Cardwell v. Perry, 82 Ky. 129; Burch v. Breckenridge, 16 B. Mon. (Ky.) 482; 63 Am. Dec. 553; Cooke v. Husbands, 11 Md. 492; Musson v. Trigg, 51 Miss. 172; Ryland v. Banks, 151 Mo. 1; 51 S. W. 720; Kim v. Weippert, 46 Mo. 532; 2 Am. Rep. 541; Batchelder v. Sargent, 47 N. H. 262; Jacques v. N. E. Church, 17 Johns. (N. Y.) 549;

8 Am. Dec. 447; Methodist, etc., Church v. Jacques, 3 Johns. Ch. (N. Y.) 77; Edwards v. Edwards, 24 O. S. 402; Phillips v. Graves, 20 O. S. 371; Machir v. Burroughs, 14 O. S. 519; Warren v. Freeman, 85 Tenn. 513; 3 S. W. 513; Young v. Young, 7 Cald. (Tenn.) 461; Hollis v. Francois, 5 Tex. 195; 51 Am. Dec. 760; Finch v. Marks, 76 Va. 207; Justis v. English, 30 Gratt. (Va.) 565; Dages v. Lee, 20 W. Va. 584; Hughes v. Hamilton, 19 W. Va. 366.

² Thomas v. Tolwell, 2 Whart. (Pa.) 11; 30 Am. Dec. 230; Cochran v. O'Hern, 4 Watts & S. (Pa.) 95; 39 Am. Dec. 60; Cater v. Eveleigh, 4 DeSaus Eq. (S. C.) 19; 6 Am. Dec. 596; Creighton v. Clifford, 6 S. C. 188.

If the intent to bind the separate estate is expressed, no question of presumptive intent can arise. If the debt is specifically charged upon the separate estate, as by note and mortgage,¹ or if it is made expressly on the credit of the separate estate,² it is of course a charge thereon. Indorsing on the contract "I hereby bind my separate estate," is sufficiently specific.³

On the other hand the contract may show affirmatively that the married woman did not intend to bind her separate estate, as by her giving a purchase money note specifying on what property it is a lien.⁴ In such cases there is of course, no charge on her separate realty.

It may not appear affirmatively from the contract itself whether it was or was not intended that the contract should be a charge on the married woman's separate estate. In such cases the first question to determine is whether the contract is on the one hand intended for the benefit of the married woman or her separate estate; or on the other, is not. If the contract is for the benefit of the married woman or her separate estate,⁵ the courts are practically unanimous in holding that such estate is bound. Even under a statute providing that a contract shall charge a separate estate if such intention appear therein, it

¹ *Hester v. Barker*, 42 S. C. 128; 20 S. E. 52.

² *Baker v. Gregory*, 28 Ala. 544; 65 Am. Dec. 366; *Rogers v. Wood*, 8 All. (Mass.) 387; 85 Am. Dec. 710; *Jones v. Craigmiles*, 114 N. C. 613; 19 S. E. 638; *Singluff v. Tindal*, 40 S. C. 504; 19 S. E. 137; *Martin v. Suber*, 39 S. C. 525; 18 S. E. 125; *National, etc., Bank v. Lumber Co.*, 100 Tenn. 479; 47 S. W. 85; *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695.

³ *National, etc., Bank v. Lumber Co.*, 100 Tenn. 479; 47 S. W. 85.

⁴ *Harvey v. Curry*, 47 W. Va. 800; 35 S. E. 838.

⁵ *Halle v. Einstein*, 34 Fla. 589; 16 So. 554; *Smith v. Poythress*, 2 Fla. 92; 48 Am. Dec. 176; *Johnson*

v. Cummins, 16 N. J. Eq. 97; 84 Am. Dec. 142; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Noel v. Kinney*, 106 N. Y. 74; 60 Am. Rep. 423; 12 N. E. 351; *Dyett v. Coal Co.*, 20 Wend. (N. Y.) 570; 32 Am. Dec. 598; *Patrick v. Littell*, 36 O. S. 79; 38 Am. Rep. 552; *Avery v. Vansickle*, 35 O. S. 270; *Winternitz v. Porter*, 86 Pa. St. 35; *Scottish, etc., Co. v. Deas*, 35 S. C. 42; 28 Am. St. Rep. 832; 14 S. E. 486; *Cater v. Eveleigh*, 4 DeSaus. Eq. (S. C.) 19; 6 Am. Dec. 596; *James v. Mayrant*, 4 DeSaus. Eq. (S. C.) 591; 6 Am. Dec. 630; *Hubbard v. Bugbee*, 55 Vt. 506; 45 Am. Rep. 637; *Dale v. Robinson*, 51 Vt. 20; 31 Am. Rep. 669.

need not appear if the contract is for the benefit of the separate estate.⁶ The only serious conflict of authority in cases of this class exists where the contract is in writing and it is sought to show by extrinsic evidence that it was intended to charge the separate estate.

If the contract is not one for the benefit of the married woman or her estate, and no express charge on her separate estate is made, the divergence of authority is complete. Some courts hold that in such case there is no presumption that the married woman intends to charge her separate estate by her contracts, but that such intent must be shown either from the form of the contract or from the surrounding circumstances.⁷ Under this rule a note does not bind the separate estate if the intent appears only in a trust deed which is void for usury.⁸ So a note signed by a married woman does not raise a presumption of a consideration moving to her and hence to charge her separate estate; her intent to do so must be shown specifically.⁹ In other jurisdictions the more reasonable rule prevails that if no other source of payment appears to have been contemplated by the contract, the married woman will be presumed to have intended that her contract should have some effect and not be merely a means of defrauding the adversary party; and that effect can only be to bind her separate estate.¹⁰ It is perhaps in contracts of surety-

⁶ *Gibson v. Hutchins*, 43 S. C. 287; 21 S. E. 250.

⁷ *Goldsmith v. Ladson*, 9 Mack (D. C.) 220; *Kantrowitz v. Prather*, 31 Ind. 92; 99 Am. Dec. 587; *Benson v. Simmers* (Ky.), 53 S. W. 1035; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482; 63 Am. Dec. 553; *Westervelt v. Baker*, 56 Neb. 63; 76 N. W. 440; citing and following *Grand, etc., Co. v. Wright*, 53 Neb. 574; 74 N. W. 82; *Jordan v. Keeble*, 85 Tenn. 412; 3 S. W. 511; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Shacklett v. Polk*, 4 Heisk. (Tenn.) 104; *Cherry v. Clements*, 10 Humph. (Tenn.) 552; *Litton v. Baldwin*, 8 Humph.

(Tenn.) 209; *Chatterton v. Young*, 2 Tenn. Ch. 768; *Dismukes v. Shafer* (Tenn. Ch. App.), 54 S. W. 671.

⁸ *Wallace v. Goodlet*, 93 Tenn. 598; 30 S. W. 27.

⁹ *Grand, etc., Co. v. Wright*, 53 Neb. 574; 74 N. W. 82; *Westervelt v. Baker*, 56 Neb. 63; 76 N. W. 440; *Farmers' Bank v. Boyd*, — Neb. —; 93 N. W. 676.

¹⁰ *Cardwell v. Perry*, 82 Ky. 129; *Hershizer v. Florence*, 39 O. S. 516; *Williams v. Urmston*, 35 O. S. 296; 35 Am. Rep. 611 (overruling *Levi v. Earl*, 30 O. S. 147; and *Rice v. R. R.*, 32 O. S. 380; 30 Am. Rep. 610); *Phillips v. Graves*, 20 O. S. 371; 5 Am. Rep. 675; *Price v. Bank*,

ship that the application of these divergent rules is best seen. Where a married woman has no power to bind her estate except that conferred by the instrument creating such estate, she cannot ordinarily bind her estate as surety.¹¹ Where her contract does in fact bind her estate only when it is for her benefit or that of the estate or is expressly charged upon the estate, her signing a note as surety does not bind her separate estate.¹²

§916. Contracts of married women under modern statutes.

The rules of equity and Common Law upon the subject of a married woman's contracts are modified by statute in almost every jurisdiction. Within the scope of the powers conferred upon her by statute her liability is governed by the rules that apply to persons of full capacity.¹ Thus within her statutory powers she may make a contract which will result in a lien on her separate property in the same way as anyone of full capacity.² Without the scope of statutory power her contracts and conveyances are void, no matter what other powers may have been given to her by statute.³ Thus since in Pennsylvania the statutes removing disabilities of married women in general does not apply to their capacity with reference to their separate use trusts, they have under such statutes no more power over such trusts than they had before.⁴ So an agreement concerning a note given by a married woman cannot change the character of the liability of her separate realty from that shown by the deed

92 Va. 468; 32 L. R. A. 214; 23 S. E. 887.

¹¹ Hartman v. Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679.

¹² Yale v. Dederer, 22 N. Y. 450; 78 Am. Dec. 216; Willard v. Eastham, 15 Gray (Mass.) 328; 77 Am. Dec. 366; Wilcox v. Arnold, 116 N. C. 708; 21 S. E. 434.

¹ Tarr v. Muir, 107 Ky. 283; 53 S. W. 663; McKell v. Bank, 62 Neb. 608; 87 N. W. 317; Hacketts-town National Bank v. Ming, 52 N. J. Eq. 156; 27 Atl. 920.

² Tarr v. Muir, 107 Ky. 283; 53 S. W. 663.

³ Haas v. Shaw, 91 Ind. 384; 46 Am. Rep. 607. A statute conferring power to act with reference to her separate estate "does not, expressly or by implication, enlarge a wife's capacity to contract generally." Grand Island Banking Co. v. Wright, 53 Neb. 574, 578; 74 N. W. 82; quoted in Kitchen v. Chapin, 64 Neb. 144, 146; 57 L. R. A. 914; 89 N. W. 632.

⁴ Holliday v. Hively, 198 Pa. St. 335; 47 Atl. 988.

executed as required by statute.⁵ The power of a married woman to make contracts at Modern Law depends therefor upon the phraseology of the statute in the particular jurisdiction whose law is in question, and the construction placed upon it by the courts. No attempt can be made here to give the details of the statutes in the different states or to discuss their effect, state by state. The different statutes can, however, for purposes of convenience be grouped into general classes which can be discussed.

§917. Power to contract for benefit of separate estate.

(1) Some statutes create a separate estate and give a married woman power to make contracts for the benefit of such estate.¹ Under such statute a married woman is liable on her contracts which fairly tend to benefit her separate estate. Thus a married woman is liable for the wages of a laborer working on her farm, though originally employed by her husband,² or on a contract that the report of the appraisers as to the amount of loss to her insured property shall be final;³ or on a loan made to her;⁴ or on a debt incurred by her in her business.⁵ She is not liable on her contracts not for the benefit of her separate estate under those statutes. Thus she is not liable on a covenant of general warranty in a deed conveying her husband's realty which she executes to release her dower,⁶ nor on a judgment

⁵ McCollum v. Boughton, 132 Mo. 601; 35 L. R. A. 480; 30 S. W. 1028; 33 S. W. 476; denying rehearing, 130 Mo. 617; 35 L. R. A. 487; 34 S. W. 480.

¹ Robertson v. Robertson (Ky.), 72 S. W. 813; Ring v. Burt, 17 Mich. 465; 97 Am. Dec. 200; Russell v. Bank, 39 Mich. 671; 33 Am. Rep. 444; Mosher v. Kittle, 101 Mich. 345; 59 N. W. 497; Detroit Chamber of Commerce v. Goodman, 110 Mich. 498; 35 L. R. A. 96; 68 N. W. 295; Edison v. Babka, 111 Mich. 235; 69 N. W. 499; Caldwell v. Jones, 115 Mich. 129; 73 N. W.

129; Doane v. Feather, 119 Mich. 691; 78 N. W. 884.

² Mosher v. Kittle, 101 Mich. 345; 59 N. W. 497.

³ Montgomery v. Ins. Co., 108 Wis. 116; 84 N. W. 175 (under the Michigan statute).

⁴ Fletcher v. Brainerd, 75 Vt. 300; 55 Atl. 608.

⁵ First National Bank v. Hirschowitz, — Fla. —; 35 So. 22.

⁶ Pyle v. Gross, 92 Md. 132; 48 Atl. 713; Augusta National Bank v. Beard's Executor, 100 Va. 687; 42 S. E. 694.

note not given for the benefit of her separate estate,⁷ nor for a note given for realty⁸ or personalty⁹ transferred to herself and her husband together; nor for a contract concerning land leased to her husband though afterwards sold to her;¹⁰ nor on a contract between herself and her husband on one side and a third person on the other for repairing property owned by the husband and wife jointly,¹¹ nor for a contract of suretyship,¹² nor for a subscription toward the erecting of a chamber of commerce building, though her realty might possibly be advanced in price thereby,¹³ nor on a mortgage to secure payment of agricultural supplies furnished to other persons joining in the mortgage, to be used in cultivating land which is hers in part,¹⁴ nor on a contract to pay her sister's board.¹⁵ Outside of her separate estate these statutes confer no power to contract.¹⁶

§918. Power to contract as feme sole with reference to separate estate.

(2) Other statutes, not only create separate statutory estates, but give a married woman power to contract with reference thereto as if she were single.¹ Under most of these statutes a

⁷ *Investment Co. v. Roop*, 132 Pa. St. 496; *sub nomine*, *Roop v. Investment Co.*, 7 L. R. A. 211; *sub nomine*, *Appeal of Roop*, 19 Atl. 278.

⁸ *Doane v. Feather*, 119 Mich. 691; 78 N. W. 884.

⁹ *Caldwell v. Jones*, 115 Mich. 129; 73 N. W. 129; *Chamberlain v. Murrin*, 92 Mich. 361; 52 N. W. 640.

¹⁰ *Edison v. Babka*, 111 Mich. 235; 69 N. W. 499.

¹¹ *Speier v. Opfer*, 73 Mich. 35; 16 Am. St. Rep. 556; 2 L. R. A. 345; 40 N. W. 909.

¹² *Russel v. Bank*, 39 Mich. 671; 33 Am. Rep. 444.

¹³ *Detroit Chamber of Commerce v. Goodman*, 110 Mich. 498; 35 L. R. A. 96; 68 N. W. 295 (two judges dissenting).

¹⁴ *Simon v. Sabb*, 56 S. C. 38; 33 S. E. 799.

¹⁵ *June v. Labadie*, — Mich. —; 92 N. W. 937.

¹⁶ *American, etc., Co. v. Owens*, 72 Fed. 219; 18 C. C. A. 513; *Shaffer v. Kugler*, 107 Mo. 58; 17 S. W. 698; *Stenger, etc., Association v. Stenger*, 54 Neb. 427; 74 N. W. 846; *Godfrey v. Megahan*; 38 Neb. 748; 57 N. W. 284; *Hirth v. Hirth*, 98 Va. 121; 34 S. E. 964.

¹ *American, etc., Co. v. Owens*, 72 Fed. 219; 18 C. C. A. 513; *Liebes v. Steffy*, — Ariz. —; 32 Pac. 261; *Warner v. Hess*, 66 Ark. 113; 49 S. W. 489; *Kirkley v. Lacey*, 7 Houst. (Del.) 213; *Tarr v. Muir*, 107 Ky. 283; 53 S. W. 663; *First, etc., Bank v. Moss*, 52 La. Ann. 1524; 28 So. 133; *Citizens' State Bank v. Smout*,

married woman has as much power to contract with reference to her separate property as her husband has with reference to his.² Thus she may be a surety³ or sole trader,⁴ or may be a member of a partnership of which her husband is not a member,⁵ and it is everywhere held that she may buy property⁶ or sell it, and this rule applies to lands owned at the passage of the statute as well as those afterwards acquired.⁷ She may authorize an attorney in fact to mortgage her realty.⁸ She may assign her interest in a life insurance policy without the intervention of a trustee,⁹ or may release a cause of action in tort for personal injuries.¹⁰ She may assume a mortgage debt on realty bought by her,¹¹ and may borrow money to pay off a lien and confess judgment therefor,¹² or confess judgment for debt for the improvement of her separate real estate.¹³ So her note given for money borrowed to buy realty,¹⁴ or for any other loan¹⁵ is

62 Neb. 223; 86 N. W. 1068; Stenger, etc., Association v. Stenger, 54 Neb. 427; 74 N. W. 846; Melick v. Varney, 41 Neb. 105; 59 N. W. 521; Farwell v. Cramer, 38 Neb. 61; 56 N. W. 716; Godfrey v. Megahan, 38 Neb. 748; 57 N. W. 284; Society, etc., v. Haines, 47 O. S. 423; 25 N. E. 119; Steffen v. Smith, 159 Pa. St. 207; 28 Atl. 295; Darwin v. Moore, 58 S. C. 164; 36 S. E. 539; Hirth v. Hirth, 98 Va. 121; 34 S. E. 964; Tufts v. Copen, 37 W. Va. 623; 16 S. E. 793.

² Farwell v. Cramer, 38 Neb. 61; 56 N. W. 716.

³ Westervelt v. Baker, 56 Neb. 63; 76 N. W. 440 (though in Nebraska such contract does not *prima facie* bind her separate estate).

⁴ Kirkley v. Lacy, 7 Houst. (Del.) 213.

⁵ Vail v. Winterstein, 94 Mich. 230; 34 Am. St. Rep. 334; 18 L. R. A. 515; 53 N. W. 932.

⁶ Liebes v. Steffy, — Ariz. —; 32 Pac. 261; Hays v. Jordan, 85 Ga. 741; 9 L. R. A. 373; 11 S. E. 833;

Melick v. Varney, 41 Neb. 105; 59 N. W. 521.

⁷ Jackson v. Everett (Tenn.), 58 S. W. 340.

⁸ Linton v. Ins. Co., 104 Fed. 584; 44 C. C. A. 54.

⁹ (Supreme Assembly) Good Fellows v. Campbell, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307.

¹⁰ Cooney v. Lincoln, 20 R. I. 183; 37 Atl. 1031 (citing Chicago, etc., R. R. Co. v. Dunn, 52 Ill. 260; 4 Am. Rep. 606; Berger v. Jacobs, 21 Mich. 215; Leonard v. Pope, 27 Mich. 145).

¹¹ Society, etc., v. Haines, 47 O. S. 423; 25 N. E. 119; Brewer v. Maurer, 38 O. S. 543; 43 Am. Rep. 436.

¹² Abell v. Chaffee, 154 Pa. St. 254; 26 Atl. 364.

¹³ Latrobe, etc., Association v. Fritz, 152 Pa. St. 224; 25 Atl. 558.

¹⁴ Steffen v. Smith, 159 Pa. St. 207; 28 Atl. 295.

¹⁵ Crampton v. Newton's Estate, — Mich. —; 93 N. W. 250.

valid. So a married woman separated in property from her husband may become a stockholder.¹⁶ She may employ an attorney at least if for her own interests, as to institute divorce proceedings,¹⁷ even if the suit is afterwards dismissed;¹⁸ or to discharge an attachment levied on her goods as the property of her husband.¹⁹ She may incur liability for necessities, such as the attendance of a doctor, even if she is living with her husband,²⁰ or for the services of a nurse.²¹ To hold her estate, it is not necessary to trace proceeds of a note into her separate estate if her intent to bind it appears from the transaction.²² Under such statutes her after-acquired property is liable for her contracts.²³

§919. Statutes conferring limited capacity.

(3) The remaining statutes which confer partial capacity may be grouped under this head. By the express provisions of some a woman who is deserted by her husband may contract as if she were unmarried,¹ at least to the extent of binding herself for such necessities as medical attendance.² Under other statutes, the court under certain circumstances may by decree confer upon a married woman the power of acting as a *feme sole*. Under some of these statutes, desertion or its equivalent is

¹⁶ First, etc., *Bank v. Moss*, 52 La. Ann. 1524; 28 So. 133. So *Kerr v. Urie*, 86 Md. 72; 63 Am. St. Rep. 493; 37 Atl. 789.

¹⁷ *Wells v. Gilpin*, 19 Colo. 305; 35 Pac. 545.

¹⁸ *Wolcott v. Patterson*, 100 Mich. 227; 43 Am. St. Rep. 456; 24 L. R. A. 629; 58 N. W. 1006.

¹⁹ *Thresher v. Barry*, 69 Conn. 470; 37 Atl. 1064.

²⁰ *Goodman v. Shipley*, 105 Mich. 439; 63 N. W. 412; following *Meads v. Martin*, 84 Mich. 306; 47 N. W. 583; *Hirshfield v. Waldron*, 83 Mich. 116; 47 N. W. 239.

²¹ *Bonebrake v. Tauer*, 67 Kan. 827; 72 Pac. 521.

²² *Spott's Estate*, 156 Pa. St. 281;

27 Atl. 132; *Darwin v. Moore*, 58 S. C. 164; 36 S. E. 539 (note given in 1890).

²³ *In re Ann* (1894), 1 Ch. 549; *Williamson v. Cline*, 40 W. Va. 194; 20 S. E. 917.

¹ *Arthur v. Broadnax*, 3 Ala. 557; 37 Am. Dec. 707; *Love v. Moynihan*, 16 Ill. 277; 63 Am. Dec. 306; *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606; 28 N. W. 159; *Wright v. Hays*, 10 Tex. 130; 60 Am. Dec. 200; *Golden v. Galveston*, 20 Tex. Civ. App. 584; 50 S. W. 416.

² *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606; 28 N. W. 159.

necessary for such decree;³ as where the wife is living apart from her husband and supports herself.⁴ But the mere insolvency of husband is not ground for a decree authorizing the wife to act as a sole trader; nor is evidence that her father-in-law will assist her evidence of a separate estate.⁵ As the decree is notice of her status to the world, a defect in the application of such nature that the court obtains no jurisdiction to make such decree is also notice to the world that the decree is in law a nullity.⁶

§920. Husband required to join in contract.

Some statutes require the husband to join in his wife's contract. Under such statutes a separate pledge of property by the wife is invalid;¹ as is a note signed by the wife, payable to the husband and indorsed by him,² or a judgment by confession where the husband did not join in the note or sign the order for confession.³ A purchase of land at public sale by an agent appointed with the consent of her husband is valid.⁴ Under such statutes the contract or conveyance is valid only if the husband joins therein.⁵ A deed executed by a married woman alone to defraud her creditors and subsequently ratified by a second deed in which her husband joins is invalid as to such creditors.⁶ A deed in which the husband did not join, conveying her interest in land previously her husband's, to her chil-

³ *In re Hughes* (1898), 1 Ch. 529; 67 L. J. Ch. N. S. 279; *Hill v. Cooper* (1893), 2 Q. B. 85; *Azbill v. Azbill*, 92 Ky. 154; 17 S. W. 284.

⁴ *Azbill v. Azbill*, 92 Ky. 154; 17 S. W. 284.

⁵ *Kohn v. Steinau* (Ky.), 29 S. W. 885.

⁶ *New England, etc., Co. v. Powell*, 94 Ala. 423; 10 So. 324.

¹ *Taylor v. Jackson* (R. I.), 25 Atl. 348.

² *Harvard, etc., Co. v. Benjamin*, 81 Md. 333; 57 Am. St. Rep. 402; 35 Atl. 930.

³ *Hoffman v. Shupp*, 80 Md. 611; 31 Atl. 505.

⁴ *Moore v. Taylor*, 81 Md. 644; 32 Atl. 320; 33 Atl. 886.

⁵ *De Roux v. Girard*, 112 Fed. 89; 50 C. C. A. 136 (decided under the Pennsylvania statute); *Weber v. Tanner* (Ky.), 64 S. W. 741; *Harvard, etc., Co. v. Benjamin*, 84 Md. 333; 57 Am. St. Rep. 402; 35 Atl. 930; *Westlake v. (City of) Youngstown*, 62 O. S. 249; 56 N. E. 873; *Bingler v. Bowman*, 194 Pa. St. 210; 45 Atl. 80.

⁶ *Murphy v. Green*, 128 Ala. 486; 30 So. 643.

dren in consideration of love is void;⁷ and a written contract by a married woman to ~~sell land~~ is unenforceable unless her husband joins, or she is living apart from him.⁸ So a mortgage in which the husband does not join is a nullity.⁹ So a mortgage may be void as not executed by husband and wife jointly and the note secured thereby may be valid;¹⁰ but if she could incur the debt for which the mortgage was given, it may be held in equity as an appointment of her property for payment.¹¹ Under such statute it has been held that a note given by a wife to her husband and indorsed by him is invalid as he did not join in the execution.¹² Such statute is held not to apply where the husband has deserted his wife.¹³ Under a statute requiring husband and wife to join in conveying the wife's property, but excepting women whose husbands are non-resident, a woman who is a non-resident may execute a valid deed without her husband's joining, though he is also a non-resident.¹⁴ A resident married woman cannot avail herself of a statute conferring power on non-resident married women.¹⁵ If the husband signs the deed but does not join in acknowledging it, the deed is invalid in some jurisdictions,¹⁶ and in others good in equity as a contract.¹⁷ A married woman who bought land is estopped

⁷ Ellis v. Pearson, 104 Tenn. 591; 58 S. W. 318.

⁸ Bartlett v. Williams, 27 Ind. App. 637; 60 N. E. 715; and the doctrine of part performance has no application. Rosenour v. Rosenour, 47 W. Va. 554; 35 S. E. 918, under a special statute of a combination type.

⁹ Siple v. Wass, 49 N. J. Eq. 463; 24 Atl. 233.

¹⁰ Hart v. Church, 126 Cal. 471; 77 Am. St. Rep. 195; 58 Pac. 910. A mortgage by a *feme covert* on part of her separate estate with the joinder of her husband is good in equity. Lynch v. Moser, 72 Conn. 714; 46 Atl. 153.

¹¹ Perrine v. Newell, 49 N. J. Eq. 57; 23 Atl. 492.

¹² Harvard, etc., Co. v. Benjamin.

84 Md. 333; 57 Am. St. Rep. 402; 35 Atl. 930.

¹³ Bieler v. Dreher, 129 Ala. 384; 30 So. 22 (by special statutory exception).

¹⁴ High v. Whitfield, 130 Ala. 444; 30 So. 449.

¹⁵ Swafford v. Herd (Ky.), 65 S. W. 803 (a statute authorizing a non-resident married woman to appoint an attorney in fact to convey).

¹⁶ Weber v. Tanner (Ky.), 64 S. W. 741; Morgan v. Snodgrass, 49 W. Va. 387; 38 S. E. 695. So of a mortgage. Dietrich v. Hutchinson, 73 Vt. 134; 87 Am. St. Rep. 698; 50 Atl. 810.

¹⁷ Rushton v. Davis, 127 Ala. 279; 28 So. 476.

to deny the lien of the vendor thereon, though the notes given therefor were void as not signed by her husband.¹⁸ So under some statutes her trustee must join. Under such statute a conveyance by husband and wife is void.¹⁹ Under a statute authorizing a married woman to act as if she were single in dealing with her separate estate, her power of attorney is valid, though not signed by her husband.²⁰

§921. Consent of husband necessary.

Some statutes require the consent of the husband, and in some cases his written consent, to the wife's contracts.¹ Under such statutes a married woman is not bound by an oral contract for the care of an insane husband, though by statute she could act as sole trader if her husband was insane.² So as attorney's fees are a matter of negotiation, not merely a liability created and fixed by law, like costs, a married woman though empowered to sue alone on all her contracts, cannot bind herself by contract therefor without her husband's consent.³ Some statutes require the written assent of her husband to any conveyance of her property. Under such statute her endorsement and delivery of her note without her husband's consent is a nullity.⁴ A transfer by a married woman of a note assigned to her, without the written consent of her husband is invalid, even in the hands of a *bona fide* holder.⁵ But the indorsement of the note by the husband as well as by the wife, has been held to be a sufficient

¹⁸ Weller v. Monroe (Ky.), 55 S. W. 1078 (citing Faught v. Henry, 13 Bush. 471; Bybee v. Smith, 88 Ky. 648; 11 S. W. 722; McClure v. Bigstaff (Ky.), 37 S. W. 294; Adam v. Feeder (Ky.), 41 S. W. 275.

¹⁹ Johnson v. Sanger, 49 W. Va. 405; 38 S. E. 645.

²⁰ Farmers', etc., Bank v. Loftus, 133 Pa. St. 97; 7 L. R. A. 313; 19 Atl. 347.

¹ Bazemore v. Mountain, 126 N. C. 313; 35 S. E. 542; Coffey v. Shuler, 112 N. C. 622; 16 S. E. 911.

² McAnally v. Insane Hospital, 109 Ala. 109; 55 Am. St. Rep. 923; 34 L. R. A. 223; 19 So. 492.

³ Cowan v. Motley, 125 Ala. 369; 28 So. 70.

⁴ Vann v. Edwards, 128 N. C. 425; 39 S. E. 66 (hence on her death the title thereto vests in her husband, in North Carolina, subject to her debts).

⁵ Walton v. Bristol, 125 N. C. 419; 34 S. E. 544; Whelpley v. Stoughton, 119 Mich. 314; 78 N. W. 137.

written assent.⁶ A contract of sale of goods without consent of the husband is not void, but voidable, whether treated as a Georgia or as an Alabama contract.⁷ A letter written by a husband as the wife's agent is sufficient to show consent, where it orders the goods to be shipped because of the writer's good standing, and where it states what the wife's property is, it charges it sufficiently.⁸ So is his joining in the execution of the instrument,⁹ or signing as a witness.¹⁰ This consent must be, however, to the same contract that the wife assents to.¹¹ An exception to these statutes is generally made in case of necessities, repairs and the like.¹²

§922. Contract required to be in writing.

Some statutes require a married woman's contracts to be in writing except in certain cases; as in Alabama, where she is a sole trader under the statute.¹ Under such statutes an agent cannot be appointed orally,² nor can an oral contract for a building be enforced by taking a lien,³ nor can it be ratified,⁴ nor can the consent of the husband give it validity.⁵ Indorsement of a promissory note in blank is not written consent within the provision of the statute, so as to enable her husband to pass title thereto.⁶ Contracts for necessities are excepted from the

⁶ Coffin v. Smith, 128 N. C. 252; 38 S. E. 864.

⁷ Clewis v. Malon, 119 Ala. 312; 24 So. 767; overruling Strauss v. Schwab, 104 Ala. 669; 16 So. 692.

⁸ Brinkley v. Ballance, 126 N. C. 393; 35 S. E. 631.

⁹ Rushton v. Davis, 127 Ala. 279; 28 So. 476; Wachovia, etc., Bank v. Ireland, 122 N. C. 571; 29 S. E. 835; *In re Freeman*, 116 N. C. 199; 21 S. E. 110.

¹⁰ Souder v. Bank, 156 Pa. St. 374; 27 Atl. 293.

¹¹ Walton v. Bristol, 125 N. C. 419; 34 S. E. 544.

¹² McAnally v. Lumber Co., 109 Ala. 397; 19 So. 417.

¹ Clement v. Draper, 108 Ala. 211;

19 So. 25; Strauss, etc., Co. v. Glass, 108 Ala. 546; 18 So. 526 (qualifying Strauss v. Schwab, 104 Ala. 669; 16 So. 692; Strouse v. Leipf, 101 Ala. 433; 46 Am. St. Rep. 122; 23 L. R. A. 622; 14 So. 667; Mitchell v. Mitchell, 101 Ala. 183; 13 So. 147).

² Scott v. Cotten, 91 Ala. 623; 8 So. 783.

³ Weathers v. Borders, 121 N. C. 387; 28 S. E. 524.

⁴ Weathers v. Borders, 121 N. C. 387; 28 S. E. 524.

⁵ Strauss, etc., Co. v. Glass, 108 Ala. 546; 18 So. 526.

⁶ Case v. Espenschied, 169 Mo. 215; 69 S. W. 276.

provisions of some of the statutes already referred. The term necessities has a different meaning in this connection from its meaning in the law of infancy. It includes a mule used to cultivate a farm from which the married woman is supported,⁷ and goods sold to renters on shares;⁸ but not the wages of an overseer, his services not being shown to be necessary;⁹ nor the rent of a hotel.¹⁰ Contracts for necessities are not enforceable without due process of law. Thus a creditor who has sold a married woman merchandise necessary for the support of her family cannot take possession of crops raised by her on her own land, but he must take judgment and issue execution subject to her right to exemptions.¹¹

§923. Power as sole trader.

Under other statutes a married woman is empowered to act as a sole trader, and as such to bind herself by contract.¹ Such statutes are constitutional.² Under such a statute a married woman may carry on business in the name of an agent.³ Unless her note is given in connection with her sole business, such statutes do not make it valid.⁴ A *feme covert* trading as a sole trader is not subject to the act concerning involuntary insolvency.⁵ Her ownership of a farm which her husband manages is not a separate business.⁶ If by statute a decree of court is necessary to empower a married woman to act as sole trader,

⁷ Allen v. Long (Ky.), 41 S. W. 17.

⁸ Bazemore v. Mountain, 121 N. C. 59; 28 S. E. 17.

⁹ Sanderlin v. Sanderlin, 122 N. C. 1; 29 S. E. 55 (in this case the contract was invalid, as neither in writing nor for necessities).

¹⁰ Crow v. Shacklett (Ky.), 38 S. W. 692.

¹¹ Rawlings v. Neal, 126 N. C. 271; 35 S. E. 597.

¹ Hickey v. Thompson, 52 Ark. 234; 12 S. W. 475; Camden v. Mul-

len, 29 Cal. 564; Wallace v. Rowley, 91 Ind. 586; Eskridge v. Carter (Ky.), 29 S. W. 748; Clark v. Manko, 80 Md. 78; 30 Atl. 621.

² Eskridge v. Carter (Ky.), 29 S. W. 748.

³ Reed v. Newcomb, 64 Vt. 49; 23 Atl. 589.

⁴ First National Bank v. Hirsch-kowitz, — Fla. —; 35 So. 22.

⁵ Clarke v. Manko, 80 Md. 78; 30 Atl. 621.

⁶ Union, etc., Bank v. Coffman, 101 Ia. 594; 70 N. W. 693.

she has not such power without such decree, even if she has invested her separate property in her business.⁷

§924. Capacity under contract with husband.

Under some statutes a married woman is given power to contract by contract with her husband for the application to her property of the provisions of the separate property acts. In the absence of such contract she cannot bind herself even as his surety.¹

§925. Power to contract as feme sole generally.

(4) Other statutes confer upon a married woman the power of contracting as if she were unmarried,¹ subject in some cases to limitations which will be hereafter discussed. Under some statutes her power to contract is said to be the same as that of her husband.² Unless the case falls within one of the exceptions her power to contract is the same as if she were unmarried.³ Under such statutes a married woman is liable personally on her contracts.⁴ So she may be estopped by a covenant of warranty from denying that the deed was given on valuable con-

⁷ McDonald v. Rozen, — Ida. —; 69 Pac. 125.

¹ Barlow Brothers Co. v. Parsons, 73 Conn. 696; 49 Atl. 205.

¹ Village of Western Springs v. Collins, 98 Fed. (Ill.) 933; 40 C. C. A. 33; Stacy v. Walter, 125 Ala. 291; 28 So. 89; Rose v. Otis, 18 Colo. 59; 31 Pac. 493; Goodrich v. Association, 96 Ga. 803; 22 S. E. 585; Pease v. Furniture Co., 176 Ill. 220; 52 N. E. 932; affirming 70 Ill. App. 138; Snell v. Snell, 123 Ill. 403; 5 Am. St. Rep. 526; 14 N. E. 684; Crum v. Sawyer, 132 Ill. 443; 24 N. E. 956; Koh-i-noor Laundry Co. v. Lockwood, 141 Ind. 140; 40 N. E. 677; Young v. McFadden, 125 Ind. 254; 25 N. E. 224; Security Bank v. Holmes, 68

Minn. 538; 71 N. W. 699; Wyatt v. Wyatt, 81 Miss. 219; 32 So. 317; McHenry v. Batavia, etc., Co., 17 Ohio C. C. 206; Hackman v. Cedar, 5 Ohio C. D. 293; Cooney v. Lincoln, 20 R. I. 183; 37 Atl. 1031; *Ex parte* Nurnberger, 40 S. C. 334; *sub nomine*, Nurnberger v. Ludekins, 18 S. E. 935; Valentine v. Bell, 66 Vt. 280; 29 Atl. 251; Brookman v. Insurance Co., 18 Wash. 308; 51 Pac. 395.

² First, etc., Bank v. Leonard, 36 Or. 390; 59 Pac. 873.

³ Hackettstown, etc., Bank v. Ming, 52 N. J. Eq. 156; 27 Atl. 920.

⁴ McHenry v. Batavia, etc., Co., 17 Ohio C. C. 206; First, etc., Bank v. Leonard, 36 Or. 390; 59 Pac. 873.

sideration.⁵ Under such statutes a married woman may convey her legal title to land acquired since the statute was passed without her husband's joining in the deed.⁶ She is personally liable on her covenants of warranty.⁷ But in Iowa her joining in a covenant in a deed conveying her husband's realty does not bind her unless she expressly so states.⁸ Her liability is not to be extended beyond her contract, however. Thus she is not liable on the covenants of her husband's deed in which she joins to release dower or homestead rights,⁹ nor does such deed convey an undivided interest in the property therein described, owned by her.¹⁰ As the progress of legislation is toward states of this class, a detailed discussion of the other classes of statutes is of less importance.

§926. Contracts of suretyship.

At Common Law a contract of suretyship by a married woman was void, like her other contracts. Where she has a separate estate, either at equity or by statute her contracts of suretyship are valid except in jurisdictions in which her power over her separate estate is limited to that expressly conferred upon her or necessarily implied from the nature of her estate.¹ So where the statute authorizing her to contract with reference to her separate estate is construed to apply only to contracts beneficial to her estate, she cannot act as surety.² Under such view of

⁵ *Stacey v. Walter*, 125 Ala. 291; 82 Am. St. Rep. 235; 28 So. 89.

⁶ *Farmers' Exchange Bank v. Hageluken*, 165 Mo. 443; 65 S. W. 728; or her equitable interest, *Cadematori v. Gauger*, 160 Mo. 352; 61 S. W. 195.

⁷ *Security Bank v. Holmes*, 68 Minn. 538; 71 N. W. 699.

⁸ *Moore v. Graves*, 97 Ia. 4; 65 N. W. 1008. This is by force of a special statute that a spouse joining in a covenant of warranty in a deed conveying the realty of the other is not bound personally unless the deed so states expressly.

⁹ *Village of Western Springs v. Collins*, 98 Fed. 933; 40 C. C. A. 33.

¹⁰ *Penny v. Mortgage Co.*, 132 Ala. 357; 31 So. 96.

¹ See § 911. *Fredericktown Savings Institution v. Michael*, 81 Md. 487; 33 L. R. A. 628; 32 Atl. 189, 340; *Binney v. Bank*, 150 Mass. 574; 6 L. R. A. 379; 23 N. E. 380; *Major v. Holmes*, 124 Mass. 108; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Lincoln v. Rowe*, 51 Mo. 571.

² *Kohn v. Collison*, 1 Marv. (Del.) 109; 27 Atl. 834; *Wright v. Parvis*,

the statute a contract of suretyship for her husband is void, though given for property which will make his estate more valuable and thereby increase her share in his estate if she survives him. The consideration moving to her is too remote.³ As with other contracts, in some jurisdictions her contract of suretyship *prima facie* binds her separate estate,⁴ in others it binds her separate estate if specifically charged thereon;⁵ but otherwise not.⁶ Under statutes conferring general power to contract, a contract of suretyship is valid.⁷ Thus a statute authorizing a married woman to give a bond with or without a warrant of attorney, as if she were a *feme sole*, includes a bond to secure the debt of her husband or another.⁸ Under a decree allowing a married woman to contract as a *feme sole* she can act as surety;⁹ but apparently not under a decree of less

etc., Co., 1 Marv. (Del.) 325; 40 Atl. 1123; Jaeckel v. Pease, 6 (Ida.) 131; 53 Pac. 399; Guy v. Liberenz, 160 Ind. 524; 65 N. E. 186; Magoffin v. Bank (Ky.), 69 S. W. 702; De Vries v. Conklin, 22 Mich. 255; Ott v. Hentall, 70 N. H. 231; 51 L. R. A. 226; 47 Atl. 80; Mueller v. Wiese, 95 Wis. 381; 70 N. W. 485.

³ Bishop v. Bourgeois, 58 N. J. Eq. 417; 43 Atl. 655.

⁴ Miller v. Brown, 47 Mo. 504; Kimm v. Weippert, 46 Mo. 532; Moeckel v. Heim, 46 Mo. App. 340; Williams v. Urmston, 35 O. S. 296; 35 Am. Rep. 611; Williamson v. Cline, 40 W. Va. 194; 20 S. E. 917.

⁵ Kershaw v. Barrett (Neb.), 90 N. W. 764; Briggs v. Bank, 41 Neb. 17; 59 N. W. 351; Smith v. Spalding, 40 Neb. 339; 58 N. W. 952; Spatz v. Martin, 46 Neb. 917; 65 N. W. 1063; First National Bank v. Stoll, 57 Neb. 758; 78 N. W. 254; Webster v. Helm, 93 Tenn. 322; 24 S. W. 488.

⁶ Union, etc., Bank v. Coffman. 101 Ia. 594; 70 N. W. 693; Smith v. Bond, 56 Neb. 529; 76 N. W.

1062; Eckman v. Scott, 34 Neb. 817; 52 N. W. 822.

⁷ Binney v. Bank, 150 Mass. 574; 6 L. R. A. 379; 23 N. E. 380; State Bank v. Maxson, 123 Mich. 250; 81 Am. St. Rep. 196; 82 N. W. 31 (under Kansas statute); King v. Hansing, 88 Minn. 401; 93 N. W. 307; Grandy v. Campbell, 78 Mo. App. 502; Cooper v. Bank, 4 Okla. 632; 46 Pac. 475; Colonial Etc., Co. v. Stevens, 3 N. D. 265; 55 N. W. 578; Miller v. Purchase, 5 S. D. 232; 58 N. W. 556; Colonial, etc., Co. v. Bradley, 4 S. D. 158; 55 N. W. 1108; First, etc., Bank v. Leonard, 36 Ore. 390; 59 Pac. 873; distinguishing Knoll v. Kiessling, 23 Ore. 8; 35 Pac. 248, and Campbell v. Snyder, 27 Ore. 249; 41 Pac. 659, as cases where the wife could, under the law then in force, bind only her separate estate and not herself personally. Ritter v. Bruss, 116 Wis. 55; 92 N. W. 361.

⁸ Warder, etc., Co. v. Stewart, 2 Marv. (Del.) 275; 36 Atl. 88.

⁹ Syper v. Harrison, 88 Ky. 461; 11 S. W. 435; Skinner v. Carr

extensive scope.¹⁰ Statutes specifically forbid a married woman to act as surety in some jurisdictions for any person; and in some others, for her husband,¹¹ and it is really because of these statutes that contracts of suretyship must be considered apart from other contracts. Where she cannot be surety for her husband, she is not liable on a note of a firm of which her husband is a member.¹² Under such statutes the test of suretyship seems to be whether the married woman received anything of value for incurring the obligation.¹³ Her obligation is valid if she receives anything of value,¹⁴ as where it is for her own debt as a separate trader,¹⁵ or for her ante-nuptial debt,¹⁶ or for the discharge of liens on her property;¹⁷ even where the

(Ky.), 51 S. W. 799. By this rule is possibly modified by the Act of 1894, under which she can only secure the debt of another by setting aside specific property for such debt, not incurring any personal liability therein. *Skinner v. Lynn* (Ky.), 51 S. W. 167. The statement in *Lane v. Bank* (Ky.), 43 S. W. 442, that she cannot be a surety under such a decree is an obiter. In *Mundo v. Anderson*, 109 Ky. 147; 58 S. W. 520, it is held that after such decree she may be surety even under the Act of 1894.

¹⁰ *Bidwell v. Robinson*, 79 Ky. 29.

¹¹ *Richardson v. Stephens*, 122 Ala. 301; 25 So. 39; *Schenig v. Cofer*, 97 Ala. 726; 12 So. 414; *Finch v. Barclay*, 87 Ga. 393; 13 S. E. 566; *Strickland v. Vance*, 99 Ga. 531; 59 Am. St. Rep. 241; 27 S. E. 152; *Smith v. Hardman*, 99 Ga. 381; 27 S. E. 731; *Munroe v. Haas*, 105 Ga. 468; 30 S. E. 654; *Coffee v. Ramey*, 111 Ga. 817; 35 S. E. 641; *Cook v. Buhrlage*, 159 Ind. 162; 64 N. E. 603; *Andrysiak v. Satkowski*, 159 Ind. 428; 63 N. E. 854; 65 N. E. 286; *International, etc., Association v. Watson*, 158 Ind. 508; 64 N. E. 23; *Seigman v.*

Streeter, 64 N. J. L. 169; 44 Atl. 888; *Pittman v. Raysor*, 49 S. C. 469; 27 S. E. 475.

¹² *Storrs, etc., Co. v. Wingate*, 67 N. H. 190; 29 Atl. 413.

¹³ *Cook v. Buhrlage*, 159 Ind. 162; 64 N. E. 603; *Field v. Noblett*, 154 Ind. 357; 56 N. E. 841; *Bowles v. Trapp*, 139 Ind. 55; 38 N. E. 406; *Goff v. Hankins*, 11 Ind. App. 456; 39 N. E. 294; *Read v. Brewer* (Miss.), 16 So. 350; *Simon v. Sabb*, 56 S. C. 38; 33 S. E. 799; *Griffin v. Earle*, 34 S. C. 246; 13 S. E. 473.

¹⁴ *Sidway v. Nichol*, 62 Ark. 146; 34 S. W. 529; *Morningstar v. Hardwick*, 3 Ind. App. 431; 29 N. E. 929; *Shaw v. Fortine*, 98 Mich. 254; 57 N. W. 128; *Schmidt v. Spencer*, 87 Mich. 121; 49 N. W. 479.

¹⁵ *Witkowski v. Maxwell*, 69 Miss. 56; 10 So. 453.

¹⁶ *Harrisburg, etc., Bank v. Bradshaw*, 178 Pa. St. 180; 34 L. R. A. 597; 35 Atl. 629; even if she was originally liable only as accommodation indorser, and she was released by failure to protest in time.

¹⁷ *Jones v. Rice*, 92 Ga. 236; 18 S. E. 348; *Waldrop v. Beal*, 89 Ga. 306; 15 S. E. 310.

debt was primarily her husband's, as where without any intent of evading the statute the husband borrowed money, giving as security a mortgage on certain real estate which he afterwards transferred to his wife.¹⁸ So a covenant not to engage in a certain business in a certain city, in which a married woman joins with her husband on their selling their business and good will is valid;¹⁹ as is her note given to take up her husband's note and prevent payee from attacking a transfer of property to her as in fraud of her husband's creditors;²⁰ or her note given to settle an action brought against her husband and herself, though the debt on which the action was brought was her husband's,²¹ or on a promise as principal jointly with her husband to reimburse a third person for paying her husband's debt,²² or a note given by a married woman as premium on an insurance policy taken out by her on her husband's life in his absence,²³ or a note given by herself and her husband for money advanced by a third person to pay premiums on a policy on her husband's life in her favor.²⁴ So she is liable on a promise to pay a debt incurred by him as her agent for her separate estate,²⁵ or to pay his debt in consideration of a transfer of realty to her.²⁶ It is even held that her promise to pay, his debt secured by a mortgage is valid by reason of the benefit to her dower in the mortgaged lands.²⁷ Her possible interest in her husband's personalty is too remote to constitute a benefit to her under this rule. Hence her promissory note given to pay his debt incurred in buying personalty is invalid.²⁸ A note given by a married woman to secure a debt which is partly hers and partly her husband's is valid as to her own debt, though

¹⁸ Taylor v. Mortgage Co., 106 Ga. 238; 32 S. E. 153; Daniel v. Royce, 96 Ga. 566; 23 S. E. 493.

¹⁹ Koh-i-noor Laundry Co. v. Lockwood, 141 Ind. 140; 40 N. E. 677.

²⁰ Whelpley v. Stoughton, 112 Mich. 594; 70 N. W. 1098.

²¹ Thornton v. Lemon, 114 Ga. 155; 39 S. E. 943.

²² Hill v. Cooley, 112 Ga. 115; 37 S. E. 109.

²³ Mitchell v. Richmond, 164 Pa. St. 566; 30 Atl. 486.

²⁴ Crenshaw v. Collier, 70 Ark. 5; 65 S. W. 709.

²⁵ Christensen v. Wells, 52 S. C. 497; 30 S. E. 611.

²⁶ Strickland v. Gray, 98 Ga. 667; 27 S. E. 155.

²⁷ Beberdick v. Crevier, 60 N. J. L. 389; 37 Atl. 959.

²⁸ Bishop v. Bourgeois, 58 N. J. Eq. 417; 43 Atl. 655.

invalid as to her husband's.²⁹ If under the contract she receives a thing of value she is liable though she incurs a liability greatly in excess thereof.³⁰ The form of the contract is therefore immaterial. If the debt is the married woman's she is liable even if she appears on the contract as a surety.³¹ If the contract is made directly with the married woman and she acquires a thing of value thereby she cannot evade liability on the ground that she was really acquiring such property in order that her husband might have the use thereof, even if such purpose was known to the adversary party.³² If a loan is actually made to the wife she is liable even though she intends to and does apply the money to her husband's debts, or allows him to use it.³³ So she is liable on a note to obtain a loan made to her, though with the knowledge of the lender she means to use the loan in paying a debt of her husband's.³⁴ So a sale of her separate estate is valid, though the purchaser knows that she means to use the proceeds to pay her husband's debt, he not being a creditor of the husband.³⁵ A married woman is liable on a contract of guaranty made as part of a contract of sale of a note owned by her, irrespective of the disposition of the proceeds.³⁶ But a device to evade the statute meets with no support from the courts. Thus a wife who gives her note for money borrowed to pay her husband's debt is not liable where part of the agreement of the contract of lending was such use;³⁷

²⁹ Lanier v. Olliff, 117 Ga. 397; 43 S. E. 711.

³⁰ Vliet v. Eastburn, 64 N. J. L. 627; *sub nomine* Eastburn v. Vliet, 46 Atl. 735. 1061. She was held liable on a note of \$2,080 because she received a note of \$80. So Woolverton v. Van Syckel, 57 N. J. L. 393; 31 Atl. 603.

³¹ Maddox v. Wilson, 91 Ga. 39; 16 S. E. 213; Arthur v. Caverly, 98 Mich. 82; 56 N. W. 1102.

³² McDonald v. Bluthenthal, 117 Ga. 120; 43 S. E. 422; Kriz v. Pege, 119 Wis. 105; 95 N. W. 108.

³³ Hamil v. Mortgage Co., 127 Ala. 90; 28 So. 558; McCrory v. Grandy,

92 Ga. 319; 18 S. W. 65; McCoy v. Barns, 136 Ind. 378; 36 N. E. 134; State *ex rel.* Morris v. Frazier, 134 Ind. 648; 34 N. E. 636; Iona, etc., Bank v. Boynton, 69 N. H. 77; 39 Atl. 522; Todd v. Bailey, 58 N. J. L. 10; 32 Atl. 696.

³⁴ Chastain v. Peak, 111 Ga. 889; 36 S. E. 967; First, etc., Bank v. Hunton, 69 N. H. 509; 45 Atl. 351.

³⁵ Nelms v. Keller, 103 Ga. 745; 30 S. E. 572.

³⁶ Kitchen v. Chapin, 64 Neb. 144; 97 Am. St. Rep. 637; 57 L. R. A. 914; 89 N. W. 632.

³⁷ First, etc., Bank v. Hunton, 69 N. H. 509; 45 Atl. 351.

nor is she liable on a guaranty of a note assigned to her by her husband and re-delivered by her to him, where the lender knows that the husband is to use the money, in part, to pay a loan due the same lender.³⁸ So one lending money to a husband on his wife's note, knowing that the husband is going to use the money to pay his debt, cannot recover.³⁹ On the same principle business by a husband and wife jointly, as a means of making her liable as surety for his debts is not her separate business under the statute authorizing her to contract for her separate business.⁴⁰ So if the money is paid to the husband and there is nothing to show what disposition was made of it, the wife is not liable,⁴¹ while if the husband takes it as her agent she is liable.⁴² The wife's liability as surety is not increased by her signing as an indorser.⁴³ It has been held that where the loan is made to the husband, the wife is not liable as surety, even if he applies the money to the use of his wife's separate estate,⁴⁴ or to necessities for the family.⁴⁵ Where on the face of the instrument the married woman does not appear as surety, some authorities hold that she cannot set up her suretyship against a *bona fide* holder for value;⁴⁶ others hold that she can.⁴⁷ It seems to be held that she estops herself from denying the validity of her note by representing that the proceeds thereof are for her separate estate,⁴⁸ as where the check given for the note is payable to her,⁴⁹ or where she acquiesces in her husband's

³⁸ First, etc., *Bank v. Hanscom*, 104 Mich. 67; 62 N. W. 167.

³⁹ *Fisk v. Mills*, 104 Mich. 433; 62 N. W. 559.

⁴⁰ *Emerson, etc., Co. v. Knapp*, 90 Wis. 34; 62 N. W. 945.

⁴¹ *Merchants', etc., Association v. Jarvis*, 92 Ky. 566; 18 S. W. 454; *Magill v. Trust Co.*, 81 Ky. 129; *Hirshman v. Brashears*, 79 Ky. 258.

⁴² *Hounshell v. Ins. Co.*, 81 Ky. 304.

⁴³ *Continental, etc., Bank v. Clark*, 117 Ala. 292; 22 So. 988; *National etc., Bank v. Whicher*, 173 Mass. 517; 73 Am. St. Rep. 317; 53 N. E. 1004.

⁴⁴ *Richardson v. Stephens*, 114

Ala. 238; 21 So. 949; *Wiltbank v. Tobler*, 181 Pa. St. 103; 37 Atl. 188.

⁴⁵ *Elston v. Corner*, 108 Ala. 76; 19 So. 324.

⁴⁶ *Scott v. Taul*, 115 Ala. 529; 22 So. 447; *Venable v. Lippold*, 102 Ga. 208; 29 S. E. 181 (where she was a joint maker).

⁴⁷ *Leschen v. Guy*, 149 Ind. 17; 48 N. E. 344; *Voreis v. Nussbaum*, 131 Ind. 267; 16 L. R. A. 45; 31 N. E. 70.

⁴⁸ *McVey v. Cantrell*, 70 N. Y. 295; 26 Am. Rep. 605; *Bratton v. Lowry*, 39 S. C. 383; 17 S. E. 832.

⁴⁹ *Hackettstown, etc., Bank v. Ming*, 52 N. J. Eq. 156; 27 Atl. 920.

statement that the money is to be used in paying off a mortgage on the wife's property.⁵⁰ A note by a husband and wife who are partners is valid as to her,⁵¹ or a note given to raise money for a corporation in which she is a stockholder,⁵² or medical services for her,⁵³ or to cultivate a farm owned by her.⁵⁴ A clause in a mortgage to the effect that the mortgagors will pay the note with interest does not bind a married woman who signs as mortgagor only.⁵⁵

§927. Mortgage or conveyance of wife's property to secure debt of husband.

A married woman has power to mortgage her property to secure her husband's debt if she is authorized by statute to contract as a *feme sole*; or if she has power by statute or in equity to deal with her separate estate.¹ Even under statutes which do not allow a married woman to be surety or guarantor for her husband, it is held that such statutes refer to personal liability, and that her power to mortgage or pledge her property for her husband's debt is not thereby limited.² Such statute

⁵⁰ *Vosburg v. Brown*, 119 Mich. 697; 78 N. W. 886.

⁵¹ *Compton v. Smith*, 120 Ala. 233; 25 So. 300.

⁵² *Williams v. Bank* (Ky.), 49 S. W. 183. *Contra*, *Allen v. Beebe*, 63 N. J. L. 377; 11 Am. & Eng. Corp. Cas. N. S. 20; 43 Atl. 681.

⁵³ *Harper v. O'Neil*, 194 Pa. St. 141; 44 Atl. 1065.

⁵⁴ *Richardson v. Stephens*, 122 Ala. 301; 25 So. 39.

⁵⁵ *Exchange, etc., Bank v. Wolverton*, 11 Wash. 108; 39 Pac. 248.

¹ *Thompson v. Kyle*, 39 Fla. 582; 63 Am. St. Rep. 193; 23 So. 12; *Marx v. Bellel*, 114 Mich. 631; 72 N. W. 620; *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512; 19 S. W. 727; *Rines v. Mansfield*, 96 Mo. 394; 9 S. W. 798; *Hagerman v. Sutton*, 91 Mo. 519; 4 S. W. 73;

Wilcox v. Todd, 64 Mo. 390; *Schneider v. Staihr*, 20 Mo. 269; *Wilson v. New*, 1 Neb. Un. 42; 95 N. W. 502; *Watts v. Gantt*, 42 Neb. 869; 61 N. W. 104; *Holmes v. Hull*, 50 Neb. 656; 70 N. W. 241; *Linton v. Cooper*, 53 Neb. 400; 73 N. W. 731; *Meares v. Butler*, 123 N. C. 206; 31 S. E. 477; *Knoll v. Kiessling*, 23 Or. 8; 35 Pac. 248; *Campbell v. Snyder*, 27 Ore. 249; 41 Pac. 659; *Citizens', etc., Association v. Heiser*, 150 Pa. St. 514; 24 Atl. 733.

² *Meares v. Butler*, 123 N. C. 206; 31 S. C. 477; *Gore v. Townsend*, 105 N. C. 228; 8 L. R. A. 443; 11 S. E. 160; *Siebert v. Bank*, 186 Pa. St. 233; 40 Atl. 472; *Kuhn v. Ogilvie*, 178 Pa. St. 303; 35 Atl. 957. So with suretyship in general, *Meads v. Hutchinson*, 111 Mo. 620; 19 S. W. 1111.

does not prevent her from assigning a life insurance policy of which she is the beneficial owner as security for the debt of her husband.³ Under the Kentucky statute a married woman can secure her husband's debt only by setting aside some part of her property by deed, mortgage and the like.⁴ A pledge of an insurance policy to secure the joint note of husband and wife,⁵ or a written assignment of a life insurance policy,⁶ complies with this statute; but a note given by her to take up her husband's note is invalid.⁷

Under statutes specifically forbidding a married woman to mortgage her property for her husband's debts; and even in some cases under statutes which forbid her to act as surety, she cannot give a valid mortgage for his debt.⁸ So an assignment of a life insurance policy as security for her husband is void.⁹ So a pledge of a note owned by a married woman to secure a debt which is due in part from herself and in part from her husband is valid as to her debt but not as to her husband's.¹⁰ So a mortgage on land owned by husband and wife in common,¹¹ or by the entirety,¹² is invalid at least as to the wife's interest. The mortgage is not valid even if the wife gives it by way of compromise, believing that her husband's debt is enforceable out of her estate.¹³ A mortgage given to a surety

³ *Dusenberry v. Ins. Co.*, 188 Pa. St. 454; 41 Atl. 736.

⁴ *New, etc., Bank v. Blythe* (Ky.), 53 S. W. 409.

⁵ *Wirgman v. Miller*, 98 Ky. 620; 33 S. W. 937.

⁶ *New York, etc., Co. v. Miller* (Ky.), 56 S. W. 975.

⁷ *Russell v. Rice* (Ky.), 44 S. W. 110; *Crumbaugh v. Postell* (Ky.), 49 S. W. 334; *Bank v. Stitt*, 107 Ky. 49; 52 S. W. 950; *Milburn v. Jackson* (Ky.), 52 S. W. 949.

⁸ *American, etc., Co. v. Owens* (S. C.), 72 Fed. 219; 18 C. C. A. 513; *American, etc., Co. v. Owens*, 64 Fed. 249; *Osborne v. Cooper*, 113 Ala. 405; 59 Am. St. Rep. 117; 21 So. 320; *Elston v. Comer*, 108 Ala. 76;

19 So. 324; *McNeil v. Davis*, 105 Ala. 657; 17 So. 101; *First, etc., Bank v. Bayless*, 96 Ga. 684; 23 S. E. 851; *Merchants, etc., Association v. Scanlan*, 144 Ind. 11; 42 N. E. 1008; *Carrigan v. Drake*, 36 S. C. 354; 15 S. E. 339.

⁹ *Union, etc., Ins. Co. v. Woods*, 11 Ind. App. 335; 37 N. E. 180, 353; 39 N. E. 205.

¹⁰ *Johnston v. Gullledge*, 115 Ga. 981; 42 S. E. 354.

¹¹ *Osborne v. Cooper*, 113 Ala. 405; 59 Am. St. Rep. 117; 21 So. 320.

¹² *Wilson v. Logue*, 131 Ind. 191; 31 Am. St. Rep. 426; 30 N. E. 1079.

¹³ *First, etc., Bank v. Bayless*, 96 Ga. 684; 23 S. E. 851.

or co-surety of her husband's to indemnify him, has been held invalid.¹⁴ Under this statute such a mortgage is void at law and equity, even as to a *bona fide* purchaser. No decree in equity is needed to interpose such defense in an action of ejectment at law.¹⁵

Evasions of this statute are common, but are repressed by the courts wherever shown by the evidence. A mortgage was held invalid where the creditor suggested that the married woman deeded the property to her son, and that the son then give a mortgage for his debt;¹⁶ and so where a husband and wife, tenants by the entirety, joined in conveying the realty to a third person, who reconveyed to the husband; the latter then mortgaged the land to secure his individual debt, this way of evading the statute being taken with the knowledge of the agent of the mortgagee.¹⁷ A different rule applies where the husband held the legal title as trustee for his wife and with her consent deeded the property to their son by a deed reciting a money consideration, in order to enable the son to raise money for his father by mortgage.¹⁸ If a married woman borrows money secured by mortgage on her property to discharge a prior mort-

¹⁴ McNeil v. Davis, 105 Ala. 657; 17 So. 101. *Contra*: where a trust deed given to indemnify several makers of a note against liability thereon was held valid though the principal debtor was her husband and the others his sureties. McCollum v. Boughton, 132 Mo. 601; 35 L. R. A. 480; 30 S. W. 1028; 33 S. W. 476; 34 S. W. 480.

¹⁵ Richardson v. Stephens, 122 Ala. 301; 25 So. 39; distinguishing Williams, etc., Co. v. Bass, 57 Ala. 487, as under a statute by which appropriation of property by a wife for her husband's debt would be declared void on her application, and which required a precedent decree so declaring it void; and qualifying Richardson v. Stephens, 114 Ala. 238; 21 So. 949. To the same ef-

fect see Taylor v. Allen, 112 Ga. 330; 37 S. E. 408.

¹⁶ National Bank v. Carlton, 96 Ga. 469; 23 S. E. 388.

¹⁷ Abicht v. Searls, 154 Ind. 594; 57 N. E. 246; Bennett v. Mattingly, 110 Ind. 197; 10 N. E. 299; 11 N. E. 792; Crooks v. Kennett, 111 Ind. 347; 12 N. E. 715; Machine Co. v. Scovell, 111 Ind. 551; 13 N. E. 58; Long v. Crosson, 119 Ind. 3; 4 L. R. A. 783; 21 N. E. 450; Wilson v. Logue, 131 Ind. 191; 31 Am. St. Rep. 426; 30 N. E. 1079; Sohn v. Gantner, 134 Ind. 31; 33 N. E. 787; Klein v. Gantner, 135 Ind. 699; 35 N. E. 2; Gezesk v. Hibberd, 149 Ind. 354; 48 N. E. 361; Government, etc., Institution v. Denny, 154 Ind. 261; 55 N. E. 757.

¹⁸ Smyth v. Fitzsimmons, 97 Ala. 451; 12 So. 48.

gage given by her to secure her husband's debt, such subsequent loan and mortgage are both valid.¹⁹

Under a statute forbidding a married woman to act as surety, she may, if within the general powers conferred on her by equity or by statute, pay the debt of her husband or of a third person,²⁰ even though she cannot act as surety,²¹ and her executory contracts of suretyship are void,²² such as a contract to convey her realty to pay for the sale to her husband of a printing establishment.²³ Thus she may convey realty to pay such debt.²⁴ Thus if she joins her husband in conveying property owned by them in entirety, in trust for her husband's debts, this amounts to a payment of her husband's debts after a sale of such property under such trust deed, and she cannot maintain ejectment against the purchaser.²⁵ In Georgia a married woman, while she cannot be surety may pay the debt of a third person,²⁶ but cannot pay her husband's debt even by way of compromise of an alleged claim against her therefor,²⁷ or if she was surety for such debt.²⁸ If the wife delivers property to pay her husband's debt,²⁹ or money,³⁰ she may recover it. So where a married woman borrowed money and gave her note for the

¹⁹ *Field v. Campbell*, — Ind. App. —; 67 N. E. 1040; rehearing denied, 68 N. E. 911.

²⁰ *Hollingsworth v. Hill*, 116 Ala. 184; 22 So. 460; *Hubbard v. Sayre*, 105 Ala. 440; 17 So. 17; *Babbitt v. Morrison*, 58 N. H. 419; *Thompson v. Ela*, 58 N. H. 490; *Shipman v. Lord*, 60 N. J. Eq. 484; 46 Atl. 1101; affirming 58 N. J. Eq. 380; 44 Atl. 215; *Meiley v. Butler*, 26 O. S. 535.

²¹ *Hubbard v. Sayre*, 105 Ala. 440; 17 So. 17.

²² *Warwick v. Lawrence*, 43 N. J. Eq. 179; 3 Am. St. Rep. 299; 10 Atl. 376.

²³ *Thomas v. Weaver*, 52 N. J. Eq. 580; 29 Atl. 353.

²⁴ *Pratt, etc., Co. v. McClain*, 135 Ala. 452; 33 So. 185; *Rogers v.*

Shewmaker, 27 Ind. App. 631; 87 Am. St. Rep. 274; 60 N. E. 462.

²⁵ *Rogers v. Shewmaker*, 27 Ind. App. 631; 87 Am. St. Rep. 274; 60 N. E. 462.

²⁶ *Villa Rica, etc., Co. v. Paratain*, 92 Ga. 370; 17 S. E. 340; *Finch v. Barclay*, 87 Ga. 393; 13 S. E. 566; *Freeman v. Coleman*, 86 Ga. 590; 12 S. E. 1064.

²⁷ *Mickleberry v. O'Neal*, 98 Ga. 42; 25 S. E. 933.

²⁸ *Riviere v. Ray*, 100 Ga. 626; 28 S. E. 391.

²⁹ *Grant v. Miller*, 107 Ga. 804; 33 S. E. 671 (where the husband delivered the property with the wife's consent).

³⁰ *Maddox v. Oxford*, 70 Ga. 179; *Chappell v. Boyd*, 61 Ga. 662.

amount of the loan plus a debt of her husband's, and paid part of her note, she could recover the excess so paid over the amount of the loan to her.³¹ A statute forbidding a conveyance for the debt of the husband is held to include a mortgage.³²

A married woman may buy up her husband's debts and give a mortgage on her lands to secure the purchase price thereof.³³

§928. Contracts between husband and wife.

At Common Law a valid contract between husband and wife was impossible; since the wife had no power to contract generally, and further the Common Law theory of the legal unity of husband and wife made a promise between husband and wife one which in law had but one party.¹ It was therefore unenforceable by either even after divorce,² or after the death of the other.³ Thus a contract for the division of property between husband and wife, each agreeing to make no claim to the estate of the other, does not bar the right of either.⁴ Under this rule a note by a wife to a partnership of which her husband is a member is invalid.⁵ This rule applied at Common Law even to executed contracts,⁶ including direct conveyances

³¹ *Lewis v. Howell*, 98 Ga. 428; 25 S. E. 504.

³² *Parsons v. Rolfe*, 66 N. H. 620; 27 Atl. 172.

³³ *Ellis v. Cribb*, 55 S. C. 328; 33 S. E. 484.

¹ *Wallingsford v. Allen*, 10 Pet. (U. S.) 583; *Erringdale v. Riggs*, 148 Ill. 403; 36 N. E. 93; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540; 50 Am. Dec. 528; *National Granite Bank v. Whicher*, 173 Mass. 517; 53 N. E. 1004; *Clark v. Patterson*, 158 Mass. 388; 33 N. E. 589; *Roby v. Phelan*, 118 Mass. 541; *Loomis v. Brush*, 36 Mich. 40; *Turner v. Davenport*, 61 N. J. Eq. 18; 49 Atl. 463; *Woodruff v. Apgar*, 42 N. J. L. 198; *Homan v. Headley*, 58 N. J. L. 485; 34 Atl. 941; *Fowler v. Trebein*, 16 O. S. 493; 91 Am.

Dec. 95; *Johnston v. Johnston*, 31 Pa. St. 450; *Putnam v. Bicknell*, 18 Wis. 333. The court calls it "the rule of the Common Law which has been declared and recognized by the legislature and by this court that contracts between husband and wife are void." *National Granite Bank v. Tyndale*, 176 Mass. 547, 550; 51 L. R. A. 447; 57 N. E. 1022.

² *Pittman v. Pittman*, 4 Or. 298.

³ *Clark v. Royal Arcanum*, 176 Mass. 468; 57 N. E. 787.

⁴ *Jewell v. McQuesten*, 68 N. H. 233; 34 Atl. 742.

⁵ *Clark v. Patterson*, 158 Mass. 388; 35 Am. St. Rep. 498; 33 N. E. 589.

⁶ *Homan v. Headley*, 58 N. J. L. 485; 34 Atl. 941; *Woodruff v. Apgar*, 42 N. J. L. 198.

of land by one to the other.⁷ These rules apply only to a contract with a lawful wife, a contract with a wife by a bigamous marriage not being invalid for that reason.⁸

Such contracts were invalid in equity while executory,⁹ but if executed and fair and reasonable, equity would enforce them.¹⁰ But as such conveyance does not pass the legal title, it is not available in an action in ejectment.¹¹ The effect of modern statutes upon the power of a married woman to make contracts with her husband is a question on which there is a lack of harmony arising in part only from a diversity of the statutes. No question can arise where the statute specifically permits a husband and wife to make contracts with each other,¹² except where they attempt to modify the rights and duties growing out of the marriage relation itself. A promise by a husband to pay his wife for performing domestic duties is invalid;¹³ and so seems to be a promise to pay her for assisting him in his business,¹⁴ or a promise by him that the property produced by their joint labor in farming shall be the property of the wife in consideration of her working for him.¹⁵ As addi-

⁷ *Newman v. Willetts*, 48 Ill. 534; *Sims v. Ricketts*, 35 Ind. 181; 9 Am. Rep. 679; *Fowler v. Trebein*, 16 O. S. 493; 91 Am. Dec. 95; *Ball v. Ball*, 20 R. I. 520; 40 Atl. 234.

⁸ *Vaughn v. Vaughn*, 100 Tenn. 282; 45 S. W. 677.

⁹ *Erringdale v. Riggs*, 148 Ill. 403; 36 N. E. 93.

¹⁰ *Jones v. Clifton*, 101 U. S. 225; *Ogden v. Ogden*, 60 Ark. 70; 46 Am. St. Rep. 151; 28 S. W. 796; *Corr's Appeal*, 62 Conn. 403; 26 Atl. 478; *McCormick v. Hammersley*, 1 App. D. C. 313; *Eckermeyer v. Hoffmeier*, 98 Ky. 724; 34 S. W. 521; *Vought v. Vought*, 50 N. J. Eq. 177; 27 Atl. 489; *Ball v. Ball*, 20 R. I. 520; 40 Atl. 234.

¹¹ *Wallace v. Pereles*, 109 Wis. 316; 83 Am. St. Rep. 898; 58 L. R. A. 644; 85 N. W. 371.

¹² *Larkin v. Baty*, 111 Ala. 303;

18 So. 666; *Osborne v. Cooper*, 113 Ala. 405; 59 Am. St. Rep. 117; 21 So. 320; *Roth's Estate*, 6 Ohio N. P. 498.

¹³ *Brittain v. Crowther*, 54 Fed. 295; *Lee v. Guano Co.*, 99 Ga. 572; 59 Am. St. Rep. 243; 27 S. E. 159; *Michigan, etc., Co. v. Chapin*, 106 Mich. 384; 58 Am. St. Rep. 490; 64 N. W. 334; *Blaechinska v. Howard Mission*, 130 N. Y. 497; 15 L. R. A. 215; 29 N. E. 755; *Birkbeck v. Ackroyd*, 74 N. Y. 356; 30 Am. Rep. 304.

¹⁴ *In re Kaufmann*, 104 Fed. 768; *Brittain v. Crowther*, 54 Fed. 295; *Turner v. Davenport*, 61 N. J. Eq. 18; 47 Atl. 766; *Blaechinska v. Howard Mission*, 130 N. Y. 497; 15 L. R. A. 215; 29 N. E. 755.

¹⁵ *Dempster Mill Mfg. Co. v. Bundy*, 64 Kan. 444; 67 Pac. 816; 58 L. R. A. 739.

tional reasons for the invalidity of such contracts have been suggested a lack of consideration,¹⁶ and the requirements of public policy.¹⁷ But a contract by a wife to furnish board for prisoners in jail, made with her husband who had a right to sublet his contract with the county to furnish such board, has been held to be so far outside the duties incident to the marriage relation as to be enforceable.¹⁸ So under a statute expressly forbidding a contract between husband and wife with reference to realty, it is clear that such a contract is invalid, even if they have separated.¹⁹ So power to husband and wife to contract with each other does not include contracts for future separation.²⁰ Power to a married woman to convey directly to her husband does not authorize mutual releases of dower rights.²¹ By statute in some jurisdictions husband and wife cannot contract with each other with reference to their dower rights.²² Statutes providing for separate property subject to the absolute disposition of the married woman are held to permit her to contract with her husband.²³ In some jurisdictions contracts between husband and wife are enforceable in equity and not at law.²⁴ Statutes conferring contractual power either generally or with reference to the separate estate have been held to make contracts between husband and wife valid.²⁵ Even though the wife cannot sue her husband in his lifetime, she can

¹⁶ *Lee v. Guano Co.*, 99 Ga. 572; 59 Am. St. Rep. 243; 27 S. E. 159.

¹⁷ *Michigan, etc., Co. v. Chapin*, 106 Mich. 384; 58 Am. St. Rep. 490; 64 N. W. 334. See § 426.

¹⁸ *Carse v. Reticker*, 95 Ia. 25; 58 Am. St. Rep. 421; 63 N. W. 461. (This case was also explained by the court as in effect a gift of the profits.)

¹⁹ *Phillips v. Blaker*, 68 Minn. 152; 70 N. W. 1082.

²⁰ *Foote v. Nickerson*, 70 N. H. 496; 54 L. R. A. 554; 48 Atl. 1088. See § 428.

²¹ *Pinkham v. Pinkham*, 95 Me. 71; 85 Am. St. Rep. 392; 49 Atl. 48.

²² *Potter v. Potter*, 43 Ore. 149; 72 Pac. 702.

²³ *Luhrs v. Hancock*, 181 U. S. 567.

²⁴ *First National Bank v. Albertson* (N. J. Eq.), 47 Atl. 818; *Bishop v. Bourgeois*, 58 N. J. Eq. 417; 43 Atl. 655; *Rahway Bank v. Brewster*, 49 N. J. L. 231; 12 Atl. 769.

²⁵ *Ward v. Shallet*, 2 Ves. Sr. 16; *Jones v. Clifton*, 101 U. S. 225; *Jones v. Chenault*, 124 Ala. 610; 82 Am. St. Rep. 211; 27 So. 515; *Luhrs v. Hancock*, — Ariz. —; 57 Pac. 605; *Magruder v. Belt*, 7 App. D. C. 303; *Fritz v. Fernandez*, — Fla. —; 34 So. 315; *Herbert v. Mueller*, 83 Ill. App. 391; *North v. North*, 166

enforce payment out of his estate after his death.²⁶ Thus a contract by a wife to repay to her husband money advanced to improve her property, even if it is used as the family homestead;²⁷ or by a husband to repay to his wife a loan made by her,²⁸ or interest thereon,²⁹ is valid, as is a contract to dismiss a divorce suit,³⁰ or a conveyance of real³¹ or personal property,³² or a contract by a wife to release her dower in her husband's realty in consideration of his promise to pay her a certain part of the purchase money received by him.³³ So is a contract by a married woman to repay her husband out of her share of her father's estate for advances to her by him.³⁴ So a husband

Ill. 179; 46 N. E. 729; affirming 63 Ill. App. 129; *Luttrell v. Boggs*, 168 Ill. 361; 48 N. E. 171; *Milburn v. Milburn*, 143 Ind. 187; 42 N. E. 611; *Walker v. Walker* (Ky.), 41 S. W. 315; *McCann v. Letcher*, 8 B. Mon. (Ky.) 320; *Moayon v. Moayon*, — Ky. —; 60 L. R. A. 415; 72 S. W. 33; *Peaks v. Hutchinson*, 96 Me. 530; 59 L. R. A. 279; 53 Atl. 38; *Matley v. Sawyer*, 38 Me. 68; *Trader v. Lowe*, 45 Md. 1; *Sturmfelsz v. Frickey*, 43 Md. 569; *Needham v. Sanger*, 17 Pick. (Mass.) 500; 19 Am. Dec. 292; *Bullard v. Briggs*, 7 Pick. (Mass.) 533; *Just v. Bank*, — Mich. —; 94 N. W. 200; *Jenne v. Marble*, 37 Mich. 319; *Farwell v. Johnston*, 34 Mich. 342; *Gregory v. Doods*, 60 Miss. 549; *Rice v. Sally*, 176 Mo. 107; 75 S. W. 398; *Crawford v. Crawford*, 24 Nev. 410; 56 Pac. 94; distinguishing *Dickerson v. Dickerson*, 24 Neb. 530; 8 Am. St. Rep. 213; *Nims v. Bigelow*, 44 N. H. 343; *Thompson v. Taylor*, 66 N. J. L. 253; 88 Am. St. Rep. 485; 54 L. R. A. 585; 49 Atl. 544 (decided under New York law); *In re Collister*, 153 N. Y. 294; 60 Am. St. Rep. 620; 47 N. E. 268; *Cornman's Estate*, 197 Pa. St. 125; 46 Atl. 940; *Kolbe v. Harrington*, 15 S. D.

263; 88 N. W. 572; *Ficklin v. Rixey*, 89 Va. 832; 37 Am. St. Rep. 891; 17 S. E. 325; *Atkins v. Atkins*, 69 Vt. 270; 37 Atl. 746.

²⁶ *In re Callister*, 153 N. Y. 294; 60 Am. St. Rep. 620; 47 N. E. 268; *Atkins v. Atkins*, 69 Vt. 270; 37 Atl. 746.

²⁷ *North v. North*, 166 Ill. 179; 46 N. E. 729; affirming 63 Ill. App. 129.

²⁸ *Fritz v. Fernandez*, — Fla. —; 34 So. 315; *Herbert v. Mueller*, 83 Ill. App. 391; *In re Callister*, 153 N. Y. 294; 60 Am. St. Rep. 620; 47 N. E. 268; *Kolbe v. Harrington*, 15 S. D. 263; 88 N. W. 572.

²⁹ *Cornman's Estate*, 197 Pa. St. 125; 46 Atl. 940.

³⁰ *Crawford v. Crawford*, 24 Nev. 410; 56 Pac. 94; distinguishing *Dickerson v. Dickerson*, 24 Neb. 530; 8 Am. St. Rep. 213.

³¹ *Duffy v. White*, 115 Mich. 264; 73 N. W. 363.

³² *Sherman v. Davenport*, 106 Ia. 741; 75 N. W. 187.

³³ *Dailey v. Dailey*, 26 Ind. App. 14; 58 N. E. 1065.

³⁴ *Hendricks v. Isaacs*, 117 N. Y. 411; 15 Am. St. Rep. 524; 6 L. R. A. 559; 22 N. E. 1029.

signing a note as surety for his wife may recover from her estate.³⁵ So under a contract whereby a wife authorizes her husband to buy property for her as her agent, the title to such property vests in the wife, even as against her husband's creditors.³⁶ So a contract whereby it is agreed that a house built by a husband on his wife's land shall remain his property is valid.³⁷ While under statutes allowing a married woman to contract with reference to her separate estate as if unmarried, it is often held that she may contract with her husband,³⁸ it has been held that such statutes do not authorize contracts between husband and wife.³⁹ So while a statute conferring general power to contract has been held to make valid a contract between husband and wife,⁴⁰ the opposite view has been taken, on the theory that though the wife's disabilities are removed, those of her husband are not.⁴¹ So a husband and wife can-

³⁵ Feather v. Feather, 116 Mich. 384; 74 N. W. 524.

³⁶ Jones v. Chenault, 124 Ala. 610; 82 Am. St. Rep. 211; 27 So. 515; Paull v. Parks (Ky.), 45 S. W. 873; Young v. Hurst (Tenn. Ch. App.), 48 S. W. 355.

³⁷ Peaks v. Hutchinson, 96 Me. 530; 59 L. R. A. 279; 53 Atl. 38.

³⁸ Leach v. Rains, 149 Ind. 152; 48 N. E. 858; Huffman v. Copeland, 139 Ind. 221; 38 N. E. 861; Third National Bank v. Guenther, 123 N. Y. 568; 20 Am. St. Rep. 780; 25 N. E. 986; Suau v. Caffé, 122 N. Y. 308; 9 L. R. A. 593; 25 N. E. 488; Williams v. Harris, 4 S. D. 22; 46 Am. St. Rep. 753; 54 N. W. 926.

³⁹ O'Daily v. Morris, 31 Ind. 111; Jenne v. Marble, 37 Mich. 319; Hendricks v. Isaacs, 117 N. Y. 411; 15 Am. St. Rep. 524; 6 L. R. A. 559; 22 N. E. 1029.

⁴⁰ Grubbe v. Grubbe, 26 Or. 363; 38 Pac. 182 (holding that the statute restricting the form of conveying realty did not apply to contracts).

⁴¹ Heacock v. Heacock, 108 Ia. 540; 75 Am. St. Rep. 273; 79 N. W. 353 (a note given by husband to wife during coverture); citing and following Hoker v. Boggs, 63 Ill. 161; Lord v. Parker, 3 All. (Mass.) 127; Knowles v. Hull, 99 Mass. 562; Roby v. Phelon, 118 Mass. 541; Aultman v. Obermeyer, 6 Neb. 260; White v. Wagner, 25 N. Y. 328; Real Estate, etc., Co. v. Roop, 132 Pa. St. 496; 7 L. R. A. 211; 19 Atl. 278; which do not all sustain the proposition. "Both husband and wife were under such legal disabilities at Common Law as that they could not contract with each other. To remove the disability of one will not validate the contract for one of the contracting parties has no assenting mind; and it would be strange doctrine to announce that because the disability was removed from one of the contracting parties, the contract is good, although the other is without a concurring mind." Heacock v. Heacock, 108 Ia. 540, 544; 75 Am. St. Rep. 273; 79

not contract as to the distributive share of the husband in the wife's estate.⁴² Contracts between husband and wife had previously been recognized in Iowa,⁴³ and as the statute allowed either to sue the other for conversion of property, it was held that a note given by the husband to the wife for property of hers which he had converted was valid.⁴⁴

§929. Partnership between husband and wife.

There is a lack of harmony on the question of whether husband and wife can act as partners with each other, due in part to differences in statutory provisions and in part to differences in determining the legal effect of similar statutes. A married woman may be a partner of her husband in business under statutes authorizing her to contract as if she were unmarried.¹ A statute authorizing her to contract with reference to her separate estate specifically providing that she may contract with her husband allows her to form a partnership with him.² Under a statute allowing her to contract with others than her husband as if she were unmarried, and forbidding her to become his surety except by a mortgage it is held that she can incur liability to third persons as his partner.³ Under statutes authorizing her to contract with reference to her separate estate, she cannot enter into a partnership with her husband.⁴ From the cases cited

N. W. 353. See the dissenting opinion in this case. To the same effect see *National Granite Bank v. Whicher*, 173 Mass. 517; 73 Am. St. Rep. 317; 53 N. E. 1004 (also on a note).

⁴² *Poole v. Burnham* 105 Ia. 620; 75 N. W. 474. (Under a statute providing that if either husband or wife owned property the other had no interest therein which could be contracted for.)

⁴³ *Corse v. Reticker*, 95 Ia. 25; 58 Am. St. Rep. 421; 63 N. W. 461 (a contract by a wife to board prisoners for her husband, who had the care of them).

⁴⁴ *Dunham v. Bentley*, 103 Ia. 136; 72 N. W. 437.

¹ *Burney v. Grocery Co.*, 98 Ga. 711; 58 Am. St. Rep. 342; 25 S. E. 915; *Hoaglin v. Henderson*, 119 Ia. 720; 97 Am. St. Rep. 335; 61 L. R. A. 756; 94 N. W. 247; *Louisville, etc., Ry. v. Alexander (Ky.)*, 27 S. W. 981; *Snell v. Stone*, 23 Or. 327; 31 Pac. 663.

² *Belser v. Banking Co.*, 105 Ala. 514; 17 So. 40.

³ *Lane v. Bishop*, 65 Vt. 575; 27 Atl. 499.

⁴ *Gilkerson, etc., Co. v. Salinger*, 56 Ark. 294; 35 Am. St. Rep. 105; 16 L. R. A. 526; 19 S. W. 747; Bar-

it will be seen that this view is taken by states that allow a husband and wife to make contracts with reference to her separate estate,⁵ and by those which hold that a married woman may bind her separate estate by her contracts as effectually as her husband can bind his;⁶ as well as by states which restrict her power under the statute to contracts intended for the management and benefit of her estate.⁷ His management of her farm does not constitute a partnership, however;⁸ nor does their leasing a hotel together and buying furniture.⁹ A statute giving her the power to contract as a *feme sole* and providing that she should have the same powers in law as her husband does not authorize her to form a partnership with him. She is not liable to third persons as a partner.¹⁰ A statute making her personally liable on debts incurred in her own name does not authorize her to form a partnership with her husband.¹¹ Under statutes allowing her to conduct business on her sole and separate account she cannot form a partnership with her husband.¹²

low Bros. Co. v. Parsons, 73 Conn. 696; 49 Atl. 205; Haas v. Shaw, 91 Ind. 384; 46 Am. Rep. 607; Scarlett v. Snodgrass, 92 Ind. 262; Lord v. Parker, 3 All. (Mass.) 127; Lord v. Davison, 3 All. (Mass.) 131; Edwards v. Stevens, 3 All. (Mass.) 315; Palmer v. Lord, 5 All. (Mass.) 460; Bowker v. Bradford, 140 Mass. 521; 5 N. E. 480; Artman v. Ferguson, 73 Mich. 146; 16 Am. St. Rep. 572; 2 L. R. A. 343; 40 N. W. 907; Speier v. Opfer, 73 Mich. 35; 16 Am. St. Rep. 556; 2 L. R. A. 345; 40 N. W. 909; Bassett v. Shepardson, 52 Mich. 3; 17 N. W. 217; Payne v. Thompson, 44 O. S. 192; 5 N. E. 654; Weisiger v. Wood, 36 S. C. 424; 15 S. E. 597; Gwynn v. Gwynn, 27 S. C. 525; 4 S. E. 229; Cox v. Miller, 54 Tex. 16; Seattle Board of Trade v. Hayden, 4 Wash. 263; 31 Am. St. Rep. 919; 16 L. R. A. 530; 30 Pac. 87; 32 Pac. 224; Carey v. Burruss, 20 W. Va. 571; 43 Am. Rep. 790; Fuller, etc., Co. v. Me-

Henry, 83 Wis. 573; 18 L. R. A. 512; 53 N. W. 896.

⁵ Haas v. Shaw, 91 Ind. 384; 46 Am. Rep. 607.

⁶ Payne v. Thompson, 44 O. S. 192; 5 N. E. 654.

⁷ Fuller, etc., Co. v. McHenry, 83 Wis. 573; 18 L. R. A. 512; 53 N. W. 896.

⁸ Krouskop v. Shontz, 51 Wis. 204; 37 Am. Rep. 817; 8 N. W. 241.

⁹ Wineman v. Phillips, 93 Mich. 223; 53 N. W. 168.

¹⁰ Seattle Board of Trade v. Hayden, 4 Wash. 263; 31 Am. St. Rep. 919; 16 L. R. A. 530; 32 Pac. 224; 30 Pac. 87.

¹¹ Haggett v. Hurley, 91 Me. 542; 41 L. R. A. 362; 40 Atl. 561.

¹² Gilkerson, etc., Co. v. Salenger, 56 Ark. 294; 35 Am. St. Rep. 105; 16 L. R. A. 526; 19 S. W. 747; Lord v. Parker, 3 All. (Mass.) 127. *Contra*, Suau v. Caffé, 122 N. Y. 308; 9 L. R. A. 593; 25 N. E. 488.

As partners are principals, and not sureties each for the other, a statute forbidding a wife to act as surety for her husband does not of itself prevent them from acting as partners.¹⁸

§930. Agent of married woman.

Unless restrained by statute a married woman may appoint an agent, or an attorney in fact,¹ to make any contract or conveyance which she could make herself. If the contract is one which she cannot make herself, she cannot make it by an agent.² Where a married woman cannot charge her general estate she cannot appoint an agent to charge it.³

§931. Ratification.

As a married woman's contract is void and not voidable it is incapable of ratification by any agreement or conduct after the woman acquires the power to make contracts,¹ whether such power is acquired by the death of the husband,² or by her ob-

¹⁸ Belser v. Banking Co., 105 Ala. 514; 17 So. 40.

¹ Williams v. Paine, 169 U. S. 55; Davie v. Davie (Ark.), 18 S. W. 935; Williams v. Paine, 7 App. D. C. 116; Security Savings Bank v. Smith, 38 Or. 72; 62 Pac. 794; Farmers', etc., Bank v. Loftus, 133 Pa. St. 97; 7 L. R. A. 313; 19 Atl. 347.

² Freeman's Appeal, 68 Conn. 533; 57 Am. St. Rep. 112; 37 L. R. A. 452; 37 Atl. 420; Weisbrod v. Ry., 18 Wis. 35; 86 Am. Dec. 743.

³ Macfarland v. Heim, 127 Mo. 327; 48 Am. St. Rep. 629; 29 S. W. 1030.

¹ New England, etc., Co. v. Powell, 94 Ala. 423; 10 So. 324; Heiney v. Lontz, 147 Ind. 417; 46 N. E. 665; Austin v. Davidson, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; Davis v. Schmidt (Ind. App.), 31 N. E. 84; Ruppel v.

Kissel (Ky.), 74 S. W. 220; Porterfield v. Butler, 47 Miss. 165; 12 Am. Rep. 329; Musick v. Dodson, 76 Mo. 624; 43 Am. Rep. 780; Weathers v. Borders, 121 N. C. 387; 28 S. E. 524; Buchanan v. Hazzard, 95 Pa. St. 240; Glidden v. Strupler, 52 Pa. St. 400; Radican v. Radican, 22 R. I. 405; 48 Atl. 143; Sherwin v. Sanders, 59 Vt. 499; 59 Am. Rep. 750; 9 Atl. 239. But where the instrument takes effect on delivery, a re-delivery after acquiring capacity makes the instrument valid. Brown v. Bennett, 75 Pa. St. 420; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268; 11 Am. Dec. 724.

² Meyer v. Haworth, 8 Ad. & El. 467; 35 E. C. L. 442; Union, etc., Bank v. Hartwell, 84 Ala. 379; 4 So. 156; Austin v. Davis, 128 Ind. 472; 25 Am. St. Rep. 456; 12 L. R. A. 120; 26 N. E. 890; Long v. Brown, 66 Ind. 160; Porterfield v.

taining an absolute divorce from him,³ or by a change in the law giving her power to make contracts,⁴ or by the rendition of a decree of court under local statutes, conferring the powers of a *feme sole*.⁵ In obiter, however, some dissent from this view may be found.⁶ Under some statutes, moreover, a contract of a married woman may be voidable only, and subject to ratification.⁷ Ratification must be at least as formal, even under these statutes, as an original contract.⁸ It must also be effected by conduct unequivocally intended as a ratification. Thus if it was possible to ratify business debts after the act of 1897 authorizing a married woman to incur such debts, the mere recognition, after the passage of the act, of the existence of a note given for such debts before the passage of the act, does not make her liable.⁹ While perfectly harmonious with the views already expressed, it must be noticed that if the contract could cause any liability in equity, such liability would support a promise made after capacity had been acquired and this contract would be enforceable at law.¹⁰ So a subsequent promise after acquiring capacity to contract, to perform a contract made before such capacity is acquired is enforceable if based on a new consideration. Thus a note executed by a

Butler, 47 Miss. 165; 12 Am. Rep. 329; Condon v. Barr, 49 N. J. L. 53; 6 Atl. 614; Nesbitt v. Turner, 155 Pa. St. 429; 23 Atl. 750.

³ Putnam v. Tennyson, 50 Ind. 456; Thompson v. Warren, 8 B. Mon. (Ky.) 488; Musick v. Dodson, 76 Mo. 624; 43 Am. Rep. 780; Hayward v. Barker, 52 Vt. 429; 36 Am. Rep. 762.

⁴ Thompson v. Hudgins, 116 Ala. 93; 22 So. 632; New England, etc., Co. v. Powell, 94 Ala. 423; 10 So. 324; Loomis v. Brush, 36 Mich. 40; Valentine v. Bell, 66 Vt. 280; 29 Atl. 251.

⁵ Russell v. Rice (Ky.), 44 S. W. 110.

⁶ "Her contracts independent of statute were merely voidable and to

avoid them she must plead her disability." Strauss v. Glass, 108 Ala. 546, 551; 18 So. 526.

⁷ Steiner v. Tramm, 98 Ala. 315; 13 So. 365. This case was decided under a statute allowing a wife to authorize her husband to sell or exchange her estate; and it was held that she might ratify an exchange made by him so as to vest in herself title to the property received in exchange.

⁸ Duncan v. Freeman, 109 Ala. 185; 19 So. 433.

⁹ Mercantile Co. v. Bowers, 105 Tenn. 138; 58 S. W. 287.

¹⁰ Condon v. Barr, 49 N. J. L. 53; 6 Atl. 614; Sherwin v. Sanders, 59 Vt. 499; 59 Am. Rep. 750; 9 Atl. 239.

married woman and her husband was void as to her before 1881, in Indiana,¹¹ but a renewal after 1881 by husband and wife of note given before is good as to both.¹²

§932. Restitution.

If a married woman invokes coverture as a defense to an executory contract,¹ or a means of recovering what she has parted with under an executed contract,² she is liable for whatever she has received under such contract.³ Thus a married woman to obtain a loan gave her note payable to her husband, who indorsed it over to the creditor. The note itself was held to be void, as being a contract between husband and wife;⁴ but recovery of the amount so loaned was allowed in assumption.⁵ In some jurisdictions, no personal liability exists against her if the contract is void, and the only remedy of the adversary party is an action *in rem* against the money received by her under the contract or against any property into which it can be traced.⁶ If the money was paid to her husband and it is not shown to have been paid over to her, she is not liable for it on avoiding her contract.⁷ She cannot retain the property conveyed to her and avoid having the purchase money collected by a sale of such property therefor.⁸

¹¹ Lackey v. Boruff, 152 Ind. 371; 53 N. E. 412.

¹² Lackey v. Boruff, 152 Ind. 371; 53 N. E. 412.

¹ National Granite Bank v. Tyn-dale, 176 Mass. 547; 51 L. R. A. 477; 57 N. E. 1022; Willock's Estate, 165 Pa. St. 522; 30 Atl. 1043; Bucknor's Estate, 136 Pa. St. 23; 20 Am. St. Rep. 891; 19 Atl. 1069.

² Pilcher v. Smith, 2 Head. (Tenn.) 208.

³ *Contra*, where her acknowledgment to the conveyance of her separate estate was not taken as provided by law. Silcock v. Baker,

25 Tex. Civ. App. 503; 61 S. W. 939.

⁴ National Granite Bank v. Whicher, 173 Mass. 517; 73 Am. St. Rep. 317; 53 N. E. 1004.

⁵ National Granite Bank v. Tyn-dale, 176 Mass. 547; 51 L. R. A. 447; 57 N. E. 1022.

⁶ Smith v. Ingram, 130 N. C. 100; 61 L. R. A. 878; 40 S. E. 984.

⁷ McKinney v. Street, 107 Tenn. 526; 64 S. W. 482.

⁸ Kennedy v. Harris, 3 Ind. Ter. 487; 58 S. W. 567; Blantz v. Bain, 95 Tenn. 87; 31 S. W. 159.

§933. Estoppel.

Within the limits of her statutory capacity she may be bound by estoppel like a person of full capacity.¹ Thus a deed by a married woman of lands devised to her estops her from setting up an after-acquired title.² So if she ostensibly borrows money, the fact that she indorses the check to her husband does not relieve her from liability, though she could not act as his surety.³ If she signs the instrument first and represents that she is the principal thereon she is estopped from avoiding liability by claiming to be surety.⁴ She is not bound by estoppel in instruments outside her statutory capacity. So where by statute she cannot mortgage her property for the debt of her husband, she is not estopped to deny the validity of such mortgage,⁵ nor is she estopped by joining in her husband's deed of her property, releasing dower therein as if it were his.⁶ Thus if she has no capacity to make a covenant of warranty she is not estopped to set up an after-acquired title in realty conveyed by her by deed containing such covenant.⁷ However, if she has agreed to a separation, the written agreement for which is not acknowledged by her as required by statute, but which is immediately performed, she cannot retain what she has received under such contract and claim the dower released by such defective contract.⁸ Mere delay in giving notice of the fact that an instrument is a forgery has been held not to estop her.⁹

§934. Right to avoid executed contracts.

In some jurisdictions a married woman may acquire property, and yet may not bind herself by an executory contract. In

¹ Estoppel by deed, *Jones v. Hill*, 70 Ark. 34; 66 S. W. 194; *Sandwich, etc., Co. v. Zellmer*, 48 Minn. 408; 51 N. W. 379.

² *Bruce v. Goodbar*, 104 Tenn. 638; 58 S. W. 282.

³ *Hackettstown, etc., Bank v. Ming*, 52 N. J. Eq. 156; 27 Atl. 920.

⁴ *Tompkins v. Triplett*, 110 Ky. 824; 96 Am. St. Rep. 472; 62 S. W. 1021.

⁵ *Bentley v. Goodwin*, 26 Ind. App. 689; 60 N. E. 735.

⁶ *Gibson v. Clark*, 132 Ala. 370; 31 So. 472. *Contra*, *Jones v. Hill*, 70 Ark. 34; 66 S. W. 194.

⁷ *Threefoot Bros. v. Hillman*, 130 Ala. 214; 89 Am. St. Rep. 39; 30 So. 513; *Wadkins v. Watson*, 86 Tex. 194; 22 L. R. A. 779; 24 S. W. 385.

⁸ *Kaiser's Estate*, 199 Pa. St. 269; 85 Am. St. Rep. 785; 49 Atl. 79.

⁹ *Hunt v. Reilly*, 24 R. I. 68; 96

such jurisdictions a married woman cannot avoid a purchase of property, and recover money paid therefor by her, after such purchase has been executed, even if she might have avoided liability under the contract while it was executory.¹

§935. Coverture must be pleaded.

To be available as a defense coverture must be pleaded.¹ If such defense is not made, a judgment against on a void contract is valid.² If under the law a married woman is liable except in certain cases, an answer alleging coverture, but not alleging facts within one of such cases is insufficient.³ As to a petition filed against a married woman the weight of authority is that facts must appear both in pleading and evidence to bring the married woman within the provisions of the statute in order to hold her on her contracts, her liability not being presumed.⁴

§936. Who can use coverture as a defense.

Only the married woman can take advantage of coverture as a defense.¹ Thus under a statute forbidding a married woman to act as surety only she or her privies in blood representation or estate can interpose coverture as a defense.² The husband

Am. St. Rep. 707; 52 Atl. 681. (Delay for three years.)

¹ Sellmeyer v. Welch, 47 Ark. 485; 1 S. W. 777; Johnson v. Jones, 51 Miss. 860; Gould v. McFall, 118 Pa. St. 455; 4 Am. St. Rep. 606; 12 Atl. 336; Pitts v. Elser, 87 Tex. 347; 28 S. W. 518.

² Strauss v. Glass, 108 Ala. 546; 18 So. 526; Rogers v. Shewmaker, 27 Ind. App. 631; 87 Am. St. Rep. 274; 60 N. E. 462; Smoot v. Judd, 161 Mo. 673; 84 Am. St. Rep. 738; 61 S. W. 854.

³ Smoot v. Judd, 161 Mo. 673; 84 Am. St. Rep. 738; 61 S. W. 854.

⁴ Strauss v. Glass, 108 Ala. 546; 18 So. 526.

⁵ Warner v. Hess, 66 Ark. 113; 49

S. W. 489; Emmett v. Yandes, 60 Ind. 548; Westervelt v. Baker, 56 Neb. 63; 76 N. W. 440; citing and following, Grand, etc., Co. v. Wright, 53 Neb. 574; 74 N. W. 82; Moore v. Wolfe, 122 N. C. 711; 30 S. E. 120; Koechling v. Henkel, 144 Pa. St. 215; 22 Atl. 808; Hecker v. Haak, 88 Pa. St. 238; Duval v. Chef, 92 Va. 489; 23 S. E. 893.

¹ Jones v. Harrell, 110 Ga. 373; 35 S. E. 690; Hawes v. Favor, 161 Ill. 440; 43 N. E. 1076; Lackey v. Boruff, 152 Ind. 371; 53 N. E. 412; Slagle v. Hoover, 137 Ind. 314; 36 N. E. 1099.

² Lackey v. Boruff, 152 Ind. 371; 53 N. E. 412.

or those claiming under him cannot plead her coverture.³ So the adversary party to the contract cannot avoid the contract on the ground of coverture if the married woman offers to perform.⁴ Thus if she has agreed to convey realty, and tenders a valid deed,⁵ the adversary party cannot interpose the objection of her original lack of capacity. So he cannot recover payments made by him under such contract.⁶ If she has performed and cannot be placed in *statu quo* she may have specific performance.⁷ So after she has performed, the adversary party is liable for the payments stipulated in the contract.⁸

If, however, the contract is executory on both sides, and the promise of the married woman is the sole consideration for the promise of the adversary party, no consideration exists for such promise of the adversary party, where the promise of the married woman is void. In cases of this sort, the adversary party does not use coverture as a defense; but there is no consideration and hence no contract.⁹

³ Slagle v. Hoover, 137 Ind. 314; 36 N. E. 1099.

⁴ Hawes v. Favor, 161 Ill. 440; 43 N. E. 1076; Carpenter v. Mitchell, 54 Ill. 126; Holmes v. Holmes, 107 Ky. 163; 92 Am. St. Rep. 342; 53 S. W. 29.

⁵ Holmes v. Holmes, 107 Ky. 163; 92 Am. St. Rep. 342; 53 S. W. 29. (She was a *feme covert* when the contract was made, but discoverd when the deed was tendered.)

⁶ Keystone Iron Co. v. Logan, 55 Minn. 537; 57 N. W. 156.

⁷ Richards v. Doyle, 36 O. S. 37; 38 Am. Rep. 550.

⁸ Lindsey v. Lindsey, 116 Ia. 480; 89 N. W. 1096. (In this case she had authority to contract for her own services. She was living with her husband, and contracted with a third party to furnish board to his employees. It was held that a settlement between such third person and her husband could not discharge her liability.)

⁹ Shirk v. Stafford, 31 Ind. App. 247; 67 N. E. 542.

CHAPTER XLII.

PARTNERSHIP.

§937. Nature and formation of partnership.

A partnership is a business relation between two or more persons arising out of a contract¹ by which they agree to unite their property, credit, services, skill or influence in some business, so that they have a community of interest in such business,² and usually divide the profits and losses between themselves in a fixed proportion.

A partnership differs from a corporation in this: that a corporation is a legal personalty,³ while a partnership is merely a relation between two or more persons⁴ and "is not a being distinct from its members."⁵ The contract of partnership may be express, and either written⁶ or oral.⁷ An oral contract of partnership to last for more than one year from

¹ Mayfield v. Turner, 180 Ill. 332; 54 N. E. 418; Briggs v. Rice Co., 83 Ill. App. 618; Simmons v. Ingram, 78 Mo. App. 603; Martin v. Baird, 175 Pa. St. 540; 34 Atl. 809. "A copartnership is in its essence a contract of agency. Each partner is the general agent of the firm, and the firm is the agent of each partner, with power to bind him to a personal liability in favor of partnership creditors." Lapento v. Lettieri, 72 Conn. 377, 383; 77 Am. St. Rep. 315; 44 Atl. 730.

² Stafford v. Sibley, 113 Ala. 447; 21 So. 459; National Surety Co. v. Townsend, etc., Co., 176 Ill. 156; 52 N. E. 938; affirming, 74 Ill. App. 312; McKasy v. Huber, 65 Minn. 9;

67 N. W. 650; Baldwin v. Eddy, 64 Minn. 425; 67 N. W. 349; Willey v. Renner, 8 N. M. 641; 45 Pac. 1132; Harvey v. Childs, 28 O. S. 319; 22 Am. Rep. 387; Frazier v. Linton, 183 Pa. St. 186; 38 Atl. 589; Carter v. McClure, 98 Tenn. 109; 60 Am. St. Rep. 842; 36 L. R. A. 282; 38 S. W. 585.

³ See § 1065.

⁴ Harris v. Visscher, 57 Ga. 229; Mayfield v. Turner, 180 Ill. 332; 54 N. E. 418.

⁵ Chambers v. Sloan, 19 Ga. 84, 85.

⁶ Gibbs's Estate, 157 Pa. St. 59; 22 L. R. A. 276; 27 Atl. 383.

⁷ Jones v. Davies, 60 Kan. 309; 72 Am. St. Rep. 354; 56 Pac. 484.

the date of the making is held to be within the statute of frauds in some jurisdictions and unenforceable with reference to its duration.⁸ The contract of partnership may be implied from the conduct of the parties.⁹ It may include a single transaction¹⁰ as well as an extended series of transactions.

As between the parties the question of partnership is one of intention, being in the first instance a question of fact,¹¹ but when the facts are conceded or established, a question of law.¹² If the parties enter into a relationship which the law holds to be a partnership they are partners although they may not have known the legal effect of their acts,¹³ or though they may have called the contract one of employment.¹⁴ A partnership is not an artificial person at law. Its liability exists only

⁸ *Wahl v. Barnum*, 116 N. Y. 87; 5 L. R. A. 623; 22 N. E. 280.

⁹ *Haug v. Haug*, 90 Ill. App. 604; *Hallenback v. Rogers*, 57 N. J. Eq. 199; 40 Atl. 576; affirmed, 58 N. J. Eq. 580; 43 Atl. 1098; *William Deering, etc., Co. v. Coberly*, 44 W. Va. 606; 29 S. E. 512. An actual partnership in which the partnership contract is inferred as a fact from the conduct of the parties must be distinguished from those cases where there is no partnership, but the persons have estopped themselves from denying its existence.

See § 950 *et seq.*

¹⁰ *Winstanley v. Gleyre*, 146 Ill. 27; 34 N. E. 628; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Pennybacker v. Leary*, 65 Ia. 220; 21 N. W. 575; *Richards v. Grinnell*, 63 Ia. 44; 50 Am. Rep. 727; 18 N. W. 668; *Jones v. Davies*, 60 Kan. 309; 72 Am. St. Rep. 354; 56 Pac. 484; *Simpson v. Tenney*, 41 Kan. 561; 21 Pac. 634; *Hunter v. Whitehead*, 42 Mo. 524; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Yeoman v. Lasley*, 40 O. S. 190; *Hulett v. Fairbanks*, 40 O. S. 233; *Spencer v. Jones*, 92 Tex. 516; 71

Am. St. Rep. 870; 50 S. W. 118; *Canada v. Barksdale*, 76 Va. 899.

¹¹ *Adamson v. Guild*, 177 Mass. 331; 58 N. E. 1081; *Densmore v. Mathews*, 58 Mich. 616; 26 N. W. 146; *Seabury v. Bolles*, 51 N. J. L. 103; 11 L. R. A. 136; 16 Atl. 54; *Spencer v. Jones*, 92 Tex. 516; 71 Am. St. Rep. 870; 50 S. W. 118.

¹² *Morgan v. Farrel*, 58 Conn. 413; 18 Am. St. Rep. 282; 20 Atl. 614; *Schmidt v. Balling*, 91 Ill. App. 388; *Janney v. Springer*, 78 Ia. 617; 16 Am. St. Rep. 460; 43 N. W. 461; *Kingsbury v. Thorp*, 61 Mich. 216; 28 N. W. 74; *Farmers' Ins. Co. v. Ross*, 29 O. S. 429.

¹³ *Chapman v. Hughes*, 104 Cal. 302; 37 Pac. 1048; 38 Pac. 109; *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217; 27 L. R. A. 126; 16 So. 601; *Jones v. Davies*, 60 Kan. 309; 72 Am. St. Rep. 354; 56 Pac. 484; *Magovern v. Robertson*, 116 N. Y. 61; 5 L. R. A. 589; 22 N. E. 398; *Spaulding v. Stubbings*, 86 Wis. 255; 39 Am. St. Rep. 888; 56 N. W. 469.

¹⁴ *Cameron v. Ry.*, 108 La. 83; 32 So. 208.

through the liability of its partners. Without statutory authority it cannot be sued in its firm name.¹⁵ A statute allowing a suit against a firm by the firm name does not destroy the Common Law right to sue the individual.¹⁶

§938. Name of partnership.

A partnership may, in the absence of statutory provision, transact business under an arbitrary or fictitious name.¹ Some statutes forbid a partnership to use a name which will deceive the general public as to the identity of the members of the partnership.² Under many of the statutes allowing a firm to sue in its firm name it must file a certificate with some specified officer showing the true names of the partners.³ This statute does not apply to a firm whose name shows the surnames of its partners,⁴ or to a foreign partnership which has no place of doing business within the state.⁵ A partnership having a fictitious name must file a new certificate on a change in membership, or it cannot take a cognovit judgment.⁶

§939. Joint ownership.

The real test of the existence of a partnership is a community of interest in the partnership business. Joint ownership¹ or a

¹⁵ Fox v. Grocery Co. (Ky.), 60 S. W. 414.

¹⁶ Davidson v. Knox, 67 Cal. 143; 7 Pac. 413; Sawyer v. Armstrong, 23 Colo. 287; 47 Pac. 391; Craig v. Smith, 10 Colo. 220; 15 Pac. 337; Peabody v. Oleson, 15 Colo. App. 346; 62 Pac. 234.

¹ Winship v. Bank, 5 Pet. (U. S.) 529; Manufacturers', etc., Bank v. Winship, 5 Pick. (Mass.) 11; 16 Am. Dec. 369; Holbrook v. Ins. Co., 25 Minn. 229; Kelley v. Bourne, 15 Or. 476; 16 Pac. 40.

² Gay v. Seibold, 97 N. Y. 472; 49 Am. Rep. 533; Zimmerman v. Erhard, 83 N. Y. 74; 38 Am. Rep. 396.

³ Calvert v. Newberger, 20 Ohio C. C. 353; 11 Ohio C. D. 184.

⁴ Carlock v. Cognacci, 88 Cal. 600; 26 Pac. 597; Pendleton v. Cline, 85 Cal. 142; 24 Pac. 659; Guiterman v. Wishon, 21 Mont. 458; 54 Pac. 566; Czatt v. Case, 61 O. S. 392; 55 N. E. 1004.

⁵ Swope v. Burnham, 6 Okla. 736; 52 Pac. 924.

⁶ Cobble v. Bank, 63 O. S. 528; 59 N. E. 221.

¹ Anaconda, etc., Co. v. Mining Co., 17 Mont. 519; 43 Pac. 924; State Bank v. Kelley Co., 47 Neb. 678; 66 N. W. 619; rehearing, 49 Neb. 242; 68 N. W. 481; Dunham v. Loverock, 158 Pa. St. 197; 38

joint leasing² of property does not constitute a partnership. So a partnership was not formed where the owner of property transferred it to others to enable them to form a corporation, stock in which was to be part consideration for the property.³ So a communistic society owning all property in common but not carrying on any business is not a partnership.⁴

§940. Sharing profits.

Sharing profits and losses is so usual an attribute of a partnership that it is implied from the relationship, and there need not be an express agreement to share losses.¹ An agreement to share losses is implied from a contract to share net profits.² So where A is to furnish capital, B to furnish labor, and both to share in the profits, a sharing of losses is implied.³ By express contract, however, there may be a partnership in which there is no sharing of losses.⁴ Conversely, if the contract provides for a sharing in profits and losses in business it is *prima facie* a partnership contract.⁵ However, as the question is one of the intention of the parties, it is not safe to make even this an arbitrary test. If there is no community of interest in the business transaction, mere sharing of profits and losses by special contract does not constitute a partnership;⁶ as where A,

Am. St. Rep. 838; 27 Atl. 990; Strickley v. Hill, 22 Utah 257; 83 Am. St. Rep. 786; 62 Pac. 893; Fish v. Thompson, 68 Vt. 273; 35 Atl. 174; Ferguson v. Gooch, 94 Va. 1; 40 L. R. A. 234; 26 S. E. 397.

² Outison v. Edmonds, 15 Wash. 362; 46 Pac. 398.

³ Mosier v. Parry, 60 O. S. 388; 54 N. E. 364.

⁴ Teed v. Parsons, 202 Ill. 455; 66 N. E. 1044; reversing, 100 Ill. App. 342.

⁵ Gates v. Johnson, 56 Neb. 808; 77 N. W. 407.

⁶ Johnson v. Carter, 120 Ia. 355; 94 N. W. 850.

⁷ Dow v. Dempsey, 21 Wash. 86; 57 Pac. 355.

⁴ Leeds v. Townsend, 89 Ill. App. 646; Jones v. Murphy, 93 Va. 214; 24 S. E. 825.

⁵ Straus v. Kohn, 83 Ill. App. 497; Atchinson, etc., Ry. v. Hucklebridge, 62 Kan. 506; 64 Pac. 58; Noyes v. Tootle, 2 Ind. Ter. 144; 48 S. W. 1031; Hart v. Hiatt, 2 Ind. Ter. 245; 48 S. W. 1038; Winter v. Pipber, 96 Ia. 17; 64 N. W. 663; Bryan v. Bullock, 119 N. C. 193; 25 S. E. 865; Commercial Bank v. Miller, 96 Va. 357; 31 S. E. 812; Smith v. Putnam, 107 Wis. 155; 82 N. W. 1077; rehearing denied, 83 N. W. 288.

⁶ National Surety Co. v. Townsend, etc., Co., 176 Ill. 156; 52 N. E. 938; affirming, 74 Ill. App. 312.

the owner of a farm and the implements thereon, leased it to B, who was to manage it, A to have two-thirds of the profits or pay two-thirds of the losses, B the other third.⁷ So one partner's sharing profits and losses with a stranger does not make him a partner.⁸ An agreement to share profits alone is *prima facie* a partnership contract, though the inference is not as strong as from a sharing of both profits and losses.⁹ At English Law an attempt was made to distinguish between a compensation equal to a share of the profits, and a share of the profits as profits, holding a partnership always to exist in the latter case as a matter of law.¹⁰ This arbitrary distinction was overthrown in England;¹¹ and at Modern Law contracting for a sharing of profits does not constitute a partnership if the parties do not intend a community of interest.¹² Thus a promise to pay a cer-

⁷ Bradley v. Ely, 24 Ind. App. 2; 79 Am. St. Rep. 251; 56 N. E. 44.

⁸ O'Connor v. Sherley, 107 Ky. 70; 52 S. W. 1056.

⁹ Paul v. Cullum, 132 U. S. 539; London, etc., Corp. v. Drennen, 116 U. S. 461; Beauregard v. Case, 91 U. S. 134; Pleasants v. Fant, 22 Wall. (U. S.) 116; Tyler v. Wad- dingham, 58 Conn. 375; 8 L. R. A. 657; 20 Atl. 335; Dame v. Kemp- ster, 146 Mass. 454; 15 N. E. 927; Torbert v. Jeffrey, 161 Mo. 645; 61 S. W. 823; Fourth National Bank v. Altheimer, 91 Mo. 190; 3 S. W. 858; First National Bank v. Gal- laudet, 122 N. Y. 655; 25 N. E. 909; Southern Fertilizer Co. v. Reams, 105 N. C. 283; 11 S. E. 467; Cos- sock v. Burgwyn, 112 N. C. 304; 16 S. E. 900; Sawyer v. Bank, 114 N. C. 13; 18 S. E. 949; Wood v. Vallette, 7 O. S. 172; First Na- tional Bank v. Ballard, 19 Ohio C. C. 63; 10 Ohio C. D. 298; Wessels v. Weiss, 166 Pa. St. 490; 31 Atl. 247; Walker v. Tupper, 152 Pa. St. 1; 25 Atl. 172; Wipperman v. Stacy, 80 Wis. 345; 50 N. W. 336; Spauld-

ing v. Stubbings, 86 Wis. 255; 39 Am. St. Rep. 888; 56 N. W. 469.

¹⁰ Waugh v. Carver, 2 H. Bl. 235.

¹¹ Cox v. Hickman, 8 H. L. Cas. 268.

¹² Cox v. Hickman, 8 H. L. Cas. 268; Wilson v. Edmonds, 130 U. S. 472; Meehan v. Valentine, 145 U. S. 611; Johnson v. Rothschilds, 63 Ark. 518; 41 S. W. 996; Cadenasso v. Antonelle, 127 Cal. 382; 59 Pac. 765; Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425; Coward v. Clanton, 122 Cal. 451; 55 Pac. 147; Butler v. Hinckley, 17 Colo. 523; 30 Pac. 250; Morton v. Nelson, 145 Ill. 586; 32 N. E. 916; Grinton v. Strong, 148 Ill. 587; 36 N. E. 559; Gottschalk v. Smith, 156 Ill. 377; 40 N. E. 937; Clark v. Barnes, 72 Ia. 563; 34 N. W. 419; Porter v. Curtis, 96 Ia. 539; 65 N. W. 824; Winter v. Pipher, 96 Ia. 17; 64 N. W. 663; Leonard v. Sparks, 109 La. 543; 33 So. 594; McWilliams v. Elder, 52 La. Ann. 995; 27 So. 352; Drovers', etc., Bank v. Roller, 85 Md. 495; 60 Am. St. Rep. 344; 36 L. R. A. 767; 37 Atl. 30; Wild v.

tain percentage of profits for the use of a machine¹³ or of a manufacturing plant,¹⁴ or for a lease of property,¹⁵ or for services rendered in the business,¹⁶ as for managing and selling land,¹⁷ or for services and the use of a patent-right,¹⁸ or for sawing logs for another,¹⁹ or cutting and rafting logs,²⁰ or for selling cross-ties for another,²¹ or to share commissions for customers furnished,²² are none of them partnership contracts if the ele-

Davenport, 48 N. J. L. 129; 57 Am. Rep. 552; 7 Atl. 295; Whiting v. Leakin, 66 Md. 255; 7 Atl. 688; Murphy v. Craig, 76 Mich. 155; 42 N. W. 1097; Clifton v. Howard, 89 Mo. 192; 58 Am. Rep. 97; 1 S. W. 26; Kellogg Newspaper Co. v. Farrell, 88 Mo. 594; Breman Savings Bank v. Saw Co., 104 Mo. 425; 16 S. W. 209; Congdon v. Olds, 18 Mont. 487; 46 Pac. 261; Whitney v. Bank, 50 Neb. 438; 69 N. W. 933; Etna Ins. Co. v. Bank, 48 Neb. 544; 67 N. W. 449; Eastman v. Clark, 53 N. H. 276; 16 Am. Rep. 192; Jernee v. Simonson, 58 N. J. Eq. 282; 43 Atl. 370; Seabury v. Bolles, 51 N. J. L. 103; 11 L. R. A. 136; 16 Atl. 54; Wild v. Davenport, 48 N. J. L. 129; 57 Am. Rep. 552; 7 Atl. 295; Grapel v. Hodges, 112 N. Y. 419; 20 N. E. 542; Waverly National Bank v. Hall, 150 Pa. St. 466; 30 Am. St. Rep. 823; 24 Atl. 665; Dunham v. Loverock, 158 Pa. St. 197; 38 Am. St. Rep. 838; 27 Atl. 990; Butler Savings Bank v. Osborne, 159 Pa. St. 10; 39 Am. St. Rep. 665; 28 Atl. 163; Taylor v. Fried, 161 Pa. St. 53; 28 Atl. 993; Ryder v. Jacobs, 182 Pa. St. 624; 38 Atl. 471; Brown v. Watson, 72 Tex. 216; 10 S. W. 395; Riedeburg v. Schmitt, 71 Wis. 644; 38 N. W. 336.

¹³ Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425.

¹⁴ Thornton v. McDonald, 108 Ga. 3; 33 S. E. 680.

¹⁵ Bradley v. Ely, 24 Ind. App.

2; 79 Am. St. Rep. 251; 56 N. E. 44; Garrett v. Publishing Co., 61 Neb. 541; 85 N. W. 537; Austin v. Neil, 62 N. J. L. 462; 41 Atl. 834; Wormser v. Lindauer, 9 N. M. 23; 49 Pac. 896; State v. Sanders, 52 S. C. 580; 30 S. E. 616; Houston, etc., Co. v. McFadden, 91 Tex. 194; 40 S. W. 216; 42 S. W. 593.

¹⁶ Gulf, etc., Co. v. Boyles, 129 Ala. 192; 29 So. 800; Johnson v. Carter, 120 Ia. 355; 94 N. W. 850; Morrow v. Murphy, 120 Mich. 204; 79 N. W. 193; modified, 80 N. W. 255; Canton Bridge Co. v. Eaton Rapids, 107 Mich. 613; 65 N. W. 761; Stone v. Mfg. Co., 65 N. J. L. 20; 46 Atl. 696; Cornell v. Redrow, 60 N. J. Eq. 251; 47 Atl. 56; Kootz v. Tuvian, 118 N. C. 393; 24 S. E. 776; Murray City Ginning Co. v. Bank (Tex. Civ. App.), 61 S. W. 508.

¹⁷ Coward v. Clanton, 122 Cal. 451; 55 Pac. 147; Mayfield v. Turner, 180 Ill. 332; 54 N. E. 418; Grigsby v. Day, 9 S. D. 585; 70 N. W. 881.

¹⁸ Warwick v. Stockton, 55 N. J. Eq. 61; 36 Atl. 488.

¹⁹ Hodges v. Rogers, 115 Ga. 951; 42 S. E. 251.

²⁰ Gore v. Benedict (Tenn. Ch. App.), 61 S. W. 1054.

²¹ Padgett v. Ford, 117 Ga. 508; 43 S. E. 1002.

²² Wheeler v. Lack, 37 Or. 238; 61 Pac. 849.

ments of community of interest and common control of business are lacking. A loan of money for use in partnership business,²³ even if a percentage of the profits is given therefor²⁴ and the lender gives advice,²⁵ or manages the business as an agent,²⁶ or leases a fishery and lends money to operate it for one-half of the net proceeds as rental,²⁷ none of them constitute the lender a partner. So a contract to indemnify against a certain per cent. of loss in consideration of a corresponding per cent. of the profits is not a partnership.²⁸ So a contract by which one furnishes logs and the other saws them into lumber and they divide the lumber²⁹ or the profits³⁰ is not a partnership. If, however, there is a community of interest in the capital of the business the transaction creates a partnership,³¹ even if the transaction assumes the outward form of a loan.³² So contracts between A and B whereby A is to buy goods of certain kinds and B is to sell them, are held to create partnerships whether profits alone³³ or both profits and losses³⁴ are to be shared. But

²³ Johnson v. Carter, 120 Ia. 355; 94 N. W. 850; Richardson v. Carlton, 109 Ia. 515; 80 N. W. 532; Krall v. Forney, 182 Pa. St. 6; 37 Atl. 846.

²⁴ *In re Young* (1896), 2 Q. B. 484; King v. Whichelow, 64 L. J. Q. B. N. S. 801; Meehan v. Valentine, 145 U. S. 611; Randle v. Barnard, 81 Fed. 682; Thillman v. Benton, 82 Md. 64; 33 Atl. 485; Clayton v. Davett (N. J. Ch.), 38 Atl. 308; State v. Hunt, 25 R. I. 69; 54 Atl. 937. *Contra*, Rahl v. Orendorff Co., 27 Tex. Civ. App. 72; 64 S. W. 1007.

²⁵ Page v. Simpson, 188 Pa. St. 393; 68 Am. St. Rep. 874; 41 Atl. 638.

²⁶ *In re Young* (1896), 2 Q. B. 484.

²⁷ Hanthorn v. Quinn, 42 Or. 1; 69 Pac. 817.

²⁸ Haines's Estate, 176 Pa. St. 354; 35 Atl. 237.

²⁹ Thornton v. George, 108 Ga. 9; 33 S. E. 633.

³⁰ (A share of profits for sawing logs, drying lumber and shipping it.) J. A. Fay, etc., Co. v. Ouachita, etc., Co., 51 La. Ann. 1708; 26 So. 386. *Contra*, where one was to furnish logs, the other to saw them, and the profits to be divided. Loveland v. Peter, 108 Mich. 154; 65 N. W. 748.

³¹ Huggins v. Huggins, 117 Ga. 151; 43 S. E. 759; Snyder v. Lindsey, 157 N. Y. 616; 52 N. E. 592; Orvis v. Curtiss, 157 N. Y. 657; 68 Am. St. Rep. 810; 52 N. E. 690; rehearing denied, 53 N. E. 1129.

³² Johnson v. Rothschilds, 63 Ark. 518; 41 S. W. 996. Citing Pooley v. Driver, L. R. 5 Ch. Div. 458; Dubos v. Jones, 34 Fla. 539; 16 So. 392; Harvey v. Childs, 28 O. S. 319; 22 Am. Rep. 387.

³³ Torbert v. Jeffrey, 161 Mo. 645; 61 S. W. 823.

³⁴ Atchison, etc., Ry. v. Hucklebridge, 62 Kan. 506; 64 Pac. 58.

a contract whereby A sells land to B, and C is to erect certain car-shops on part of it, and on resale the profits are to be divided between B and C, does not create a partnership. A cannot, therefore, hold C for the purchase price of the realty.³⁵ Sharing in gross receipts is not a partnership,³⁶ as where A trained B's horses, and they divided the winnings.³⁷ So the ordinary form of a contract between a depot company and a railroad company,³⁸ or between connecting carriers,³⁹ does not constitute a partnership.

§941. Examples of partnership.

A partnership is formed by a combination of two land-owners to sell the timber off their lands,¹ or to sell land,² or where one is to furnish money to manufacture an article patented by the other,³ or where one is to furnish estimates and iron for bridges and the other is to furnish other material and work and solicit orders,⁴ or where two attorneys take specified cases together, and assume the costs and divide the profits.⁵ But an agreement between A and B, attorneys, on the one part, and C, a client, on the other, whereby A and B were to manage certain litigation for C, C to pay costs, expenses and fees, and A and B to divide the fees, does not constitute A and B partners.⁶ So creditors of an insolvent partnership who allowed the business to be carried on to make a profit for them were held as partners.⁷ A

³⁵ Hughes v. Ewing, 162 Mo. 261; 55 L. R. A. 481; 52 S. W. 301.
62 S. W. 465.

³⁶ Shrum v. Simpson, 155 Ind. 160; 49 L. R. A. 792; 57 N. E. 708.

(a cropping contract); Concannon v. Rose, 9 Kan. App. 791; 59 Pac. 729; Beecher v. Bush, 45 Mich. 188; 40 Am. Rep. 465; 7 N. W. 785; McArthur v. Ladd, 5 Ohio 514; Cedarberg v. Guernsey, 12 S. D. 77; 80 N. W. 159.

³⁷ Stone v. Supply Co., 103 Ky. 318; 45 S. W. 78.

³⁸ Brady v. Ry., 114 Fed. 100; 57 L. R. A. 712.

³⁹ Post v. R. R., 103 Tenn. 184; 55 L. R. A. 481; 52 S. W. 301.

¹ Tanner v. Hughes (Ky.), 50 S. W. 1099.

² Cronkrite v. Trexler, 187 Pa. St. 100; 41 Atl. 22.

³ Illinois, etc., Co. v. Reed, 102 Ia. 538; 71 N. W. 423.

⁴ Clinton, etc., Works v. Bank, 103 Wis. 117; 79 N. W. 47.

⁵ Southworth v. People, 183 Ill. 621; 56 N. E. 407; affirming, 85 Ill. App. 289.

⁶ Willis v. Crawford, 38 Or. 522; 53 L. R. A. 904; 64 Pac. 866; 63 Pac. 985.

⁷ Webb v. Hicks, 123 N. C. 244;

voluntary association of dredgers to fix prices and divide up work is not a partnership.⁸

§942. Limited partnerships.

Statutes of many states provide for limited partnerships, in which one partner is the general partner, personally liable for all the firm's debts, while the others are special partners, liable only for the amount contributed by them.¹ The statute in such cases provides fully for filing a certificate showing the facts about the limited partnership and for publication as a means of giving notice. An attempted limited partnership which does not comply fully with the statute is a general partnership,² as where publication is omitted,³ or the statutory statement is omitted,⁴ or does not show the value of the contribution of the special partner as required by statute,⁵ or is false, as where it omits a mortgage,⁶ or where it recites that a partner's share is paid in when it is not paid in for a week thereafter.⁷ An attempted limited partnership becomes a general partnership where the assets on renewal were substantially less than at the original formation,⁸ or where assets of the old partnership are taken of such a value that it does not leave enough to pay old debts and the new firm assumes some of such debts,⁹ or where all the property of the old insolvent partnership was set aside as the property of the special partner.¹⁰ A limited partnership be-

31 S. E. 479 [citing, *Talloe v. Bush*, 75 Ala. 432; *Hitchings v. Ellis*, 12 Gray (Mass.) 449]. *Contra*, *Fewell v. Surety Co.*, 80 Miss. 782; 92 Am. St. Rep. 625; 28 So. 755.

⁸ *Potter v. Dredging Co.*, 59 N. J. Eq. 422; 46 Atl. 537.

¹ *Robbins Electric Co. v. Weber*, 172 Pa. St. 635; 34 Atl. 116.

² *Van Horne v. Corcoran*, 127 Pa. St. 255; 4 L. R. A. 386; 18 Atl. 16; *Ussery v. Crusman* (Tenn. Ch. App.), 47 S. W. 567.

³ *Davis v. Sanderlin*, 119 N. C. 84; 25 S. E. 815.

⁴ *Spencer, etc., Co. v. Johnson*, 53 S. C. 533; 31 S. E. 392.

⁵ *Blumenthal v. Whitaker*, 170 Pa. St. 309; 33 Atl. 103 (where a reference to an appraisal of such contribution filed in court was held insufficient).

⁶ *First National Bank v. Creveling*, 177 Pa. St. 270; 35 Atl. 595.

⁷ *Myers v. Electric Co.*, 59 N. J. L. 153; 35 Atl. 1069.

⁸ *Durgin v. Colburn*, 176 Mass. 110; 57 N. E. 213.

⁹ *Lee v. Burnley*, 195 Pa. St. 58; 45 Atl. 668.

¹⁰ *Fourth Street National Bank v. Whitaker*, 170 Pa. St. 297; 33 Atl. 100.

comes a general partnership on expiration of the time for which it was formed.¹¹ But under a statute allowing a limited partnership to succeed to a firm name it may succeed to the name of one who becomes a limited partner, even if without such succession the use of his name would have made him a general partner.¹²

§943. Joint stock companies.

A partnership may by agreement issue stock and thus resemble a corporation in outward form without losing any of the essential attributes of a partnership.¹

§944. Scope of partnership.

The scope of a partnership is primarily a question of the intention of the partners. There is no restriction on the exercise of such powers as it chooses at any time to exercise, except such prohibitions on illegal, immoral or fraudulent conduct as apply equally to individuals.¹ A partnership may itself be a member of another firm if the partners of the constituent firm consent thereto.² If it appears that all the partners have either authorized or ratified the contract, no further question as to its validity ordinarily remains. The cases where the question of the validity of partnership contracts arises is where one partner has made the contract without specific authority from his co-part-

¹¹ *Sarmiento v. The Catharine C.*, 110 Mich. 120; 67 N. W. 1085.

¹² *Groves v. Wilson*, 168 Mass. 370; 47 N. E. 100.

¹ *Wadsworth v. Duncan*, 164 Ill. 360; 45 N. E. 132; *Hodgson v. Baldwin*, 65 Ill. 532; *Kenyon v. Williams*, 19 Ind. 44; *Edwards v. Gasoline Works*, 168 Mass. 564; 38 L. R. A. 791; 47 N. E. 502; *Farnum v. Patch*, 60 N. H. 294; 49 Am. Rep. 313; *Carter v. McClure*, 98 Tenn. 109; 60 Am. St. Rep. 842; 36 L. R. A. 282; 38 S. W. 585; *Willis v. Chapman*, 68 Vt. 459; 35 Atl. 459.

A partnership is not a "corporation, joint-stock company, or association, or acting corporation or association" for purposes of serving summons. *In re Grossmayer*, 177 U. S. 48, 50.

² In this respect it differs sharply from corporations. See § 1067 *et seq.*

² *Willson v. Morse*, 117 Ia. 581; 91 N. W. 823; *Meador v. Hughes*, 14 Bush (Ky.) 652; *McLaughlin v. Mulloy*, 14 Utah 490; 47 Pac. 1031; *Commercial Bank v. Miller*, 96 Va. 357; 31 S. E. 812.

ners. As to their implied scope partnerships may be divided into the classes of the non-trading and the trading. Some powers can be exercised by partners in partnership of either type. Thus a partner may retain an attorney to protect the interests of the firm.³

§945. Liability of partners on contract within scope of business.

Liability to third persons on partnership contracts arises from the actual existence of the partnership in question, by express acquiescence, by ratification and by estoppel. If a partnership exists in fact, the partners are liable on contracts made within the scope of the partnership business by any one of the partners, if the adversary party knows of no limitation on his authority,¹ even where the adversary party did not know who such partners were when he entered into such contract.² If the contract is within the actual scope of the partnership business, the members are liable thereon, without any reference to principles of estoppel.³ Thus if a partner has authority to obtain certain information the partnership is liable for acts done by him to obtain such information.⁴ Illustrations of the power of a partner to bind the firm within the general scope of its business are given in subsequent sections.⁵

³ Tomlinson v. Broadsmith (1896), 1 Q. B. 386.

¹ Flagg v. Stowe, 85 Ill. 164; Baxter v. Rollins, 90 Ia. 217; 48 Am. St. Rep. 432; 57 N. W. 838; Warren v. French, 6 All. (Mass.) 317; Mace v. Heath, 30 Neb. 620; 46 N. W. 918; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733.

² Blanchard v. Kaull, 44 Cal. 440; Bigelow v. Gregory, 73 Ill. 197; Coleman v. Coleman, 78 Ind. 344; Kaiser v. Bank, 56 Ia. 104; 41 Am. Rep. 85; 8 N. W. 772; Johnson v. Carter, 120 Ia. 355; 94 N. W. 850; Parrish v. Maupin (Ky.), 42 S. W. 1121; Holbrook v. Ins. Co., 25 Minn.

229; Weir Furnace Co. v. Bodwell, 73 Mo. App. 389; Jones v. Beekman (N. J. Eq.), 47 Atl. 71; Central, etc., Bank v. Walker, 66 N. Y. 424; Ash v. Guie, 97 Pa. St. 493; 39 Am. Rep. 818; Harrod v. Hamer, 32 Wis. 162.

³ Chicago, etc., Bank v. Kinnare, 174 Ill. 358; 51 N. E. 607; reversing, 67 Ill. App. 186; Slater v. Clark, 68 Ill. App. 433; Patterson v. Swickard (Ky.), 41 S. W. 435; Vetsch v. Neiss, 66 Minn. 459; 69 N. W. 315.

⁴ Hamlyn v. Houston (1903), 1 K. B. 81.

⁵ See §§ 946, 947.

§946. Non-trading firms.

A partner in a non-trading firm has very limited power to bind the partnership. A partner in a non-trading firm may contract for supplies,¹ but he cannot otherwise contract firm debts,² and he cannot give the firm's note even for the firm's debt, so as to bind his partners if they object thereto.³ Thus a member of a law firm cannot borrow money for the firm,⁴ or bind the firm by a note,⁵ or agree to collect a note without charge,⁶ or be a constructive trustee so as to charge his partner with knowledge.⁷ So one of a firm of solicitors cannot allow a third person to use the firm name.⁸ A member of a mining partnership has not general power to bind his partners.⁹ So a member of a firm of physicians,¹⁰ publishers,¹¹ or planters,¹²

¹ *McPherson v. Bristol*, 122 Mich. 351; 81 N. W. 254.

² *Schellenbeck v. Studebaker*, 13 Ind. App. 437; 55 Am. St. Rep. 240; 41 N. E. 845; *Breckinridge v. Shrieve*, 4 Dana (Ky.) 375; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757.

³ *Dowling v. Bank*, 145 U. S. 512; *Teed v. Parsons*, 202 Ill. 455; 66 N. E. 1044; reversing, 100 Ill. App. 342; *Schellenbeck v. Studebaker*, 13 Ind. App. 437; 55 Am. St. Rep. 240; 41 N. E. 845; *Lee v. Bank*, 45 Kan. 8; 11 L. R. A. 238; 25 Pac. 196; *Harris v. Baltimore*, 73 Md. 22; 25 Am. St. Rep. 565; 8 L. R. A. 677; 17 Atl. 1046; 20 Atl. 111, 985; *McPherson v. Bristol*, 115 Mich. 258; 73 N. W. 236; *Stavnow v. Kenefick*, 79 Mo. App. 41; *National, etc., Bank v. Noyes*, 62 N. H. 35; *Walker v. Walker*, 66 Vt. 285; 29 Atl. 146; *Snively v. Matheson*, 12 Wash. 88; 50 Am. St. Rep. 877; 40 Pac. 628; *Smith v. Sloan*, 37 Wis. 285; 19 Am. Rep. 757.

⁴ *Worster v. Forbush*, 171 Mass. 423; 50 N. E. 936.

⁵ *Hedley v. Bainbridge* 3 Q. B.

316; *Garland v. Jacomb*, L. R. 8 Exch. 216; *Levy v. Pyne*, Car. & M. 453; *Breckinridge v. Shrieve*, 4 Dana (Ky.) 375.

⁶ *Davis v. Dodson*, 95 Ga. 718; 51 Am. St. Rep. 108; 29 L. R. A. 496; 22 S. E. 645. (Hence if he misappropriates the money, the firm is not liable.)

⁷ *Mara v. Browne* (C. A.) (1896), 1 Ch. 199.

⁸ *Marsh v. Joseph* (C. A.) (1897), 1 Ch. 213.

⁹ *McConnell v. Denver*, 35 Cal. 365; 95 Am. Dec. 107; *Skillman v. Lachman*, 23 Cal. 199; 83 Am. Dec. 96; *Patrick v. Weston*, 22 Colo. 45; 43 Pac. 446; *Judge v. Brasewell*, 13 Bush (Ky.) 67; *Congdon v. Olds*, 18 Mont. 487; 46 Pac. 261; *Waldron v. Hughes*, 44 W. Va. 126; 29 S. E. 505.

¹⁰ *Crosthwait v. Ross*, 1 Humph. (Tenn.) 23; 34 Am. Dec. 613.

¹¹ *Pooley v. Whitmore*, 10 Heisk. (Tenn.) 629; 27 Am. Rep. 733.

¹² *Benton v. Roberts*, 4 La. Ann. 216; *Prince v. Crawford*, 50 Miss. 344.

cannot bind the firm by a note. A firm engaged in the business of contracting and building,¹³ or digging tunnels,¹⁴ or in paving and curbing streets,¹⁵ or in keeping a tavern,¹⁶ or in milling,¹⁷ is a non-trading firm.

§947. Trading firms.

A member of a trading firm may bind his firm by borrowing money on their behalf,¹ especially if the partnership has acquiesced in similar loans on former occasions,² and giving their note,³ or making drafts for them,⁴ even if the money thus advanced in good faith is in fact diverted by the borrowing partner.⁵ So where A indorsed a note for a firm, in good faith, though the proceeds were not applied to the firm's debts, and A had to pay the note, he may recover from the firm.⁶ A partner may give a chattel mortgage.⁷ A partner cannot bind the firm by accommodation paper,⁸ or by a contract of guaranty,⁹ nor by

¹³ *Snively v. Matheson*, 12 Wash. 88; 50 Am. St. Rep. 877; 40 Pac. 628.

¹⁴ *Gray v. Ward*, 18 Ill. 32.

¹⁵ *Harris v. Baltimore*, 73 Md. 22; 25 Am. St. Rep. 565; 8 L. R. A. 577; 17 Atl. 1046; 20 Atl. 111, 985.

¹⁶ *Cocke v. Bank*, 3 Ala. 175.

¹⁷ *Lanier v. McCabe*, 2 Fla. 32; 48 Am. Dec. 173.

¹ *First National Bank v. Grignon*, 7 Ida. 646; 65 Pac. 365.

² *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199; 66 Pac. 1058. (A loan by a brewery to a saloon, borrowed to cash miners' checks.)

³ *Morris v. Maddox*, 97 Ga. 575; 25 S. E. 487; *First National Bank v. Grignon*, 7 Ida. 646; 65 Pac. 365; *Dickson v. Dryden*, 97 Ia. 122; 66 N. W. 148; *Carter v. Steele*, 83 Mo. App. 211.

⁴ *Farmer v. Bank (Ky.)*, 51 S. W. 586.

⁵ *Dowling v. Bank*, 145 U. S. 512; *Winship v. Bank*, 5 Pet. (U. S.) 529; *Sherwood v. Snow*, 46 Ia. 481;

26 Am. Rep. 155; *Smith v. Collins*, 115 Mass. 388; *Stimson v. Whitney*, 130 Mass. 591; *Fuller v. Percival*, 126 Mass. 381; *Atlas National Bank v. Savery*, 127 Mass. 75; 34 Am. Rep. 345; *Reed v. Bacon*, 175 Mass. 407; 56 N. E. 716; *Stevens v. McLachlan*, 120 Mich. 285; 79 N. W. 627; *First National Bank v. Morgan*, 73 N. Y. 593; *Real Estate Investment Co. v. Smith*, 162 Pa. St. 441; 29 Atl. 855.

⁶ *Meyran v. Abel*, 189 Pa. St. 215; 69 Am. St. Rep. 806; 42 Atl. 122.

⁷ *Morris v. Hubbard*, 14 S. D. 525; 86 N. W. 25; *Rock v. Collins*, 99 Wis. 630; 67 Am. St. Rep. 885; 75 N. W. 426. But in Louisiana a partner must have express authority to execute a mortgage. *Kahn v. Becnel*, 108 La. 296; 32 So. 444.

⁸ *Union National Bank v. Wickham*, 18 Ohio C. C. 685; 6 Ohio C. D. 790.

⁹ *Kelley-Goodfellow Shoe Co. v. Lumber Co.*, 86 Mo. App. 438.

a note for a debt of their predecessors,¹⁰ nor by a note given for an individual debt in whole,¹¹ or in part,¹² even to prevent such creditor from reaching such partner's interest in such firm,¹³ nor can he give a note in renewal of a debt from which the firm has been released by failure to protest,¹⁴ nor can he give a note due at once for debt not yet due.¹⁵ Ordinarily he cannot assume debts of others,¹⁶ or bind the firm for his own debt,¹⁷ and he cannot pay individual debts with firm money,¹⁸ or prefer individual debts in assignment,¹⁹ or mortgage firm property for an individual debt,²⁰ nor can he bind the firm by a promise to indemnify a surety,²¹ though he may bind the firm as surety on their own debt.²² Thus he may guarantee a note sold by them,²³ or may buy a stock of goods and assume debts against it, in order to secure their own debt,²⁴ or may give a mortgage to secure a firm debt, even though the notes of individual partners were originally given therefor.²⁵ He cannot confess judgment against the firm,²⁶ though as such judgment is voidable only at

¹⁰ *Broughton v. Sumner*, 80 Mo. App. 386.

¹¹ *Terry v. Platt*, 1 Penn. (Del.) 185; 40 Atl. 243; *Cody v. Bank*, 103 Ga. 789; 30 S. E. 281; *McRae v. Campbell*, 101 Ga. 662; 28 S. E. 920; *Brobston v. Penniman*, 97 Ga. 527; 25 S. E. 350.

¹² *Hatch v. Reid*, 112 Mich. 430; 70 N. W. 889; *Huttig, etc., Co. v. McMahon*, 81 Mo. App. 440.

¹³ *Durrell v. Staples*, 169 Mass. 49; 47 N. E. 441.

¹⁴ *Meyer v. Hegler*, 121 Cal. 682; 54 Pac. 271.

¹⁵ *McCord Co. v. Callaway*, 109 Ga. 796; 35 S. E. 171.

¹⁶ *Rice v. Jackson*, 171 Pa. St. 89; 32 Atl. 1936.

¹⁷ *Lewin v. Barry*, 15 Colo. App. 461; 63 Pac. 121 (for rent); *Talbott v. Plaster Co.*, 86 Mo. App. 558; *Woolson v. Fuller*, 71 Vt. 335; 45 Atl. 753 (for clothes).

¹⁸ *Columbia National Bank v. Rice*, 48 Neb. 428; 67 N. W. 165;

Brown v. Pettit, 178 Pa. St. 17; 56 Am. St. Rep. 742; 34 L. R. A. 723; 35 Atl. 865.

¹⁹ *Field v. Romero*, 7 N. M. 630; 41 Pac. 517.

²⁰ *McCord Co. v. Callaway*, 109 Ga. 796; 35 S. E. 171; *Johnson v. Shirley*, 152 Ind. 453; 53 N. E. 459; *Mansur, etc., Co. v. Ritchie*, 143 Mo. 587; 45 S. W. 634 (even if all partners concur—but see *Buchanan v. Bank* (Tenn. Ch. App.), 57 S. W. 207).

²¹ *Seeberger v. Wyman*, 108 Ia. 527; 79 N. W. 290.

²² *McLaughlin v. Mulloy*, 14 Utah 490; 47 Pac. 1031.

²³ *McNeal v. Gossard*, 6 Okla. 363; 50 Pac. 159.

²⁴ *National Bank v. Dickinson*, 107 Ala. 265; 18 So. 144.

²⁵ *West Coast Grocery Co. v. Stinson*, 13 Wash. 255; 43 Pac. 35.

²⁶ *Harper v. Cunningham*, 8 App. D. C. 430. *Contra*, *Adams v. Leeds Co.*, 195 Pa. St. 70; 45 Atl. 666.

the election of the partners, a creditor cannot attack it.²⁷ One partner cannot make a general assignment for the benefit of the firm's creditors if the other partners are accessible,²⁸ though he can if they have absconded.²⁹ He cannot mortgage all the property of the firm even for firm debts if the other partners are accessible,³⁰ but he may give a chattel mortgage on all the firm's property in the absence of his partners.³¹ He cannot execute a sealed instrument on behalf of the firm,³² even if a sealed instrument is negotiable by law in the state in which it is executed,³³ but if a seal is not necessary to its validity, it may be rejected as surplusage.³⁴ While a partner in a trading firm has power to sell property of the firm in the general course of the firm's business, he has no power to sell partnership property, the sale of which will make it practically impossible for the firm to continue in business.³⁵ Thus a member of a farming firm cannot sell the live stock and farming implements.³⁶ He cannot sell property of the firm in which it does not deal.³⁷ He can buy and sell such articles as are proper in the exercise of the business of the firm, and the firm is bound by such contract even if other partners have already sold all of such goods on hand.³⁸ He cannot buy, on speculation, articles in which the firm deals

²⁷ *Belcher v. Curtis*, 119 Mich. 1; 75 Am. St. Rep. 376; 77 N. W. 310; *McAlpin Co. v. Finsterwald*, 57 O. S. 524; 49 N. E. 784.

²⁸ *Parker v. Brown*, 85 Fed. 595; 29 C. C. A. 357; *Mills v. Miller*, 109 Ia. 688; 81 N. W. 169; *Loeb v. Pierpont*, 58 Ia. 469; 43 Am. Rep. 122; 12 N. W. 544; *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227; 20 Pac. 225; *Fox v. Curtis*, 176 Pa. St. 52; 34 Atl. 952.

²⁹ *Voshmik v. Urquhart*, 91 Wis. 513; 65 N. W. 60.

³⁰ *McGrath v. Cowen*, 57 O. S. 385; 49 N. E. 338; *McManus v. Smith*, 37 Or. 222; 61 Pac. 844.

³¹ *Beckman v. Noble*, 115 Mich. 523; 73 N. W. 803.

³² *Milwee v. Jay*, 47 S. C. 430;

25 S. E. 298; *Waldron v. Hughes*, 44 W. Va. 126; 29 S. E. 505.

³³ *Hull v. Young*, 30 S. C. 121; 3 L. R. A. 521; 8 S. E. 695.

³⁴ *Waldron v. Hughes*, 44 W. Va. 126; 29 S. E. 505.

³⁵ *Lowman v. Sheets*, 124 Ind. 416; 7 L. R. A. 784; 24 N. E. 351; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453; *Cayton v. Hardy*, 27 Mo. 536; *Phillips v. Thorp*, 12 Okla. 617; 73 Pac. 268.

³⁶ *Rutherford v. McDonnell*, 66 Ark. 448; 51 S. W. 1060. *Contra*, one partner may sell the entire stock, *Hetterman Bros. Co. v. Young* (Tenn. Ch. App.), 52 S. W. 532.

³⁷ *Pimpton v. Taylor*, 11 Ohio C. D. 570.

³⁸ *Bass Dry Goods Co. v. Mfg.*

regularly.³⁹ A member of a firm of cotton factors cannot make a valid sale of cotton for his firm on speculation.⁴⁰ He can compromise claims if in good faith,⁴¹ but not where the only consideration for such compromise is a personal advantage received by such partner.⁴² One partner cannot contract for liquidated damages,⁴³ or waive exemptions,⁴⁴ or bind his partner by representations as to property formerly owned by the firm which has been divided between the partners and has become individual property.⁴⁵ A member of a firm of real-estate brokers may agree to pay a commission to an agent acting for the firm in making sales,⁴⁶ or may revoke a contract to give his firm exclusive right to sell realty on commission in a certain time.⁴⁷ A partner of a firm in the bicycle business may give a note for a rubber and cement business;⁴⁸ a partner in a saw mill may contract to return borrowed lumber.⁴⁹ A partner in a stage line has no power to contract for mining;⁵⁰ a partner to train and race horses, cannot sell one owned by them as tenants in common,⁵¹ and power to reorganize and issue new bonds is not power to change the gauge of the road.⁵²

Co., 113 Ga. 1142; 39 S. E. 471.

³⁹ Maurin v. Lyon, 69 Minn. 237; 65 Am. St. Rep. 568; 72 N. W. 72.

⁴⁰ Sparks v. Flannery, 104 Ga. 323; 30 S. E. 823.

⁴¹ Walker v. Lumber Co. (Ky.), 35 S. W. 272.

⁴² Remington v. Ry. Co., 109 Wis. 154; 84 N. W. 898; 85 N. W. 321 (where a fee due to a firm of attorneys was compromised by one of them by accepting employment as attorney at a salary which formed a reasonable compensation for such services). So, Davis v. Dodson, 95 Ga. 718; 51 Am. St. Rep. 108; 29 L. R. A. 496; 22 S. E. 645.

⁴³ Waldron v. Hughes, 44 W. Va. 126; 29 S. E. 505.

⁴⁴ Guscott v. Roden, 112 Ala. 632; 21 So. 313.

⁴⁵ Spencer v. Jones, 92 Tex. 516; 71 Am. St. Rep. 870; 50 S. W. 118; reversing, 47 S. W. 29, 665.

⁴⁶ Boyd v. Watson, 101 Ia. 214; 70 N. W. 120.

⁴⁷ Harper v. McKinnis, 53 O. S. 434; 42 N. E. 251 (even in order to buy such realty himself).

⁴⁸ Ketcham National Bank v. Hagen, 164 N. Y. 446; 58 N. E. 523.

⁴⁹ Forbes v. Morehead (Ky.), 58 S. W. 982.

⁵⁰ Gutheil v. Gilmer, 23 Utah 84; 63 Pac. 817; Cavanaugh v. Salisbury, 22 Utah 465; 63 Pac. 39.

⁵¹ Williams v. Tam, 131 Cal. 64; 63 Pac. 133.

⁵² Browning v. Kelley, 124 Ala. 645; 27 So. 391; Modifying on rehearing, 113 Ala. 420; 21 So. 928.

§948. Express acquiescence.

A contract to which all the members of a partnership give their consent is binding upon them,¹ even if outside the ordinary business of the partnership.² Thus all the partners may agree to an assignment for the benefit of creditors.³ So with the consent of all the partners, one partner may apply partnership funds to an individual liability.⁴

§949. Liability of partners on contract without scope of business.

If a contract is made by one partner in excess of his authority and no circumstances of estoppel exist, the remaining partners are not liable upon such contract.¹ If the firm consists of two partners, one of them can avoid liability on future contracts by giving notice of his dissent to the person with whom such contract is made,² even if under such contract property was actually received by the firm.³ So if A and B are partners and X before selling to the firm through A on credit is notified by B not to sell on credit, X cannot, after selling on credit, hold B.⁴ If the firm consists of more than two members a minority cannot revoke the authority of agents previously appointed and empowered to act.⁵ So employment of an attorney by the majority may bind the firm even as against the active dissent of one part-

¹ *Kling v. Tunstall*, 109 Ala. 608; 19 So. 907; *Seeberger v. Wyman*, 108 Ia. 527; 79 N. W. 290.

² *Penn v. Fogler*, 182 Ill. 76; 55 N. E. 192; reversing, 77 Ill. App. 365; *Kincaid v. Paper Co.*, 63 Kan. 288; 88 Am. St. Rep. 243; 54 L. R. A. 412; 65 Pac. 247.

³ *Drucker v. Wellhouse*, 82 Ga. 129; 2 L. R. A. 328; 8 S. E. 40.

⁴ *Kincaid v. Paper Co.*, 63 Kan. 288; 88 Am. St. Rep. 243; 54 L. R. A. 412; 65 Pac. 247; *Hutchinson v. Morris*, 86 Mo. App. 40.

⁵ *Thompson v. Bank*, 111 U. S. 529; *Nofsinger v. Goldman*, 122 Cal. 609; 55 Pac. 425; *Cook v. Slate Co.*, 36 O. S. 135; 38 Am. Rep. 568;

Peterson v. Armstrong, 24 Utah 96; 66 Pac. 767.

² *Wilcox v. Jackson*, 7 Colo. 521; 4 Pac. 966; *Knox v. Buffington*, 50 Ia. 320; *Johnston v. Bernheim*, 86 N. C. 339; *Yeager v. Wallace*, 57 Pa. St. 365.

³ *Dawson v. Elrod*, 105 Ky. 624; 88 Am. St. Rep. 320; 49 S. W. 465; *Monroe v. Conner*, 15 Me. 178; 32 Am. Dec. 148.

⁴ *Dawson v. Elrod*, 105 Ky. 624; 88 Am. St. Rep. 320; 49 S. W. 465; *Monroe v. Conner*, 15 Me. 178; 32 Am. Dec. 148.

⁵ *Johnston v. Dutton*, 27 Ala. 245; *Lerch v. Bard*, 177 Pa. St. 197; 35 Atl. 714.

ner.⁶ Still less can a firm be held liable on a contract with an individual member, where it is not shown that such contract was made on behalf of the firm.⁷

§950. Estoppel.

Although no partnership in fact exists, or although its powers have been exceeded, third persons who have been misled as to the existence or powers of the partnership and have acted in reliance on such belief, may enforce partnership liability against those persons who have so misled them and held themselves out as members of the partnership in question or have held out the person with whom such third person dealt as a member thereof.¹ A partnership is liable for the transactions of one whom they allow to act as a partner.² So where creditors trust persons as partners, and property as firm property, they may subject such property to their debts as against individual partners or their creditors.³ So secret limitations on the apparent power of a partner are ineffectual as to one dealing with him in ignorance

⁶ At least such attorney may represent the firm in court. *Clark v. Ry.*, 136 Pa. St. 408; 10 L. R. A. 238; 20 Atl. 562. So the majority if acting in good faith cannot be charged with losses caused by events that could not be foreseen, as long as they act within the scope of the partnership business, even though the minority object. *Markle v. Wilbur*, 200 Pa. St. 457; 50 Atl. 204.

⁷ *Wood v. Martin*, 115 Ga. 147; 41 S. E. 490; *Rothrock Construction Co. v. Mfg. Co.*, 80 Miss. 517; 32 So. 484.

¹ *McGowan v. Tan Bark Co.*, 121 U. S. 575; *Tillis v. McKinna*, 114 Ala. 311; 21 So. 465; *Carlton v. Grissom*, 98 Ga. 118; 26 S. E. 77; *Gray v. Blasingame*, 110 Ga. 343; 35 S. E. 653; *Daugherty v. Heckard*, 189 Ill. 239; 59 N. E. 569; *Janes v. Gilbert*, 168 Ill. 627; 48 N. E. 177; *affirming*, 68 Ill. App. 611; *Dooley*

v. Vance, 97 Ill. App. 42; *Janes v. Bergevin*, 83 Ill. App. 607; *Wilson v. Roelofs*, 88 Ill. App. 480; *Wallerich v. Smith*, 97 Ia. 308; 66 N. W. 184; *Rider v. Hammell*, 63 Kan. 733; 66 Pac. 1026; *Green v. Taylor*, 98 Ky. 330; 56 Am. St. Rep. 375; 32 S. W. 945, *Safety, etc., Association v. O'Meara* (Ky.), 58 S. W. 775; *Johnson v. Marx*, 109 La. 1036; 34 So. 68; *Houston River Canal Co. v. Kopke*, 106 La. 609; 31 So. 156; *Stimson v. Whitney*, 130 Mass. 591; *Princeton, etc., Co. v. Gulick*, 16 N. J. L. 161; *Fowler v. Bank* (Tenn. Ch. App.), 57 S. W. 209; *Bartlett v. Clough*, 94 Wis. 196; 68 N. W. 875.

² *Chicago, etc., Bank v. Kinnare*, 174 Ill. 358; 51 N. E. 607; *reversing*, 67 Ill. App. 186; *Tyler v. Omeis*, 76 Minn. 537; 79 N. W. 528.

³ *Thayer v. Humphrey*, 91 Wis. 276; 51 Am. St. Rep. 887; 30 L. R. A. 549; 64 N. W. 1007.

thereof,⁴ as where a partner had been for years accustomed to sign his firm's name to accommodation paper and they had acquiesced therein.⁵ So introducing one as a partner, putting his name on letter heads and signing a letter announcing that he is a member of the firm is admissible to prove liability as a partner.⁶ So a contract with a firm whereby the firm is to furnish goods as a set-off against a debt incurred against the firm is binding upon a subsequent secret partner, so that after such goods are furnished the new firm cannot recover from the party to whom they are furnished.⁷

The reason for this general rule is that third persons are not bound to know of the existence, scope or powers of a partnership, and under principles of estoppel may rely upon representations made to them, believed by them and acted on by them, so as to preclude those making such representations from afterwards denying them.⁸ Estoppel may operate conversely to prevent proof of an existing partnership. Thus, if A has by his conduct induced X to believe that B is the sole party in interest and to deal with him accordingly, A is estopped from proving that he was in fact B's partner.⁹ This last principle is not, however, acquiesced in by all the courts. One who purchases goods as an individual is not estopped to show that he is acting

⁴ *Irwin v. Williar*, 110 U. S. 499; *Bass Dry-Goods Co. v. Mfg. Co.*, 113 Ga. 1142; 39 S. E. 471; *McDonald v. Fairbanks*, 161 Ill. 124; 43 N. E. 783; affirming, 58 Ill. App. 384; *Crane Co. v. Tierney*, 175 Ill. 79; 51 N. E. 715; reversing, 75 Ill. App. 354; *Rice v. Jackson*, 171 Pa. St. 89; 32 Atl. 1036.

⁵ *Bank, etc., v. Weston*, 159 N. Y. 201; 45 L. R. A. 547; 54 N. E. 40; *Second National Bank v. Weston*, 161 N. Y. 520; 76 Am. St. Rep. 283; 55 N. E. 1080.

⁶ *Peninsular Savings Bank v. Currie*, 123 Mich. 666; 82 N. W. 511.

⁷ *Neelley v. Flummerfelt*, 116 Mich. 344; 74 N. W. 1118, and see *Rogers v. Batchelor*, 12 Pet. (U. S.)

221; *Locke v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631. Though such prior debt was not of itself binding on the incoming partner.

See § 955.

⁸ An interesting example arising occasionally under estoppel, of those cases where a person cannot lie, though he tries strenuously to do so, exists where a retiring partner allows a third person to deal with the firm after dissolution under the belief that he is still a member. As he is thus estopped to deny the partnership, he is not guilty of fraud. *Wilson v. Roelofs*, 88 Ill. App. 480.

⁹ *Willard v. Bullen*, 41 Or. 25; 67 Pac. 924; 68 Pac. 422.

for a firm of which he is a member, when the vendor undertakes to apply a payment made for such goods to an individual debt due from such individual.¹⁰

§951. Wrongful act or omission necessary to create estoppel.

Estoppel can exist only where there is some wrongful act or omission of the person against whom estoppel is sought to be enforced. Where the person held out as a partner does not know that he is thus held out and is guilty of no negligence he cannot be held liable.¹

Conduct not calculated or intended to mislead cannot be relied on as an estoppel. Thus the fact that a partnership has often given its check against funds in a certain bank to pay the individual debt of a partner is not such a course of dealing that it is estopped to deny the validity of a note signed with the partnership name, and given to such bank by one of the partners to take up his individual debt.²

The declaration of one alleged partner as to the existence of the partnership does not bind the other,³ and is not even admissible against such other,⁴ though it is as against the party making it.⁵

§952. Reliance necessary to create estoppel.

In order to estop one from denying his liability as a partner, the person in whose favor the estoppel is alleged must have acted in reliance upon the facts which are claimed to create the estoppel.¹ First, to create estoppel such facts must be known to the

¹⁰ Hoaglin v. Henderson, 119 Ia. 720; 97 Am. St. Rep. 335; 61 L. R. A. 756; 94 N. W. 247.

¹ Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425; Munton v. Ruth-erford, 121 Mich. 418; 80 N. W. 112; Seabury v. Bolles, 52 N. J. L. 413; 51 N. J. L. 103; 11 L. R. A. 136; 21 Atl. 952.

² People's Savings Bank v. Smith, 114 Ga. 185; 39 S. E. 920.

³ Vanderhurst v. De Witt, 95 Cal.

57; 20 L. R. A. 595; 30 Pac. 94; First National Bank v. Cody, 93 Ga. 127; 19 S. E. 831; Frisbie v. Felton, 65 Vt. 138; 26 Atl. 110; Commercial Bank v. Miller, 96 Va. 357; 31 S. E. 812.

⁴ Thompson v. Mallory, 108 Ga. 797; 33 S. E. 986.

⁵ Dodds v. Ragan Co., 110 Ga. 303; 34 S. E. 1004.

¹ Nofsinger v. Goldman, 122 Cal. 609; 55 Pac. 425.

party alleging the estoppel at the time at which he enters into the transaction with reference to which the estoppel is invoked. Thus where he did not then know that the person against whom he is seeking to enforce liability was held out as a partner, he cannot claim that by reason of a holding out as a partner to others, an estoppel exists in his favor.² So one who knows that no partnership exists cannot enforce liability as partners against members of an alleged firm other than the person with whom he dealt.³ Second, to cause estoppel there must be an actual belief of third persons based on facts known to them when they deal with the partnership.⁴ Where the representation was known to be untrue and not relied on, no estoppel can be claimed to exist.⁵ Thus if the powers of a partner are actually known to one who deals with him, the latter cannot claim that the partnership is bound by estoppel if such partner exceeds his powers.⁶ A partnership is therefore not liable on a contract made in excess both of the real and of the apparent scope of partnership.⁷

§953. Ratification.

A partnership may become liable on the unauthorized contracts of its members, by ratification thereof.¹ Acquiescence by all the partners in a contract, whether before or after the contract is executed, makes them liable thereon, and acquiescence

² *Thompson v. Bank*, 111 U. S. 529; *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217; 27 L. R. A. 126; 16 So. 601; *Wood v. Pennell*, 51 Me. 52; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; 5 Pac. 588; *Carey v. Marshall*, 67 N. J. L. 236; 51 Atl. 698; *Cook v. Slate Co.*, 36 O. S. 135; 38 Am. Rep. 568; *Denithorne v. Hook*, 112 Pa. St. 240; 3 Atl. 777; *Hicks v. Cram*, 17 Vt. 449.

³ *Thornton v. McDonald*, 108 Ga. 3; 33 S. E. 680; *Baldwin's Estate*, 170 N. Y. 156; 58 L. R. A. 122; 63 N. E. 62.

⁴ *Wilson v. Edmonds*, 130 U. S.

472; *Fisher v. McDonald Co.*, 85 Ill. App. 653; *Fletcher v. Pullen*, 70 Md. 205; 14 Am. St. Rep. 355; 16 Atl. 887.

⁵ *Nightingale v. Furniture Co.*, 71 Fed. 234; *Thornton v. McDonald*, 108 Ga. 3; 33 S. E. 680; *Pratt v. Langdon*, 97 Mass. 97; 93 Am. Dec. 61; *Martin v. Fewell*, 79 Mo. 401.

⁶ *Barwick v. Alderman*, — Fla. —; 35 So. 13.

⁷ *Brooks-Waterfield v. Jackson* (Ky.), 53 S. W. 41.

¹ *McGahan v. Bank*, 156 U. S. 219; *Pacific, etc., Ins. Co. v. Fisher*, 109 Cal. 566; 42 Pac. 154; *Sparks v. Flannery*, 104 Ga. 323; 30 S. E.

after the execution of the contract is ratification.² Thus a chattel mortgage given by one partner without authority is valid if the rest acquiesce therein.³ So if a partner is authorized only to obtain an option on certain property, and he purchases it and gives the firm's note, subsequent acquiescence by the remaining partners makes such contract valid.⁴ Ratification is also effected by receiving the benefits of the transaction.⁵ So receiving money obtained from notes is a ratification thereof.⁶ Taking possession and paying rent under a lease is ratification by the lessee, and receiving such rent is ratification by the lessor.⁷ Partial ratification is impossible. Thus where a partner sold goods under an agreement that a part of the purchase price should be set off against his individual debt, the partnership cannot recover such part and affirm the sale.⁸ Ratification to be binding must be made with full knowledge of the material facts. Thus part payment by the firm's checks without the knowledge of the other partner, is not ratification.⁹ So a ratification of a note under seal has been held invalid if the partner so ratifying did not know that it was under seal.¹⁰ A ratification has been held binding where the partner had not full knowl-

823; *Buettner v. Steinbrecher*, 91 Ia. 588; 60 N. W. 177; *Corbett v. Cannon*, 57 Kan. 127; 45 Pac. 80; *Burkhardt v. Yates*, 161 Mass. 591; 37 N. E. 759; *Koch v. Endriss*, 97 Mich. 444; 56 N. W. 847; *Edwards v. Spalding*, 20 Mont. 54. 60; 49 Pac. 443, 591; *Columbia National Bank v. Rice*, 48 Neb. 428; 67 N. W. 165; *Columbus State Bank v. Dole*, 56 Neb. 508; 76 N. W. 1054; *McNaughten v. Partridge*, 11 Ohio 223; 38 Am. Dec. 731; *Miller v. Glass Works*, 172 Pa. St. 70; 33 Atl. 350; *Gutheil v. Gilmer*, 23 Utah 84; 63 Pac. 817.

² *Sparks v. Flannery*, 104 Ga. 323; 30 S. E. 823; *Corbett v. Cannon*, 57 Kan. 127; 45 Pac. 80; *Clippinger v. Starr*, 130 Mich. 463; 90 N. W. 280; *Columbus State Bank v. Dole*, 56

Neb. 508; 76 N. W. 1054; *Rock v. Collins*, 99 Wis. 630; 67 Am. St. Rep. 885; 75 N. W. 426.

³ *Columbus State Bank v. Dole*, 56 Neb. 508; 76 N. W. 1054; *Rock v. Collins*, 99 Wis. 630; 67 Am. St. Rep. 885; 75 N. W. 426.

⁴ *Tyler v. Waddingham*, 58 Conn. 375; 8 L. R. A. 657; 20 Atl. 335.

⁵ *Smith v. Packard*, 98 Fed. 793; 39 C. C. A. 294.

⁶ *O'Connor v. Sherley*, 107 Ky. 70; 52 S. W. 1056.

⁷ *Golding v. Brennan*, 183 Mass. 286; 67 N. E. 239.

⁸ *Grover v. Smith*, 165 Mass. 132; 52 Am. St. Rep. 506; 42 N. E. 555.

⁹ *Meyer v. Hegler*, 121 Cal. 682; 54 Pac. 271.

¹⁰ *Hull v. Young*, 30 S. C. 121; 3 L. R. A. 521; 8 S. E. 695.

edge, but knew facts enough to put him on inquiry which would have resulted in full knowledge.¹¹ Ratification is binding though made in ignorance of the legal effect of the contract.¹² The partner who made the contract cannot ratify it.¹³

§954. Dissolution.

A partnership when once formed may be dissolved by the agreement of the partners,¹ or by the act of either, even if before the time for which the contract was to last.² Some courts have expressed the view that such a partnership cannot be dissolved without cause before the time limited.³ If a partnership is formed to last for a fixed time, but the right to dissolve the partnership by giving written notice is reserved, it may be dissolved at any time by such written notice.⁴ Dissolution by operation of law may be caused by efflux of the time fixed by the partnership agreement,⁵ or by death of a partner.⁶ There is

¹¹ Sibley v. Bank, 97 Ga. 126; 25 S. E. 470.

¹² Miller v. Glass Works, 172 Pa. St. 70; 33 Atl. 350 (as that the partners were individually liable on the contract).

¹³ Peterson v. Armstrong, 24 Utah 96; 66 Pac. 767.

¹ Richardson v. Gregory, 126 Ill. 166; 18 N. E. 777; Howard v. Pratt, 110 Ia. 533; 81 N. W. 722; Wood v. Fox, 1 A. K. Mar. (Ky.) 451.

² Lapenta v. Lattieri, 72 Conn. 377; 77 Am. St. Rep. 315; 44 Atl. 730; Solomon v. Kirkwood, 55 Mich. 256; 21 N. W. 336; Skinner v. Dayton, 19 Johns. (N. Y.) 513; 10 Am. Dec. 286. Undoubtedly either has the power to end the partnership whenever he pleases; though his exercise of that power without just cause may leave him liable in damages for such dissolution. See Lapenta v. Lattieri, 72 Conn. 377; 77 Am. St. Rep. 315; 44 Atl. 730.

³ Hannaman v. Karrick, 9 Utah 236; 33 Pac. 1039; Cole v. Moxley, 12 W. Va. 730; Moore v. May, 117 Wis. 192; 94 N. W. 45. Hannaman v. Karrick, 9 Utah 236; 33 Pac. 1039, was affirmed by the supreme court of the United States in Karrick v. Hannaman, 168 U. S. 328, not on the ground that the rule of law there laid down was correct, for the Supreme Court was "not prepared to assent" to the proposition involved; but on the ground that the measure of damages given was exactly the same as would be allowed if the one partner could by his wrongful act dissolve the partnership before the expiration of the time limited.

⁴ Swift v. Ward, 80 Ia. 700; 11 L. R. A. 302; 45 N. W. 1044.

⁵ Morrill v. Weeks, 70 N. H. 178; 46 Atl. 32.

⁶ Parker v. Parker, 99 Ala. 239; 42 Am. St. Rep. 48; 13 So. 520; Maynard v. Richards, 166 Ill. 466;

qualified existence of the partnership for purposes of settlement.⁷ By contract it may be agreed that death will not cause dissolution.⁸ A partnership formed by contract, as a joint-stock company, is not dissolved by the death of a member if such is the original agreement,⁹ or by a sale of the share of a partner to a person outside the company.¹⁰ In legal effect a provision that death shall not dissolve the partnership creates a new partnership.¹¹ Conveyance of all the firm's property,¹² sale of the entire business,¹³ ceasing to do business,¹⁴ and rescission by one partner because the other wrongfully refuses to pay in his share of the capital,¹⁵ cause dissolution by operation of law. So a sale of one partner's interest is held to effect a dissolution.¹⁶

57 Am. St. Rep. 145; 46 N. E. 1138; affirming, 61 Ill. App. 336; Schmidt v. Archer, 113 Ind. 365; 14 N. E. 543; Van Kleeck v. McCabe, 87 Mich. 599; 24 Am. St. Rep. 182; 49 N. W. 872; Russell v. McCall, 141 N. Y. 437; 38 Am. St. Rep. 807; 36 N. E. 498; Stubbings v. O'Connor, 102 Wis. 352; 78 N. W. 577. *Contra* of mining partnerships, Patrick v. Weston, 22 Colo. 45; 43 Pac. 446; Childers v. Neely, 47 W. Va. 70; 81 Am. St. Rep. 777; 49 L. R. A. 468; 34 S. E. 828.

⁷ Maynard v. Richards, 166 Ill. 466; 57 Am. St. Rep. 145; 46 N. E. 1138; affirming, 61 Ill. App. 336.

⁸ Scholefield v. Eichelberger, 7 Pet. (U. S.) 586; Vincent v. Martin, 79 Ala. 540; Rand v. Wright, 141 Ind. 226; 39 N. E. 447; Stanwood v. Owen, 14 Gray (Mass.) 195; Exchange Bank v. Tracy, 77 Mo. 594; Wilcox v. Derickson, 168 Pa. St. 331; 31 Atl. 1080; Brew v. Hastings, 196 Pa. St. 222; 79 Am. St. Rep. 706; 46 Atl. 257; Davis v. Christian, 15 Gratt. (Va.) 11; McNash v. Oat Co., 57 Vt. 316; Willis v. Chapman, 68 Vt. 459; 35 Atl. 459. *Contra*, Laney v. Laney, 6 Dem. (N. Y.) 241.

⁹ Carter v. McClure, 98 Tenn. 109; 60 Am. St. Rep. 842; 36 L. R. A. 252; 30 S. W. 585.

¹⁰ Machinists' National Bank v. Dean, 124 Mass. 81; McNeist v. Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668.

¹¹ Pitkin v. Pitkin, 7 Conn. 307; 18 Am. Dec. 111; Exchange Bank v. Tracy, 77 Mo. 594; Kennedy v. Porter, 109 N. Y. 526; 17 N. E. 426; McGrath v. Cowen, 57 O. S. 385; 49 N. E. 338.

¹² Dellapiazza v. Foley, 112 Cal. 380; 44 Pac. 727.

¹³ Haeberly's Appeal, 191 Pa. St. 239; 43 Atl. 207.

¹⁴ Ligare v. Peacock, 109 Ill. 94; Bank v. Page, 98 Ill. 109; Potter v. Tolbert, 113 Mich. 486; 71 N. W. 849; Jones v. Jones, 18 Ohio C. C. 260; 10 Ohio C. D. 71.

¹⁵ Lapenta v. Lettieri, 72 Conn. 377; 77 Am. St. Rep. 315; 44 Atl. 730.

¹⁶ Rowe v. Simmons, 113 Cal. 688; 45 Pac. 983; Summerlot v. Hamilton, 121 Ind. 87; 22 N. E. 973; Schlicher v. Vogel, 61 N. J. Eq. 158; 47 Atl. 448. *Contra*, in mining partnerships, Childers v. Neely, 47 W. Va. 70; 81 Am. St.

So, taking in new partner is a new contract, and abrogates a provision that if either partner becomes intoxicated he shall pay \$1,000 to the other.¹⁷ But the mere delivery of a "trust mortgage,"¹⁸ or an agreement to sell partnership interest, do not effect dissolution.¹⁹ A decree of court may effect a dissolution. Such a decree may be based on fraud,²⁰ or exclusion from inspection of books,²¹ or insanity,²² or on the insolvency of a partner.²³ Thus the transfer of one partner's interest in partnership real estate made to his father without consideration to avoid paying debts of the firm is ground for dissolution.²⁴ Insanity is not of itself dissolution, but is merely the ground for a decree of dissolution,²⁵ even after adjudication.²⁶ Bankruptcy of one partner does not of itself dissolve a partnership.²⁷ If a partnership is formed between husband and wife, a divorce does not of itself dissolve such partnership.²⁸ Lack of mutual trust is ground for a decree of dissolution.²⁹ But the sale of transferable shares in a partnership organized as a joint stock company, if acquiesced in by other members, is not dissolution.³⁰

§955. Assumption of debts on change of firm.

If a retiring partner sells his interest to his co-partners, it is an implied term of the contract that the purchasing partners

Rep. 777; 49 L. R. A. 468; 34 S. E. 828.

¹⁷ Givens v. Berry (Ky.), 52 S. W. 942.

¹⁸ Smith v. Smith, 93 Me. 253; 44 Atl. 905.

¹⁹ Phelps v. State, 109 Ga. 115; 34 S. E. 210.

²⁰ White v. Smith, 63 Ark. 513; 39 S. W. 555.

²¹ Moore v. Price, 116 Ala. 247; 22 So. 531.

²² Walters v. McGreavy, 111 Ia. 538; 82 N. W. 949.

²³ Havner v. Stephens (Ky.), 58 S. W. 372.

²⁴ Hubbard v. Moore, 67 Vt. 532; 32 Atl. 465.

²⁵ Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112; 4 L. R. A. 440; 21 N. E. 566; Walters v. McGreavy, 111 Ia. 538; 82 N. W. 949.

²⁶ Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112; 4 L. R. A. 440; 21 N. E. 566.

²⁷ Patrick v. Weston, 22 Colo. 45; 43 Pac. 446.

²⁸ Snell v. Stone, 23 Or. 327; 31 Pac. 663. Whether such partnership can be formed, see § 929.

²⁹ Breaux v. Le Blanc, 50 La. Ann. 228; 69 Am. St. Rep. 403; 23 So. 281.

³⁰ Carter v. McClure, 98 Tenn. 109; 60 Am. St. Rep. 842; 36 L. R. A. 282; 38 S. W. 585.

assume the liabilities of the firm, and will protect the retiring partner against any liability by reason thereof.¹ An incoming partner does not assume any liability for pre-existing debts unless he agrees so to do.² So a new firm, one member of which was a member of the old firm, is not liable for the debts of the old firm.³ If one partner retires and the remaining partners or the members of the new firm agree with him to assume the partnership debts a question is presented as to whether the retiring partner remains primarily liable to the creditors of the firm whose debts were incurred while he was a partner, or whether he is now a surety for the members who have assumed such debts. He clearly does not become a surety as to creditors who do not assent to such an arrangement.⁴ The weight of authority is that he remains primarily liable, even as to assenting creditors,⁵ and as he does not become a surety he is not released by an extension of time for valuable consideration without his assent.⁶ There is some authority, however, for the proposition that such an arrangement makes the retiring partner a surety if the creditors assent.⁷ So he is held to be a surety released by extension of time,⁸ and entitled to require the creditors of the partnership to sue promptly.⁹ Such an arrangement certainly does not release the retiring partner entirely unless the creditors specifically assent thereto.¹⁰ If a purchasing partner agrees to pay the debts of the firm, it has been held that the retiring partner has a

¹ Cobb v. Benedict, 27 Colo. 342; 62 Pac. 222; Edens v. Williams, 36 Ill. 252; Lambert v. Griffith, 50 Mich. 286; 15 N. W. 458; Schlicher v. Vogel, 61 N. J. Eq. 158; 47 Atl. 448.

² Nix v. Bank, 23 Colo. 511; 48 Pac. 522.

³ Ball v. Mashburn, 110 Ga. 285; 34 S. E. 851.

⁴ Eagle Mfg. Co. v. Jennings, 29 Kan. 657; 44 Am. Rep. 668; Rawson v. Taylor, 30 O. S. 389; 27 Am. Rep. 464; Shapleigh Hardware Co. v. Wells, 90 Tex. 110; 59 Am. St. Rep. 783; 37 S. W. 411; McCoy v.

Jack, 47 W. Va. 201; 34 S. E. 991.

⁵ National Cash Register Co. v. Brown, 19 Mont. 200; 61 Am. St. Rep. 498; 37 L. R. A. 515; 47 Pac. 995.

⁶ National Cash Register Co. v. Brown, 19 Mont. 200; 61 Am. St. Rep. 498; 37 L. R. A. 515; 47 Pac. 995.

⁷ Wiley v. Temple, 85 Ill. App. 69.

⁸ Millerd v. Thorn, 56 N. Y. 402.

⁹ Colgrove v. Tallman, 67 N. Y. 95; 23 Am. Rep. 90.

¹⁰ Andres v. Morgan, 62 O. S. 236;

cause of action as soon as the purchasing partner allows any bill of the original partnership to remain unpaid after it is due.¹¹

§956. Powers after dissolution.

After dissolution either partner may settle outstanding accounts,¹ and may complete the performance of contracts previously entered into,² but he cannot bind his partners on new contracts,³ and he cannot give notes,⁴ even in renewal of a pre-existing firm debt,⁵ or deliver a note previously signed,⁶ or bind his partners by a contract of indorsement,⁷ or extend limitations by a new promise.⁸ Pre-existing debts are not discharged by dissolution. Thus dissolution does not discharge

78 Am. St. Rep. 712; 56 N. E. 875.

¹¹ *Peacey v. Peacey*, 27 Ala. 683; *Tucker v. Murphey*, 114 Ga. 662; 40 S. E. 836; *Gillen v. Peters*, 39 Kan. 489; 18 Pac. 613; *Ham v. Hill*, 29 Mo. 275; *Miller v. Bailey*, 19 Or. 539; 25 Pac. 27.

¹ *Western Stage Co. v. Walker*, 2 Ia. 504; 65 Am. Dec. 789; *Gordon v. Albert*, 168 Mass. 150; 46 N. E. 423; *Riggen v. Investment Co.*, 31 Or. 35; 47 Pac. 923. Either partner has a right to possession of assets. *Gray v. Green*, 142 N. Y. 316; 40 Am. St. Rep. 596; 37 N. E. 124.

² *Western Stage Co. v. Walker*, 2 Ia. 504; 65 Am. Dec. 789; *Page v. Wolcott*, 15 Gray (Mass.) 536.

³ *Bass Dry Goods Co. v. Mfg. Co.*, 116 Ga. 176; 42 S. E. 415; *Richard v. Moulton*, 109 La. 465; 33 So. 563; *Evangelical Synod v. Schoeneich*, 143 Mo. 652; 45 S. W. 647; *Graves v. Bank*, 49 Neb. 437; 68 N. W. 612 (especially for individual debts); *Palmer v. Dodge*, 4 O. S. 21; 62 Am. Dec. 271.

⁴ *Potter v. Tolbert*, 113 Mich. 486; 71 N. W. 849; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529.

⁵ *Harwell v. Mfg. Co.*, 123 Ala. 460; 26 So. 501; *Perrin v. Keene*, 19 Me. 355; 36 Am. Dec. 759; *White v. Tudor*, 24 Tex. 639; 76 Am. Dec. 126.

⁶ *Merrit v. Pollys*, 16 B. Mon. (Ky.) 355; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Gale v. Miller*, 54 N. Y. 536; *Woodworth v. Downer*, 13 Vt. 522; 37 Am. Dec. 611. *Contra*, he may renew notes. *Meyran v. Abel*, 189 Pa. St. 215; 69 Am. St. Rep. 806; 42 Atl. 122.

⁷ *Whitworth v. Ballard*, 56 Ind. 279; *Bryant v. Lord*, 19 Minn. 396; *Fellows v. Wyman*, 33 N. H. 351; *Dana v. Conant*, 30 Vt. 246.

⁸ *Mayberry v. Willoughby*, 5 Neb. 368; 25 Am. Rep. 491; *Shoemaker v. Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Kerper v. Wood*, 48 O. S. 613; 15 L. R. A. 656; 29 N. E. 501; *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694. *Contra*, that he can extend limitations by a new promise. *Cody v. Shepard*, 11 Pick. (Mass.) 400; 22 Am. Dec. 379; *Vinal v. Burrill*, 16 Pick. (Mass.) 401; *Mills v. Hyde*, 19 Vt. 59; 46 Am. Dec. 177; *Wheelock v. Doolittle*, 18 Vt. 440; 46 Am. Dec. 163.

liability on a lease.⁹ The managing partner after dissolution may incur debts for expenses necessary to winding up the business and he is entitled to be reimbursed therefor.¹⁰

§957. Notice necessary on dissolution.

On dissolution personal notice should be given to those who have dealt with the firm before dissolution and know of the connection of the partner in question with such firm, if the retiring partner wishes to avoid liability on subsequent contracts.¹ Thus an attorney retained by the old firm,² a person who has made one loan to the old firm,³ a bank where the firm cashed drafts,⁴ or borrowed money,⁵ and a depositor with a dissolved banking firm,⁶ are each entitled to personal notice. Where personal notice should be given, a notice published but not known by the party dealing with the firm,⁷ or a notice mailed but not received,⁸ even if a red line is drawn around the notice,⁹ or a notice to two commercial agencies and a local item in one or

⁹ Barnes v. Trust Co., 169 Ill. 112; 48 N. E. 31; affirming 66 Ill. App. 282.

¹⁰ Conrad v. Buck, 21 W. Va. 396.

¹ Court v. Berlin (1897), 2 Q. B. 396; Birkhead v. De Forest, 120 Fed. 645; 57 C. C. A. 107; Neal v. Smith, 116 Fed. 20; Camp v. Southern, etc., Co., 97 Ga. 582; 25 S. E. 362; Arnold v. Hart, 176 Ill. 442; 52 N. E. 936; affirming 75 Ill. App. 165; Borgan v. Lyell, 2 Mich. 102; 55 Am. Dec. 53; Bank v. Weston, 172 N. Y. 259; 64 N. E. 946; Second National Bank v. Weston, 161 N. Y. 520; 76 Am. St. Rep. 283; 55 N. E. 1080; Ellison v. Sexton, 105 N. C. 356; 18 Am. St. Rep. 907; 11 S. E. 180; Tobin v. McKinney, 14 S. D. 52; 91 Am. St. Rep. 688; 84 N. W. 228; Amidown v. Osgood, 24 Vt. 278; 58 Am. Dec. 171.

² Court v. Berlin (1897), 2 Q. B. 396.

³ Thayer v. Goss, 91 Wis. 90; 64 N. W. 312.

⁴ Camp v. Southern, etc., Co., 97 Ga. 582; 25 S. E. 362.

⁵ Bank v. Weston, 172 N. Y. 259; 64 N. E. 946.

⁶ Arnold v. Hart, 176 Ill. 442; 52 N. E. 936; affirming 75 Ill. App. 165. Even one who has made only two such deposits. Tobin v. McKinney, 14 S. D. 52; 91 Am. St. Rep. 688; 84 N. W. 228.

⁷ H. H. Nevens & Co. v. Bulger, 93 Me. 502; 45 Atl. 503; Rose v. Colfield, 53 Md. 18; 36 Am. Rep. 389.

⁸ Austin v. Holland, 69 N. Y. 571; 25 Am. Rep. 246.

⁹ Haynes v. Carter, 12 Heisk. (Tenn.) 7; 27 Am. Rep. 747.

two newspapers,¹⁰ or the general notoriety of the dissolution,¹¹ is each insufficient. The contents of new letter-heads of the firm showing a change of members is sufficient if such letter-heads were sent to the customer in question, and he had been notified that the formation of certain contracts was delayed owing to a contemplated reorganization.¹² A notice of a change in the partnership given to a traveling salesman as agent of the adversary party,¹³ is sufficient. Notice by publication is sufficient as to all other persons,¹⁴ in order to free the retiring partners from liability for future contracts. When a dormant partner withdraws, notice is not necessary to those who did not know he was a partner.¹⁵

Where dissolution takes place by operation of law, notice is not necessary.¹⁶ So where a firm is dissolved by bankruptcy proceedings instituted against one partner, such proceeding is notice to all creditors.¹⁷ So on the death of one partner notice of dissolution is not necessary.¹⁸

In the absence of necessary notice a retiring partner is liable for contracts entered into after dissolution with those who are ignorant thereof,¹⁹ especially where the old firm name is re-

¹⁰ *Citizens' National Bank v. Weston*, 162 N. Y. 113; 56 N. E. 494 (citing *Bank v. Weston*, 159 N. Y. 201; 45 L. R. A. 547; 54 N. E. 40; *Mill Co. v. Harris*, 124 N. Y. 280; 26 N. E. 541).

¹¹ *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; 28 Am. Dec. 306.

¹² *Edwards v. Wheeler's Estate*, 130 Mich. 219; 89 N. W. 679.

¹³ *Ach v. Barnes*, 107 Ky. 219; 53 S. W. 293.

¹⁴ *Watkinson v. Bank*, 4 Whart. (Pa.) 492; 34 Am. Dec. 521; *Ellison v. Sexton*, 105 N. C. 356; 18 Am. St. Rep. 907; 11 S. E. 180; *New York, etc., Bank v. Crowell*, 177 Pa. St. 313; 35 Atl. 613; *Thayer v. Goss*, 91 Wis. 90; 64 N. W. 312.

¹⁵ *Gorman v. Davis, etc., Co.*, 118 N. C. 370; 24 S. E. 770. To ex-

cuse a dormant partner from notice he must have been unknown or not generally known. *Rowland v. Estes*, 190 Pa. St. 111; 42 Atl. 528.

¹⁶ *Little v. Hazlett*, 197 Pa. St. 591; 47 Atl. 855.

¹⁷ *Eustis v. Bolles*, 146 Mass. 413; 4 Am. St. Rep. 327; 16 N. E. 286.

¹⁸ *Bass Dry Goods Co. v. Mfg. Co.*, 116 Ga. 176; 42 S. E. 415; *Marlett v. Jackman*, 3 All. (Mass.) 287; *Little v. Hazlett*, 197 Pa. St. 591; 47 Atl. 855.

¹⁹ *Bloch v. Price*, 32 Fed. 562; *Young v. Clapp*, 147 Ill. 176; 32 N. E. 187; 35 N. E. 372; *Shapard Grocery v. Hynes*, 3 Ind. Ter. 74; 53 S. W. 486; *Dickson v. Dryden*, 97 Ia. 122; 66 N. W. 148; *Turner v. Gill*, 105 Ky. 414; 49 S. W. 311; *H. H. Nevens & Co. v. Bulger*, 93

tained,²⁰ or the retiring member holds himself out as a member of the firm.²¹ The notice must be given before liability is incurred by the adversary party to relieve the retiring partner. Thus where notice of retirement was given after A made a contract with the old firm, and after such notice A shipped goods in performance of such contract, the retiring partner is held to be a surety.²² If the notice is given but the dissolution never took place,²³ or if the retirement of the partner was merely ostensible to permit him to carry out an illegal scheme,²⁴ none of the partners are thereby relieved from liability. While dissolution with proper notice generally prevents further liability of a retiring partner, he is liable to the amount of money left in the business.²⁵

§958. Powers of surviving partners.

On the death of a partner, the surviving partner has, under the statutes of many states, the legal title to the partnership property, with power to liquidate the firm's business.¹ He cannot bind the firm or the estate of his deceased partner,² or the

Me. 502; 45 Atl. 503; Central National Bank v. Frye, 148 Mass. 498; 20 N. E. 325; Elkinton v. Booth, 143 Mass. 479; 10 N. E. 460; Knaus v. Givens, 110 Mo. 58; 19 S. W. 535; Stoddard Mfg. Co. v. Krause, 27 Neb. 83; 42 N. W. 913; Ellison v. Sexton, 105 N. C. 356; 18 Am. St. Rep. 907; 11 S. E. 180; Alexander v. Harkins, 120 N. C. 452; 27 S. E. 120; Robinson v. Floyd, 159 Pa. St. 165; Brown v. Foster, 41 S. C. 118; 19 S. E. 299. Compare Swigert v. Aspden, 52 Minn. 565; 54 N. W. 738; Green v. Bank, 78 Tex. 2; 14 S. W. 253.

²⁰ Thatcher v. Allen, 58 N. J. L. 240; 33 Atl. 284; Evans, etc., Co. v. Hadfield, 93 Wis. 665; 68 N. W. 468.

²¹ Shapard Grocery Co. v. Hynes, 3 Ind. Ter. 74; 53 S. W. 486.

²² Porter v. Baxter, 71 Minn. 195; 73 N. W. 844.

²³ Spragans v. Lawson (Ky.), 60 S. W. 373.

²⁴ Utley v. Clements, 79 Minn. 68; 81 N. W. 739.

²⁵ Adams v. Albert, 155 N. Y. 356; 63 Am. St. Rep. 675; 49 N. E. 929.

¹ McKinzie v. United States, 34 Ct. Cl. 278; Maynard v. Richards, 166 Ill. 466; 57 Am. St. Rep. 145; 46 N. E. 1138; Bauer Grocer Co. v. Shoe Co., 87 Ill. App. 434. The surviving partner of a firm of attorneys must account for fees for services rendered under the old contract. Little v. Caldwell, 101 Cal. 553; 40 Am. St. Rep. 89; 36 Pac. 107.

² Durant v. Pierson, 124 N. Y. 444; 21 Am. St. Rep. 686; 12 L. R. A. 146; 26 N. E. 1095; Oyster v. Short, 177 Pa. St. 594, 601; 35 Atl. 710, 711.

executor of his deceased partner,³ by a new contract as by purchasing goods,⁴ or by giving a note.⁵ He cannot bind the heirs of decedent by renewing a lease, but their acceptance of rent for one year may ratify the lease for that year.⁶

Even where decedent by will gives the surviving partner power to continue the business, he cannot bind the estate of the deceased partner beyond the amount in the business,⁷ unless the will specifically provides that he may bind the estate for new debts.⁸ A surviving partner cannot give a cognovit note for a firm debt,⁹ though he may confess judgment.¹⁰

Proper items of indebtedness incurred by a surviving partner after the death of the other partner will be allowed him by the court in settling accounts.¹¹ He may be credited with expenses necessary to preserve the property, and even with expenses necessary to keep up its value. Thus the surviving partner of a horse-racing firm may be credited with the expenses of caring for and training horses after his partner's death and entering them for stakes.¹² If the law requires him to settle

³ Mattison v. Farnham, 44 Minn. 95; 46 N. W. 347.

⁴ Friend v. Young (1897), 2 Ch. 421.

⁵ Bodey v. Cooper, 82 Md. 625; 34 Atl. 362.

⁶ Oliver v. Olmstead, 112 Mich. 483; 70 N. W. 1036; Betts v. June, 51 N. Y. 274.

⁷ Smith v. Ayer, 101 U. S. 320; Burwell v. Cawood, 2 How. (U. S.) 560; Steiner v. Steiner, etc., Co., 120 Ala. 128; 26 So. 494; Pitkin v. Pitkin, 7 Conn. 307; 18 Am. Dec. 111; Stewart v. Robinson, 115 N. Y. 328; 5 L. R. A. 410; 22 N. E. 160, 163; Wilcox v. Derickson, 168 Pa. St. 331; 31 Atl. 1080. *Contra*, where a limited partner had become liable as a general partner by failure to comply with the statute, a provision in the will that the business was to continue was held to charge subsequent debts against the estate.

J. B. Wathen & Bro. Co. v. Carney (Tenn. Ch. App.), 47 S. W. 1115. So *Ussery v. Crusman* (Tenn. Ch. App.), 47 S. W. 567.

⁸ Ferris v. Van Ingen, 110 Ga. 102; 35 S. E. 347. Under such a will he can deed realty to secure debts. In this case the surviving partner was made executor. *Laughlin v. Lorenz*, 48 Pa. St. 275; 86 Am. Dec. 592; *Davis v. Christian*, 15 Gratt. (Va.) 11.

⁹ *Bauer Grocer Co. v. Shoe Co.*, 87 Ill. App. 434.

¹⁰ *Evans v. Watts*, 192 Pa. St. 112; 43 Atl. 464.

¹¹ *Wolfort v. Reilly*, 133 Mo. 463; 34 S. W. 847. Even for borrowed money. *Herron v. Wampler*, 194 Pa. St. 277; 45 Atl. 81; *Kenney v. Howard*, 68 Vt. 194; 34 Atl. 700.

¹² *Central, etc., Co. v. Respass*, 112 Ky. 606; 56 L. R. A. 479; 66 S. W. 421.

his accounts with the partnership at a certain time, and he continues the business beyond such time, he must, in case subsequent losses occur, settle as of the date at which the settlement should have been made.¹³

§959. Peculiarities of enforcement of contract between partners.

At Common Law one partner could not sue another on matters arising out of the partnership before an accounting was had between the partners,¹ and while the partnership was still in existence.² So an action could not be brought by the executor against the surviving partner,³ or by the surviving partner against the heirs of a deceased partner while the partnership accounts are unsettled.⁴ This objection is waived by failure to object at trial.⁵ Such an action at law would lie after the partnership was ended, or after accounting.⁶ A partner may sue at law for contribution upon a matter outside the partnership,⁷ or where by express agreement a partnership item has been

¹³ *Huggins v. Huggins*, 117 Ga. 151; 43 S. E. 759.

¹ *Dukes v. Kellogg*, 127 Cal. 563; 60 Pac. 44; *Miller v. Freeman*, 111 Ga. 654; 51 L. R. A. 504; 36 S. E. 961; *Sindclare v. Walker*, 137 Ill. 43; 31 Am. St. Rep. 353; 27 N. E. 59; *Bowzer v. Stoughton*, 119 Ill. 47; 9 N. E. 208; *Newman v. Tichenor*, 88 Ill. App. 1; *O'Brien v. Smith*, 42 Kan. 49; 21 Pac. 784; *Stone v. Mattingly* (Ky.), 19 S. W. 402; *Johnson v. Ewald*, 82 Mo. App. 276; *Willey v. Renner*, 8 N. M. 641; 45 Pac. 1132; *Devore v. Woodruff*, 1 N. D. 143; 45 N. W. 701; *Kunneke v. Mapel*, 60 O. S. 1; 53 N. E. 259; *Oglesby v. Thompson*, 59 O. S. 60; 51 N. E. 878; *Eddins v. Menefee* (Tenn. Ch. App.), 54 S. W. 992.

² *Miller v. Freeman*, 111 Ga. 654; 51 L. R. A. 504; 36 S. E. 961; *Se-*

bastian v. Academy Co. (Ky.), 56 S. W. 810.

³ *Palm v. Poponoe*, 60 Kan. 297; 56 Pac. 480.

⁴ *Blakley v. Smock*, 96 Wis. 611; 71 N. W. 1052.

⁵ *Smith v. Putnam*, 107 Wis. 155; 82 N. W. 1077; rehearing denied, 83 N. W. 288.

⁶ *Johnson v. Peck*, 58 Ark. 580; 25 S. W. 865.

⁷ *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. 808; *Mullany v. Keenan*, 10 Ia. 224; *Soule v. Frost*, 76 Me. 119; *Carpenter v. Greenap*, 74 Mich. 664; 16 Am. St. Rep. 662; 4 L. R. A. 241; 42 N. W. 276; *Bates v. Lane*, 62 Mich. 132; 28 N. W. 753; *Halleck v. Streeter*, 52 Neb. 827; 73 N. W. 219; *Bank v. Delafield*, 126 N. Y. 410; 27 N. E. 797; *Jennings v. Pratt*, 19 Utah 129; 56 Pac. 951; *Coffin v. McIntosh*, 9 Utah 315; 34 Pac. 247.

separated from the mass of partnership business.⁸ One partner may before final accounting maintain an action at law against another to recover money borrowed by the latter from the former to put into the partnership business,⁹ or for money which he is to pay the former for an interest in a patent which they are to contribute to the partnership.¹⁰ So where a partnership is formed between physicians to carry out a contract to transfer the good will of one to the other a suit can be brought for failure to transfer such good will.¹¹ After an accounting and an adjustment of all rights and liabilities growing out of the partnership one partner may maintain an action against the other for the balance due.¹² Thus one partner may sue another on a note given on sufficient consideration based on partnership accounts,¹³ or on an express agreement based on a mutual adjustment of their affairs.¹⁴ After dissolution and a sale by one partner to the others the former may maintain an action against such others.¹⁵ So, after a dissolution of a firm composed of A, B and C, whereby A was to collect all claims and pay all debts, A may maintain an action on a debt due from B and C to the firm of A, B and C.¹⁶ So, after dissolution of a firm composed of A and B under an agreement whereby A owns all the accounts, A may maintain an action against B if B collects any of such accounts.¹⁷

⁸ *Williams v. Henshaw*, 11 Pick. (Mass.) 79; 22 Am. Dec. 366; *George v. Benjamin*, 100 Wis. 622; 69 Am. St. Rep. 963; 76 N. W. 619. Compare *McMahon v. Rauhr*, 47 N. Y. 67.

⁹ *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. 808; *Crater v. Bininger*, 45 N. Y. 545.

¹⁰ *Cook v. Canny*, 96 Mich. 398; 55 N. W. 987.

¹¹ *Tichenor v. Newman*, 186 Ill. 264; 57 N. E. 826.

¹² *Douthit v. Douthit*, 133 Ind. 26; *Thompson v. Smith*, 82 Ia. 598; 48 N. W. 988; *Logan v. Trayser*, 77 Wis. 579; 46 N. W. 877.

¹³ *Scott v. Campbell*, 30 Ala. 728;

Berry v. De Bruyn, 77 Ill. App. 359; *Hey v. Harding* (Ky.), 53 S. W. 33; *Chamberlain v. Walker*, 10 All. (Mass.) 429; *Mitchell v. Wells*, 54 Mich. 127; 19 N. W. 777; *Bank v. Wood*, 128 N. Y. 35; 27 N. E. 1020; *Crater v. Bininger*, 45 N. Y. 545; *Moore v. Gano*, 12 Ohio 300; *Wilson v. Wilson*, 26 Or. 251; 38 Pac. 185. ¹⁴ *Douthit v. Douthit*, 133 Ind. 26; 32 N. E. 715.

¹⁵ *Huffman v. Huffman*, 63 S. C. 1; 40 S. E. 963.

¹⁶ *Beede v. Fraser*, 66 Vt. 114; 44 Am. St. Rep. 824; 28 Atl. 880.

¹⁷ *Glade v. White*, 42 Neb. 336; 60 N. W. 556.

The law cannot settle accounts between three partners,¹⁸ nor could two firms sue each other if they had a member in common.¹⁹ However, if one of two firms having a common member gives a note to the other firm for a partnership debt, signed by the individual names of some of the partners, omitting the name of the member in common, the payee firm may sue the makers at law.²⁰ Where the statute makes partnership contracts joint and several, one partner may sue the other at law on a joint and several note.²¹ By reason of its more flexible procedure, equity gives adequate relief in actions between partners growing out of partnership business,²² or in an action between two firms having a common member.²³

¹⁸ *Stevens v. Coburn*, 71 Vt. 261; 44 Atl. 354.

¹⁹ *Crosby v. Timolat*, 50 Minn. 171; 52 N. W. 526.

²⁰ *Jungk v. Reed*, 9 Utah 49; 33 Pac. 236.

²¹ *Morrison v. Stockwell*, 9 Dana (Ky.) 172; *Sturges v. Swift*, 32 Miss. 239; *Willis v. Barron*, 143 Mo. 450; 65 Am. St. Rep. 673; 45

S. W. 289; *Merrill v. Green*, 55 N. Y. 270; *Walker v. Wait*, 50 Vt. 668.

²² *Vieth v. Ress*, 60 Neb. 52; 82 N. W. 116; *Sanger v. French*, 157 N. Y. 213; 51 N. E. 979.

²³ *Schnebly v. Cutler*, 22 Ill. App. 87; *Crosby v. Timolat*, 50 Minn. 171; 52 N. W. 526; *Cole v. Reynolds*, 18 N. Y. 74.

CHAPTER XLIII.

AGENCY.

§960. Nature of agency.

An agent is one appointed to transact business and to make contracts with third persons in place of and on behalf of the person appointing him, known as the principal.¹ If the facts exist which in law create the relation of principal and agent such relationship exists though the parties may not have intended such facts to have such legal effect,² or though they may have expressly agreed that such should not be the legal effect.³ Thus an ostensible lease of a mill, the lessee to conduct the business for a fixed salary and a certain per cent of the profits is a contract of agency.⁴ On the other hand, one who is really the adversary party cannot change the nature of the transaction by stipulating that he is merely an agent.⁵ Agency has therefore a two-fold aspect. It is, on the one hand, a contract between principal and agent, which does not differ as to its fundamental principles from other contracts; on the other hand, it is a means of bringing the principal into contractual relations with persons with whom in point of fact he has had no personal dealings. In this chapter there will be presented only the general principles of the law of agency affecting the rights and liabilities of parties dealing with the principal through the agent. The

¹ Central, etc., Co. v. Bank, 101 Ga. 345; 28 S. E. 863; Upham v. Richey, 163 Ill. 530; 45 N. E. 228; Metzger v. Huntington, 139 Ind. 501; 37 N. E. 1084; 39 N. E. 235; Barbar v. Martin, — Neb. —; 93 N. W. 722; Elwell v. Coon (N. J. Eq.), 46 Atl. 580.

² Bradstreet Co. v. Gill, 72 Tex.

115; 13 Am. St. Rep. 768; 2 L. R. A. 405; 9 S. W. 753.

³ Hall v. Ins. Co., 23 Wash. 610; 51 L. R. A. 288; 63 Pac. 505.

⁴ Petteway v. McIntyre, 131 N. C. 432; 42 S. E. 851.

⁵ So in gambling transaction. Munns v. Commission Co., 117 Ia. 516; 91 N. W. 789.

question of the rights of principal and agent between themselves is a special branch of contract law, and is out of place in a general work on contract.

§961. Appointment of agent.

As between principal and agent, an agent can be appointed only by a contract, which may be express,¹ though informal, as by a statement by the principal that whatever the agent did "went"; or implied² as by acquiescence in the assumption of such authority by the agent.³ The chief rule as to form of appointment is that it must be of as high a nature as the act to be done by the agent. At Common Law the classes of contracts as to dignity were the formal and the simple, there being no distinction in rank between the oral and the written. Power to an agent to act under seal must be given by seal,⁵ unless he acts in the presence of his principal.⁶ So an agent cannot assign a tax certificate where an acknowledgment thereto is necessary.⁷ If the agent is to make a simple contract, any form of authority

¹ *Graves v. Horton*, 38 Minn. 66; 35 N. W. 568; *Hermann v. Ins. Co.*, 100 N. Y. 411; 53 Am. Rep. 197; 3 N. E. 341; *Cribben v. Deal*, 21 Or. 211; 28 Am. St. Rep. 746; 27 Pac. 1046; *Bank v. Chester*, 6 Humph. (Tenn.) 458; 44 Am. Dec. 318.

² *Scheibeck v. Van Derbeck*, 122 Mich. 29; 80 N. W. 880.

³ *Arnold v. Spurr*, 130 Mass. 347; *Matteson v. Blackmer*, 46 Mich. 393; 9 N. W. 445; *Reeves v. Kelley*, 30 Mich. 132; *Neibles v. Ry. Co.*, 37 Minn. 151; 33 N. W. 332; *Cline v. Stradlee* (Tenn. Ch. App.), 48 S. W. 272; *Sheanon v. Ins. Co.*, 83 Wis. 507; 53 N. W. 878; *Van Eita v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486. The statement is sometimes made that there is an agency of necessity. *Benjamin v. Dockham*, 134 Mass. 418. This is a figurative expression used to denote a liability which may arise without

the consent and in defiance of the intention of the party liable.

⁴ *Bank v. Mohr*, 130 Cal. 268; 62 Pac. 511; *Sammis v. Poole*, 188 Ill. 396; 58 N. E. 934; affirming 89 Ill. App. 118.

⁵ *Overman v. Atkinson*, 102 Ga. 750; 29 S. E. 758; *Watson v. Sherman*, 84 Ill. 263; *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184; 17 Am. Dec. 53; *Emerson v. Mfg. Co.*, 12 Mass. 237; 7 Am. Dec. 66; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Smith v. Dickinson*, 6 Humph. (Tenn.) 261; 44 Am. Dec. 306.

⁶ *Jansen v. Cahill*, 22 Cal. 563; 83 Am. Dec. 84; *Croy v. Busenbark*, 72 Ind. 48; *Gardner v. Gardner*, 5 Cush. (Mass.) 483; 52 Am. Dec. 740.

⁷ *Wilson v. Wood*, 10 Okla. 279; 61 Pac. 1045.

is sufficient unless there is some specific statutory provision to the contrary. Thus a contract which by the statute of frauds must be proved by writing, such as a contract to sell realty,⁸ may be made by an agent having oral authority. As between the principal and third persons, the facts may be such that the principal is estopped to deny the existence of an agency which is in fact non-existent, or to deny that it extends beyond its actual scope.⁹

§962. Termination of agent's authority.

The authority of an agent to bind his principal may cease by expiration of time,¹ or the accomplishment of the purpose for which he was appointed,² or by express³ or implied revocation arising out of the intention of the principal to revoke.⁴ It may also be revoked by operation of law regardless of the intention of the principal, as by the death of either,⁵ or by insanity,⁶ as by

⁸ Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805; Smith v. Browne, 132 N. C. 365; 43 S. E. 915; Brodhead v. Reinbold, 200 Pa. St. 618; 86 Am. St. Rep. 735; 50 Atl. 229. See §§ 692, 693.

⁹ See § 965.

¹ Gundlach v. Fischer, 59 Ill. 172.

² Short v. Millard, 68 Ill. 292; Moore v. Stone, 40 Ia. 259; Ahern v. Baker, 34 Minn. 98; 24 N. W. 341; Hermann v. Ins. Co., 100 N. Y. 411; 53 Am. Rep. 197; 3 N. E. 341.

³ Sheahan v. Steamship Co., 87 Fed. 167; Duffield v. Michaels, 97 Fed. 825; Linder v. Adams, 95 Ga. 668; 22 S. E. 687; Ballard v. Ins. Co., 119 N. C. 187; 25 S. E. 956; Hitchcock v. Kelley, 18 Ohio C. C. 808; 4 Ohio C. D. 180; Flaherty v. O'Connor, 24 R. I. 587; 54 Atl. 376. As by demand for a power of attorney and surrender thereof. Kelly v. Brennan, 55 N. J. Eq. 423; 37 Atl. 137.

⁴ Walker v. Denison, 86 Ill. 142;

Chenault v. Quisenberry (Ky.), 56 S. W. 410; 57 S. W. 234; Elliott v. Barrett, 144 Mass. 256; 10 N. E. 820. A power of attorney to convey realty is revoked by a conveyance to the agent as trustee. Chenault v. Quisenberry (Ky.), 56 S. W. 410; 57 S. W. 234.

⁵ Long v. Thayer, 150 U. S. 520; Pacific Bank v. Hannah, 90 Fed. 72; Krumdich v. White, 107 Cal. 37; 39 Pac. 1066; Lanaux's Succession, 46 La. Ann. 1036; 25 L. R. A. 577; 15 So. 708; Brown v. Cushman, 173 Mass. 368; 53 N. E. 860; Mills v. Ins. Co., 77 Miss. 327; 78 Am. St. Rep. 522; 28 So. 954; Martine v. Ins. Co., 53 N. Y. 339; 13 Am. Rep. 529; Duckworth v. Orr, 126 N. C. 674; 36 S. E. 150; McDonald v. Black, 20 Ohio 185; 55 Am. Dec. 448; Kern's Estate, 176 Pa. St. 373; 35 Atl. 231; Triplett v. Woodward, 98 Va. 187; 35 S. E. 455.

⁶ Blake v. Garwood, 42 N. J. Eq. 276; 10 Atl. 874.

the principal's lunacy known, though not adjudged,⁷ or by bankruptcy of the principal,⁸ or assignment for the benefit of creditors.⁹ However, the appointment of a receiver for the principal does not revoke the agency, where the receiver accepts the services of the agent.¹⁰ It has been said that the death of the principal does not always, as a matter of law, revoke the authority of the agent.¹¹ The cases cited, however, are those in which payment has been made to an agent after the death of the principal, such payment has been transmitted to the legal representatives of the principal, and accordingly as they have received and retained the benefits of the transaction they are estoppel to deny the authority of the agent.

No one can appoint an agent in a hostile country during a war.¹² War revokes the agency of citizens of the one hostile country appointed by a principal domiciled in the other, as far as the execution of such power involves communication with the principal or transmission of property to him.¹³ Other powers are not revoked by war.¹⁴ Thus, a power to sell, where advantageous to the donor of the power, is not revoked by war.¹⁵

A power coupled with an interest cannot be revoked, and is an exception to the rules as to revocation.¹⁶ Thus power to col-

⁷ *Matthessen, etc., Co. v. McMahon*, 38 N. J. L. 536.

⁸ *In re Daniels*, 6 Biss. (U. S.) 405.

⁹ *Elwell v. Coon* (N. J. Eq.), 46 Atl. 580.

¹⁰ *Leupold v. Weeks*, 96 Md. 280; 53 Atl. 937.

¹¹ *Meinhardt v. Newman*, — Neb. —; 99 N. W. 261; *Deweese v. Muff*, 57 Neb. 17; 73 Am. St. Rep. 488; 42 L. R. A. 789; 77 N. W. 361; *Ish v. Crane*, 8 O. S. 520; s. c., 13 O. S. 574.

¹² *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562.

¹³ *New York, etc., Co. v. Davis*, 95 U. S. 425; *Howell v. Gordon*, 40

Ga. 302; *Conley v. Burson*, 1 Heisk. (Tenn.) 145.

¹⁴ *Williams v. Paine*, 169 U. S. 55; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Robinson v. Society*, 42 N. Y. 54; 1 Am. Rep. 490; *Darling v. Lewis*, 11 Heisk. (Tenn.) 125; *Maloney v. Stephens*, 11 Heisk. (Tenn.) 738; *Manhattan, etc., Co. v. Warwick*, 20 Gratt. (Va.) 614; 3 Am. Rep. 218.

¹⁵ *Williams v. Paine*, 169 U. S. 55.

¹⁶ *In re Hannan's, etc., Co.* (1896), 2 Ch. 643; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Walker v. Denison*, 86 Ill. 142; *Baker v. Baird*, 79 Mich. 255; 44 N. W. 604; *Durbrow v. Eppens*, 65 N. J. L. 10; 46 Atl. 582; *Wheeler v.*

lect rents and apply proceeds on a mortgage,¹⁷ or power to sell and apply the proceeds,¹⁸ or an assignment of a life insurance policy with power to the assignee to collect it,¹⁹ is not revoked by the death of the principal.

§963. Scope of agent's authority.

The extent of the agent's authority as between him and his principal is primarily a question of fact.¹ The construction of the language creating the authority or the inferences admissible from the facts from which authority may be inferred are questions of law.² As illustrating what powers have been held to be implied and what have not been so held, general power to manage a business includes power to do whatever is customary and necessary in such business.³ Thus it includes power to lease,⁴ to vacate leased realty without surrendering the lease,⁵ to employ an attorney,⁶ to borrow money,⁷ to give a note,⁸ to endorse checks of his principal for goods bought on credit in pursuance of his authority,⁹ and to rescind contracts,¹⁰ but not to loan the principal's credit,¹¹ unless the debt for which the principal becomes surety is really the principal's own debt;¹²

Knaggs, 8 Ohio 169; *Montague v. McCarroll*, 15 Utah 318; 49 Pac. 418 (power to sell land in consideration of \$5.00).

¹⁷ *Kelly v. Bowerman*, 113 Mich. 446; 71 N. W. 836.

¹⁸ *Terwilliger v. R. R. Co.*, 149 N. Y. 86; 43 N. E. 432.

¹⁹ (*Supreme Assembly*) *Good Felows v. Campbell*, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307.

¹ *Willcox v. Hines*, 100 Tenn. 524; 66 Am. St. Rep. 761; 45 S. W. 781.

² *Seehorn v. Hall*, 130 Mo. 257; 51 Am. St. Rep. 562; 32 S. W. 643.

³ *Rathbun v. Snow*, 123 N. Y. 343; 10 L. R. A. 355; 25 N. E. 379.

⁴ *Phillips, etc., Co. v. Whitney*, 109 Ala. 645; 20 So. 333.

⁵ *Byxbee v. Blake*, 74 Conn. 607;

57 L. R. A. 222; 51 Atl. 535 (the agent's conduct after the term ended being considered as a renewal).

⁶ *Davis v. Matthews*, 8 S. D. 300; 66 N. W. 456.

⁷ *Helena National Bank v. Telegraph Co.*, 20 Mont. 379; 63 Am. St. Rep. 628; 51 Pac. 829; *McDermott v. Jackson*, 97 Wis. 64; 72 N. W. 375.

⁸ *Whitten v. Bank*, 100 Va. 546; 42 S. E. 309.

⁹ *Graton, etc., Co. v. Redelsheimer*, 28 Wash. 370; 68 Pac. 879.

¹⁰ *Van Santvoord v. Smith*, 79 Minn. 316; 82 N. W. 642.

¹¹ *Boord v. Strauss*, 39 Fla. 381; 22 So. 713.

¹² *Andres v. Morgan*, 62 O. S. 236; 78 Am. St. Rep. 712; 56 N. E. 875.

nor does a general manager have implied power to mortgage.¹³ Power to sell is not power to employ an attorney,¹⁴ or to buy,¹⁵ or to dedicate realty for a street,¹⁶ or to indemnify against loss in business,¹⁷ nor to sell on credit,¹⁸ or to sell on credit, taking a note payable to the agent,¹⁹ or to rescind a sale already made.²⁰

Power to sell land is not power to mortgage,²¹ or to exchange,²² and power to sell goods at retail is not power to mortgage the entire stock.²³ Power to sell usually includes power to make such warranties as are customary in that place and business. Thus in sales of personalty power to warrant quality is implied from power to sell as to such warranties as are customary.²⁴ Whether the warranty is customary or not is a question of fact.²⁵ Power to sell a new brand of fertilizer has been

¹³ First National Bank v. Kirkby, 43 Fla. 376; 32 So. 881.

¹⁴ Kirby v. Scraper Co., 9 S. D. 623; 70 N. W. 1052.

¹⁵ McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393; 58 Pac. 358; Finance Co. v. Coal Co., 65 Minn. 442; 68 N. W. 70.

¹⁶ Anderson v. Bigelow, 16 Wash. 198; 47 Pac. 426.

¹⁷ Kinser v. Clay Co., 165 Ill. 505; 46 N. E. 372; affirming, 64 Ill. App. 437; Braun v. Hess, 187 Ill. 283; 58 N. E. 371; affirming 86 Ill. App. 544.

¹⁸ Sale of realty. Burks v. Hubbard, 69 Ala. 379; Dresden School Dist. v. Ins. Co., 62 Me. 330; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555.

¹⁹ McGrath v. Vanaman, 53 N. J. Eq. 459; 32 Atl. 686.

²⁰ Diversy v. Kellogg, 44 Ill. 114; 92 Am. Dec. 154; West End, etc., Co. v. Crawford, 120 N. C. 347; 27 S. E. 31; Fletcher v. Nelson, 6 N. D. 94; 69 N. W. 53. *Contra*, Palmer v. Roath, 86 Mich. 602; 49 N. W. 590. But a state agent to sell machines has power to agree to take machine back if unsatisfactory. Ma-

rian Mfg. Co. Harding, 155 Ind. 648; 58 N. E. 194.

²¹ Chapman v. Hughes, 134 Cal. 641; 58 Pac. 298; 60 Pac. 974; 66 Pac. 982; Salem National Bank v. White, 159 Ill. 136; 42 N. E. 312; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316; 84 Am. St. Rep. 927; 85 N. W. 1019.

²² Chapman v. Hughes, 134 Cal. 641; 58 Pac. 298; 60 Pac. 974; 66 Pac. 982.

²³ Kiefer v. Klinsick, 144 Ind. 46; 42 N. E. 447.

²⁴ Dreyfus v. Goss, 67 Kan. 57; 72 Pac. 537; McCormick Harvesting Machinery Co. v. Hiatt, — Neb. —; 95 N. W. 627; Bierman v. Mills Co., 151 N. Y. 482; 56 Am. St. Rep. 635; 37 L. R. A. 799; 45 N. E. 856; Reese v. Bates, 94 Va. 321; 26 S. E. 865; Westurn v. Page, 94 Wis. 251; 68 N. W. 1003; Pickert v. Marston, 68 Wis. 465; 60 Am. Rep. 876; 32 N. W. 550; overruling Boothby v. Scales, 27 Wis. 626.

²⁵ Reese v. Bates, 94 Va. 321; 26 S. E. 865; Westurn v. Page, 94 Wis. 251; 68 N. W. 1003; Larson v. Taylor Co., 86 Wis. 281; 39 Am. St. Rep. 893; 56 N. W. 915.

held to include power to warrant its quality.²⁶ Power to sell as general agent has been held to include power to warrant,²⁷ even as to one who knows that local agents are unauthorized to warrant.²⁸ Power given by a mortgagee to a mortgagor of chattels to sell and apply the proceeds to the mortgage debt is held to include power to warrant.²⁹ If the warranty is not customary the agent has no implied authority to make it.³⁰ Title is usually warranted. Accordingly power to sell land includes power to warrant the title,³¹ and so does power to sell personally.³² Power to sell guaranteed goods to be tested is power to fix the method of testing the goods,³³ or to extend the time of the trial.³⁴ It is presumed that the principal intends that the custom of the market shall determine the agent's power to sell therein.³⁵ Power given by a wife to her husband to mortgage her realty is not power to release her dower in his realty.³⁶ Power to pledge includes power to pledge again to raise money to pay the first loan;³⁷ and power to pay includes power to promise to pay so as to avoid limitations.³⁸ Power to loan is not power to negotiate,³⁹ or to collect unless the note is in the posses-

²⁶ *Hille v. Adair* (Ky.), 58 S. W. 697; *Reese v. Bates*, 94 Va. 321; 26 S. E. 865.

²⁷ *Hille v. Adair* (Ky.), 58 S. W. 697.

²⁸ *J. I. Case, etc., Co. v. McKinnon*, 82 Minn. 75; 84 N. W. 646.

²⁹ *National Citizens' Bank v. Ertz*, 83 Minn. 12; 53 L. R. A. 174; 85 N. W. 821.

³⁰ *Wait v. Bourne*, 123 N. Y. 592; 25 N. E. 1053; *Smith v. Tracy*, 36 N. Y. 79.

³¹ *Vanada v. Hopkins*, 1 J. J. Mar. (Ky.) 285; 19 Am. Dec. 92; *Bronson v. Coffin*, 118 Mass. 156; *Le Roy v. Beard*, 8 How. (U. S.) 451; *Backman v. Charlestown*, 42 N. H. 125; *Schultz v. Griffin*, 121 N. Y. 294; 18 Am. St. Rep. 825; 24 N. E. 480; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671. *Contra*, see

Howe v. Harrington, 18 N. J. Eq. 495.

³² *Nelson v. Cowing*, 6 Hill (N. Y.) 336; overruling *Gibson v. Colt*, 7 Johns. (N. Y.) 390; *Nixon v. Hyseratt*, 5 Johns. (N. Y.) 58.

³³ *Smith v. Mfg. Co.*, 58 N. J. L. 242; 33 Atl. 244.

³⁴ *Reeves v. Cress*, 80 Minn. 466; 83 N. W. 443.

³⁵ *Taylor v. Bailey*, 169 Ill. 181; 48 N. E. 200; affirming 68 Ill. App. 622.

³⁶ *Security Savings Bank v. Smith*, 38 Or. 72; 84 Am. St. Rep. 756; 62 Pac 794.

³⁷ *Hayes' Appeal*, 195 Pa. St. 177; 45 Atl. 1007.

³⁸ *In re Hale* (1899), 2 Ch. 107.

³⁹ *Fortune v. Stockton*, 182 Ill. 454; 55 N. E. 367; affirming 82 Ill. App. 272.

sion of the agent.⁴⁰ But general power to handle money for investment is power to extend payment or to collect notes.⁴¹ Power to buy for cash does not include power to buy on credit.⁴² Power to collect is not power to modify the contract,⁴³ or to extend the time of payment,⁴⁴ or to waive the principal's right in property,⁴⁵ or to set off the debt to be collected against a debt owed by the principal,⁴⁶ or to indorse checks received,⁴⁷ and power to foreclose is not power to extend time of payment.⁴⁸ Power to collect interest is not power to collect the principal,⁴⁹ at least before maturity,⁵⁰ unless by custom,⁵¹ or by the principal's acquiescence in such conduct,⁵² or if the note is in the

⁴⁰ *Bacon v. Pomeroy*, 118 Mich. 145; 76 N. W. 324; *Church Association v. Walton*, 114 Mich. 677; 72 N. W. 998; *Bromley v. Lathrop*, 105 Mich. 492; 63 N. W. 510; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Hollinshead v. Stuart*, 8 N. D. 35; 42 L. R. A. 659; 77 N. W. 89; *Bartel v. Brown*, 104 Wis. 493; 80 N. W. 801; *Kohl v. Beach*, 107 Wis. 409; 81 Am. St. Rep. 849; 50 L. R. A. 600; 83 N. W. 657.

⁴¹ *Harrison National Bank v. Austin*, 65 Neb. 632; 91 N. W. 540.

⁴² *Fradley v. Hyland*, 37 Fed. 49; 2 L. R. A. 749; *Wheeler v. McGuire*, 86 Ala. 398; 2 L. R. A. 808; 5 So. 190; *Chapman v. Oil Co.*, 117 Ga. 881; 45 S. E. 268.

⁴³ *Rogers v. College*, 64 Ark. 627; 39 L. R. A. 636; 44 S. W. 454.

⁴⁴ *Van Vechten v. Jones*, 104 Ia. 436; 73 N. W. 1032.

⁴⁵ *Johnson v. Wilson*, 137 Ala. 468; 97 Am. St. Rep. 52; 34 So. 392.

⁴⁶ *Hill v. Van Duzer*, 111 Ga. 867; 36 S. E. 966. An agent to collect cannot set off his own debt to the debtor of the principal in payment of his principal's debt, leaving himself indebted to his principal. *Western, etc., Co. v. Portrey*, 50 Neb. 801; 70 N. W. 383. (It is not a

good novation, as the principal's consent is lacking. See § 1351.

⁴⁷ *Deering v. Kelso*, 74 Minn. 41; 73 Am. St. Rep. 324; 76 N. W. 792; *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81; 18 L. R. A. 663; 20 S. W. 802. *Contra*, if the agent collecting security of a loan association is to pay the money received therefrom to the treasurer he has authority to indorse. *Gate City, etc., Association v. Bank*, 126 Mo. 82; 47 Am. St. Rep. 633; 27 L. R. A. 401; 28 S. W. 633.

⁴⁸ *Karcher v. Gans*, 13 S. D. 383; 83 N. W. 431.

⁴⁹ *Joy v. Vance*, 104 Mich. 97; 62 N. W. 140; *Walsh v. Peterson*, 59 Neb. 645; 81 N. W. 853; *Frey v. Curtis*, 52 Neb. 406; 72 N. W. 478; *Lawson v. Nicholson*, 52 N. J. Eq. 821; 31 Atl. 386; *Brewster v. Carnes*, 103 N. Y. 556; 9 N. E. 323.

⁵⁰ *Little Rock, etc., Co. v. Wiggins*, 65 Ark. 385; 46 S. W. 731; *Dilenbeck v. Rehse*, 105 Ia. 749; 73 N. W. 1072; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157.

⁵¹ *Thornton v. Lawther*, 169 Ill. 228; 48 N. E. 412; reversing 67 Ill. App. 214.

⁵² *Springfield Savings Bank v. Kjaer*, 82 Minn. 180; 84 N. W. 752.

possession of the agent.⁵³ Power to collect installments when due is not power to collect before they are due.⁵⁴ Power to collect and reinvest is power to collect before maturity.⁵⁵ Power to collect is power to accept cash only therefor, not a savings deposit book.⁵⁶ Power to settle a debt is power to accept the note of a third person,⁵⁷ or personal property.⁵⁸ A collecting agency has power to employ an attorney for its principal.⁵⁹ Power to solicit orders is not power to collect,⁶⁰ or to rescind,⁶¹ or to make a binding contract of sale.⁶² Power to ship goods includes power to take a special bill of lading.⁶³ Power to write insurance within certain territorial limits is not power to write insurance outside such limits.⁶⁴ Power to insure is not power to insure on credit, taking a promissory note for the premium.⁶⁵ Power to lease is not power to covenant to irrigate;⁶⁶ but such agent may bind his principal by a representation that a wall of the building to be leased is fire-proof.⁶⁷ An attorney has no implied authority to consent to a compromise judgment against

⁵³ *Ambrose v. Barrett*, 121 Cal. 297; 53 Pac. 805; 54 Pac. 264; *Hitchcock v. Kelley*, 18 Ohio C. C. 808; 4 Ohio C. D. 180.

⁵⁴ *Park v. Cross*, 76 Minn. 187; 77 Am. St. Rep. 630; 78 N. W. 1107; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157.

⁵⁵ *Thornton v. Lawther*, 169 Ill. 228; 48 N. E. 412; reversing 67 Ill. App. 214.

⁵⁶ *Dixon v. Guay*, 70 N. H. 161; 46 Atl. 456. To the same effect is *Cram v. Sickel*, 51 Neb. 828; 66 Am. St. Rep. 478; 71 N. W. 724.

⁵⁷ *Nichols & Shepard Co. v. Hackney*, 78 Minn. 461; 81 N. W. 322.

⁵⁸ *Oliver v. Sterling*, 20 O. S. 391.

⁵⁹ *Strong v. West*, 110 Ga. 382; 35 S. E. 693.

⁶⁰ *Jackson Paper Mfg. Co. v. Bank*, 199 Ill. 151; 59 L. R. A. 657; 65 N. E. 136; *Dreyfus v. Goss*, 67 Kan. 57; 72 Pac. 537; *Clark v. Murphy*, 164 Mass. 490; 41 N. E.

674; *Brown v. Lally*, 79 Minn. 38; 81 N. W. 538; *Smith v. Browne*, 132 N. C. 365; 43 S. E. 915; *Simon v. Johnson*, 105 Ala. 344; 53 Am. St. Rep. 125; 16 So. 884.

⁶¹ *Bingham v. Hibbard*, 28 Or. 386; 43 Pac. 383.

⁶² *John Matthews, etc., Co. v. Renz (Ky.)*, 61 S. W. 9.

⁶³ *California, etc., Works v. R. R. Co.*, 113 Cal. 329; 36 L. R. A. 648; 45 Pac. 691. But a vendor delivering live stock to the railroad is not the agent of the purchaser. *Norfolk, etc., R. R. Co. v. Harman*, 91 Va. 601; 50 Am. St. Rep. 855; 22 S. E. 490.

⁶⁴ *Ins. Co. v. Thornton*, 130 Ala. 222; 55 L. R. A. 547; 30 So. 614.

⁶⁵ *Mutual Life Ins. Co. v. Logan*, 87 Fed. 637; 31 C. C. A. 172.

⁶⁶ *Durkee v. Carr*, 38 Or. 189; 63 Pac. 117.

⁶⁷ *Matteson v. Rice*, 116 Wis. 328; 92 N. W. 1109.

his client.⁶⁸ A husband has no implied authority to act as agent for his wife.⁶⁹

§964. Liability of principal.—Agent acting within authority.

If the contract of the agent is in fact within his authority, the principal is liable thereon, without reference to any facts creating estoppel, or to the knowledge possessed by the adversary party of the facts that make the principal liable.¹ Payment to an authorized agent discharges the debt paid.² The principal is liable for the acts of his agent within the scope of his authority even if the existence of the principal is not disclosed.³ Thus payment to the agent of an undisclosed principal discharges the debt.⁴ So if the contract does not purport to bind the real principal, but the agent,⁵ or a third party who does not consent thereto,⁶ the real principal is liable thereon.

§965. Liability of principal.—Estoppel.

Outside of the class of public agents the actual authority conferred by a principal upon his agent is practically inaccessible

⁶⁸ Kilmer v. Gallaher, 112 Ia. 583; 84 Am. St. Rep. 358; 84 N. W. 397.

⁶⁹ Rust-Owen Lumber Co. v. Holt, 60 Neb. 50; 83 Am. St. Rep. 512; 82 N. W. 112.

¹ Garfield, etc., Co. v. Lime Co., 184 Mass. 60; 61 L. R. A. 946; 67 N. E. 863; Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488; 76 Am. St. Rep. 111; 78 N. W. 936; Nutter v. Brown, 51 W. Va. 598; 42 S. E. 661.

² Henken v. Schwicker, 174 N. Y. 298; 66 N. E. 971.

³ Bergtholdt v. Porter Bros. Co., 114 Cal. 681; 46 Pac. 738; Simpson v. Guano Co., 99 Ga. 168; 25 S. E. 94; Allison v. Sutlive, 99 Ga. 151; 25 S. E. 11; Baldwin v. Garrett, 111 Ga. 876; 36 S. E. 966; Woodford v. Hamilton, 139 Ind. 481; 39 N. E. 47; Steele-Smith Grocery Co. v. Potthast, 109 Ia. 413;

80 N. W. 517; Jones v. Johnson, 86 Ky. 530; 6 S. W. 582; Maxey Mfg. Co. v. Burnham, 89 Me. 538; 56 Am. St. Rep. 436; 36 Atl. 1003; Schendel v. Stevenson, 153 Mass. 351; 26 N. E. 689; Simmons Hardware Co. v. Todd, 79 Miss. 163; 29 So. 851; Weber v. Collins, 139 Mo. 501; 41 S. W. 249; Yates v. Repetto, 65 N. J. L. 294; 47 Atl. 632; Belt v. Water Power Co., 24 Wash. 387; 64 Pac. 525. An undisclosed principal is not liable on a conveyance of realty. Sanger v. Warren, 91 Tex. 472; 66 Am. St. Rep. 913; 44 S. W. 477.

⁴ Cheshire Provident Institution v. Gibson (Neb.), 89 N. W. 243.

⁵ Crawford v. Moran, 168 Mass. 446; 47 N. E. 132.

⁶ Simmons Hardware Co. v. Todd, 79 Miss. 163; 29 So. 851.

to the public at large. Accordingly persons who do not know what the agent's authority really is are justified in dealing with him upon the assumption that he has the authority which the principal indicates by his conduct that the agent possesses. Thus dealing with the agent, such persons may hold the principal on contracts outside the real authority of the agent but inside his apparent authority.¹ Thus if a husband is his wife's agent to deliver a note signed by them both, his statement that she is principal is binding on her, if her name is written above his and prevents her from interposing the defense that she was a surety.² In contracts made in excess of the real authority of the agent the liability of the principal depends on the application of principles of estoppel. Thus the principal is liable only so far as the person dealing through the alleged agent had reason to believe from the facts known to him at the time, that the con-

¹ *Post v. Pearson*, 108 U. S. 418; *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Phillips, etc. Co. v. Whitney*, 109 Ala. 645; 20 So. 333; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252; 19 So. 318; *Buckley v. Silverberg*, 113 Cal. 673; 45 Pac. 804; *Camp v. Hall*, 39 Fla. 535; 22 So. 792; *Thornton v. Lawther*, 169 Ill. 228; 48 N. E. 412; reversing 67 Ill. App. 214; *Nash v. Classen*, 163 Ill. 409; 45 N. E. 276; *Croy v. Busenbark*, 72 Ind. 48; *Sawin v. Savings Association*, 95 Ia. 477; 64 N. W. 401; *Vanada v. Hopkins*, 1 J. J. Mar. (Ky.) 285; 19 Am. Dec. 92; *Columbia, etc., Co. v. Tinsley* (Ky.), 60 S. W. 10; *H. Herman Sawmill Co. v. Bailey* (Ky.), 58 S. W. 449; *Heath v. Stoddard*, 91 Me. 499; 40 Atl. 547; *Schendel v. Stevenson*, 153 Mass. 351; 26 N. E. 689; *Lock v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631; *Thompson v. Clay*, 60 Mich. 627; 27 N. W. 699; *Drohan v. Lumber Co.*, 75 Minn. 251; 77 N. W. 957; *Day, etc., Co. v. Bixby*, (Neb.), 93 N. W. 688; *Phoenix*

Ins. Co. v. Walter, 51 Neb. 182; 70 N. W. 938; *Thomson v. Shelton*, 49 Neb. 644; 68 N. W. 1055; *Camden, etc., Co. v. Abbott*, 44 N. J. L. 257; *Edwards v. Doolley*, 120 N. Y. 540; 24 N. E. 827; *Schley v. Fryer*, 100 N. Y. 71; 2 N. E. 280; *Hubbard v. Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585; 2 L. R. A. 823; 16 Atl. 817; *Minnelly v. Goodwin* (Tenn. Ch.), 39 S. W. 855; *Griggs v. Selden*, 58 Vt. 561; 5 Atl. 504; *Rohrbough v. Express Co.*, 50 W. Va. 148; 88 Am. St. Rep. 849; 40 S. E. 398. "Persons dealing with an agent have a right to presume that his agency is general and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it." *Trainer v. Morison*, 78 Me. 160, 163; 57 Am. Rep. 790; 3 Atl. 185; quoted in *Wood v. Finson*, 89 Me. 459, 460; 36 Atl. 911.

² *Tompkins v. Triplett*, 110 Ky. 824; 62 S. W. 1021.

tract was within the scope of the agent's authority.³ The principal may be estopped to deny the authority of the agent by actively holding him out to the world as his agent. Thus private instructions contrary to the apparent authority of the agent and not known to the person dealing with him,⁴ or an uncommunicated revocation of the agent's authority,⁵ do not prevent the principal from being bound by the contract of his agent made in his behalf with a person acting in good faith. Thus a recorded power of attorney and a deed made in pursuance thereof passes title to a *bona fide* grantee is against a grantee from the principal by a prior unrecorded deed.⁶ So a principal is bound by a letter written by his agent at his order, though its contents differ

³ *Nofsinger v. Goldman*, 122 Cal. 609; 55 Pac. 425; *Rodgers v. Peckham*, 120 Cal. 238; 52 Pac. 483; *Blass v. Terry*, 156 N. Y. 122; 50 N. E. 953; reversing 87 Hun (N. Y.) 563; *Fabian Mfg. Co. v. Newman* (Tenn. Ch. App.), 62 S. W. 218.

⁴ *Butler v. Maples*, 9 Wall. (U. S.) 766; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252; 19 So. 318; *Sweetser v. Shorter*, 123 Ala. 518; 26 So. 298; *Lytte v. Bank*, 121 Ala. 215; 26 So. 6; *Louisville, etc., Co. v. Tift*, 100 Ga. 86; 27 S. E. 765; *Armour v. Ross*, 110 Ga. 403; 35 S. E. 787; *Crain v. Bank*, 114 Ill. 516; 2 N. E. 486; *Hichhorn v. Bradley*, 117 Ia. 130; 90 N. W. 592; *Dreyfus v. Goss*, 67 Kan. 57; 72 Pac. 537; *Sanford v. Ins. Co.*, 174 Mass. 416; 75 Am. St. Rep. 358; 54 N. E. 883; *Brown v. Ins. Co.*, 165 Mass. 565; 52 Am. St. Rep. 535; 43 N. E. 512; *Baker v. Produce Co.*, 113 Mich. 533; 71 N. W. 866; *Allis v. Voigt*, 90 Mich. 125; 51 N. W. 190; *Leo Austrian & Co. v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350; 54 N. W. 50;

Van Santvoord v. Smith, 79 Minn. 316; 82 N. W. 642; *Watts v. Howard*, 70 Minn. 122; 72 N. W. 840; *Potter v. Milling Co.*, 75 Miss. 532; 23 So. 259; *Cross v. R. R. Co.*, 141 Mo. 132; 42 S. W. 675; affirming 71 Mo. App. 585; *Hall v. Hopper*, 64 Neb. 633; 90 N. W. 549; *Rathbun v. Snow*, 123 N. Y. 343; 10 L. R. A. 355; 25 N. E. 379; *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32; 88 Am. St. Rep. 770; 55 L. R. A. 408; 50 Atl. 286; *Anderson v. Surety Co.*, 196 Pa. St. 288; 46 Atl. 306; *Wilson v. Assurance Co.*, 51 S. C. 540; 64 Am. St. Rep. 700; 29 S. E. 245; *Smith v. Droubay*, 20 Utah 443; 58 Pac. 1112; *Hall v. Ins. Co.*, 23 Wash. 610; 83 Am. St. Rep. 844; 51 L. R. A. 288; 63 Pac. 505.

⁵ *Swinerton v. Argonaut, etc., Co.*, 112 Cal. 375; 44 Pac. 719; *Maxey Mfg. Co. v. Burnham*, 89 Me. 538; 56 Am. St. Rep. 436; 36 Atl. 1003.

⁶ *Gratz v. Improvement Co.*, 82 Fed. 381; 40 L. R. A. 393; 27 C. C. A. 305.

from the instructions given,⁷ and a third person may rely on the impression created by A's agent that the contract is made with A, though in fact the agent is making it for B.⁸ So an uncommunicated rule that the insurance agent must make a personal examination is not binding on persons taking insurance.⁹ So secret instructions to an agent not to insure certain kinds of property do not prevent the principal from being liable on insurance covering such property.¹⁰ So a sub-agent, who was employed as the agent of the general agent and not as the agent of the insurance company, may bind the company if held out as an agent.¹¹ The same rule applies where a sub-agent, with similar powers, having authority to sign the general agent's name, signs it to a policy contrary to the instructions of the company. Such policy binds the company and therefore the general agent is liable over to the company.¹² So where an agent having power to deliver a note on receipt of a written contract delivers the note before such contract is executed, relying on the promise of the adversary party to execute it later, such note is valid in the hands of a *bona fide* holder.¹³ So one who authorizes an agent to make a loan is liable for usury exacted by such agent, though such principal did not authorize usury or know of it.¹⁴ So an agent authorized to sell crops binds his principal by waiving his principal's lien as landlord though he sells more of the crops than specified in his secret instructions.¹⁵ The principal may

⁷ *Morris v. Posner*, 111 Ia. 335; 82 N. W. 755.

⁸ *Lambert v. Loan Association*, 65 N. J. L. 79; 46 Atl. 766.

⁹ *Phillips v. Ins. Co.*, 101 Fed. 33.

¹⁰ *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32; 88 Am. St. Rep. 770; 55 L. R. A. 408; 50 Atl. 286.

¹¹ *Hall v. Ins. Co.*, 23 Wash. 610; 83 Am. St. Rep. 844; 51 L. R. A. 288; 63 Pac. 505.

¹² *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. St. 32; 88 Am. St. Rep. 770; 55 L. R. A. 408; 50 Atl. 286.

¹³ *Chase National Bank v. Faurot*, 149 N. Y. 532; 35 L. R. A. 605; 44 N. E. 165. So if the purchaser of a note leaves it in the custody of payee and knowingly allows the payee to collect it he is estopped to deny payee's agency. *Morgan v. Neal*, 7 Ida. 629; 97 Am. St. Rep. 264; 65 Pac. 66.

¹⁴ *Robinson v. Blaken*, 85 Minn. 242; 89 Am. St. Rep. 541; 88 N. W. 845.

¹⁵ *Fishbaugh v. Spunaugle*, 118 Ia. 337; 92 N. W. 58.

be estopped by acquiescence in conduct of the alleged agent, known,¹⁶ or which should be known,¹⁷ to such principal. Thus if a principal has acquiesced in an agent's collecting certain payments, he is estopped to deny his authority to collect later payments.¹⁸ It has been held that the liability of the principal to third persons is not based on estoppel; and that it is not necessary to show that the person dealing with the agent knew of the facts upon which his apparent authority was based.¹⁹ This is not in accordance with the weight of authority; and probably the courts so holding do so through a confusion between apparent authority vesting in estoppel; and real authority which is proved by the past conduct of principal and agent, whether such conduct is known to the adversary party or not.²⁰

§966. Acts of unauthorized agent not estoppel.

The acts which create estoppel must be those of the principal to be estopped or of some one authorized by him. The acts and declarations of the alleged agent cannot estop the principal from denying the fact of the agency, and are not even admissible in evidence to establish such agency, if such principal has not

¹⁶ *Holt v. Schneider*, 57 Neb. 523; 77 N. W. 1086; *De Witt v. De Witt*, 202 Pa. St. 255; 51 Atl. 987; *Telephone Co. v. Brown*, 104 Tenn. 56; 78 Am. St. Rep. 906; 50 L. R. A. 277; 55 S. W. 155.

¹⁷ *Martin v. Webb*, 110 U. S. 7; *Blake v. Mfg. Co.* (N. J. Eq.), 38 Atl. 241; *Hanover National Bank v. American, etc., Co.*, 148 N. Y. 612; 51 Am. St. Rep. 721; 43 N. E. 72.

¹⁸ *Grant v. Humerick* (Ia.), 94 N. W. 510; *Harrison National Bank v. Austin*, 65 Neb. 632; 59 L. R. A. 294; 91 N. W. 540.

¹⁹ *Prescott v. Flinn*, 9 Bing. 19; *Williams v. Mitchell*, 17 Mass. 98;

Blake v. Mfg. Co. (N. J. Eq.), 38 Atl. 241.

²⁰ *Moore v. Publishing Association*, 95 Fed. 485; *Lester v. Webb*, 1 All. (Mass.) 34; *Perry v. Ins. Co.*, 67 N. H. 291; 68 Am. St. Rep. 668; 33 Atl. 731; *Fifth National Bank v. Phosphate Co.*, 119 N. Y. 256; 23 N. E. 737. "The recognition by a corporation of acts on the part of an agent similar in character to those which may be in dispute tends strongly to establish the agent's authority." *Olcott v. R. R. Co.*, 27 N. Y. 546, 560; 84 Am. Dec. 298. (Citing *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44; 8 Am. Dec. 219; *Wood v. R. R. Co.*, 8 N. Y. 160.)

acquiesced therein,¹ though his testimony to the fact of his authority is admissible.²

§967. Liability of principal.—Agent acting outside of authority.

The principal is not liable for a contract made by his agent outside both his real and his apparent authority.¹ The liability of the principal where the agent has exceeded his authority de-

¹ Trust Co. v. Robinson, 79 Fed. 420; Wailes v. Neal, 65 Ala. 59; Hawcote v. Kilbourn, 44 Ark. 213; Smith v. Ins. Co., 107 Cal. 432; 40 Pac. 540; Ferris v. Baker, 127 Cal. 520; 59 Pac. 937; Union Coal Co. v. Edman, 16 Colo. 438; 27 Pac. 1060; Amicalola, etc., Co. v. Coker, 111 Ga. 872; 36 S. E. 950; Massillon, etc., Co. v. Akerman, 110 Ga. 570; 35 S. E. 635; Grand Rapids, etc., Co. v. Morel, 110 Ga. 321; 35 S. E. 312; Proctor v. Tows, 115 Ill. 138; 3 N. E. 569; Whitam v. R. R. Co., 96 Ia. 737; 65 N. W. 403; Machine Co. v. Clark, 15 Kan. 492; Eaton v. Provident Association, 89 Me. 58; 35 Atl. 1015; Fontaine, etc., Electrical Co. v. Rauch, 117 Mich. 401; 75 N. W. 1063; Murphy v. Ins. Co., 83 Mo. App. 481; Association v. Murray, 47 Neb. 627; 66 N. W. 635; Gifford v. Landrine, 37 N. J. Eq. 127; Taylor v. Hunt, 118 N. C. 168; 24 S. E. 359; Q. W. Loverin-Browne Co. v. Bank, 7 N. D. 569; 75 N. W. 923; Central, etc., Supply Co. v. Thompson, 112 Pa. St. 118; 3 Atl. 439; Ehrhardt v. Breeland, 57 S. C. 142; 35 S. E. 537; Dickerman v. Ins. Co., 67 Vt. 609; 32 Atl. 489; Fisher v. White, 94 Va. 236; 26 S. E. 573; Garber v. Blatchley, 51 W. Va. 147; 41 S. E. 222; Rosendorf v. Poling, 48 W. Va. 621; 37 S. E. 555.

² McRae v. Development Co. (Cal.), 54 Pa. 743; O'Leary v. Ins. Co.,

100 Ia. 390; 69 N. W. 686; Lawall v. Groman, 180 Pa. St. 532; 57 Am. St. Rep. 662; 37 Atl. 98; Connor v. Johnson, 59 S. C. 115; 37 S. E. 240; Garber v. Blatchley, 51 W. Va. 147; 41 S. E. 222.

¹ Simon v. Johnson, 101 Ala. 368; 13 So. 491; Birmingham, etc., Co. v. R. R. Co., 127 Ala. 137; 28 So. 679; Snapp v. Stanwood, 65 Ark. 222; 45 S. W. 546; Lakeside, etc., Co. v. Campbell, 39 Fla. 523; 22 So. 878; Brandenstein v. Douglas, 105 Ga. 845; 32 S. E. 341; Blackmer v. Mining Co., 187 Ill. 32; 58 N. E. 289; Kinser v. Clay Co., 165 Ill. 505; 46 N. E. 372; affirming 64 Ill. App. 437; Noftsgier v. Barkdoll, 148 Ind. 531; 47 N. E. 960; Kiefer v. Klinsick, 144 Ind. 46; 42 N. E. 447; Stover v. Flower, 120 Ia. 514; 94 N. W. 1100; Godshaw v. Struck, 109 Ky. 285; 58 S. W. 781; 51 L. R. A. 668; Warren v. Goodwyn, 110 La. 198; 34 So. 411; Munroe v. Whitehouse, 90 Me. 139; 37 Atl. 866; Davies v. Steamboat Co., 94 Me. 379; 53 L. R. A. 239; 47 Atl. 896; Clark v. Murphy, 164 Mass. 490; 41 N. E. 674; Gore v. Assurance Co., 119 Mich. 136; 77 N. W. 650; Clark v. Haupt, 109 Mich. 212; 68 N. W. 231; Olson v. Ry. Co., 81 Minn. 402; 84 N. W. 219; Perrine v. Cooley, 42 N. J. L. 623; Law v. Stokes, 32 N. J. L. 249; 90 Am. Dec. 655; Ferguson v. Mfg. Co., 118 N. C. 946; 24 S. E. 710; Thompson v.

pende on principles of estoppel. If no facts exist, therefore, to estop the principal from denying the authority of the agent, persons dealing with the agent must take notice of his powers.² So persons dealing with an agent are bound by known limitations on his authority.³ So where the agent is a special agent of limited powers, the principal in the absence of estoppel or ratification, is not bound by his contract in excess of his authority.⁴ Thus an agreement by a local railway agent in violation of a known rule of the railway to make no charge to a large shipper for demurrage or storage is not binding on the company.⁵ So an agent having an assignment of a judgment for safe keeping cannot assign such judgment to one who knows the facts.⁶ So a conveyance by an attorney in fact, having known authority to convey only on approval by his principal, is of no validity if made without such approval.⁷ So if A buys a piano from B as agent of X and makes his note therefor payable to B personally, it has been held that if B does not account to X for the proceeds of such note, X may recover the piano, X not having ratified the sale and no such custom of business being shown.⁸

Sproul, 179 Pa. St. 266; 36 Atl. 290; *Mundis v. Emig*, 171 Pa. St. 417; 32 Atl. 1135; *Brown v. West*, 69 Vt. 440; 38 Atl. 87; *Parr v. Mfg. Co.*, 117 Wis. 278; 93 N. W. 1099; *McKindly v. Dunham*, 55 Wis. 515; 42 Am. Rep. 740; 13 N. W. 485.

² *Insurance Co. v. Thornton*, 130 Ala. 222; 89 Am. St. Rep. 30; 55 L. R. A. 517; 30 So. 614; *Planters', etc., Fire Association v. De Loach*, 113 Ga. 802; 39 S. E. 466; *Deffenbaugh v. Mfg. Co.*, 120 Mich. 242; 79 N. W. 197; *Spelman v. Milling Co.*, 26 Mont. 76; 55 L. R. A. 640; 66 Pac. 597; *Chase v. Swift*, 60 Neb. 696; 83 Am. St. Rep. 552; 84 N. W. 86; *Carney v. Ins. Co.*, 162 N. Y. 453; 76 Am. St. Rep. 347; 49 L. R. A. 471; 57 N. E. 78; *Fargo v. Cravens*, 9 S. D. 646; 70 N. W. 1053.

³ *Littleton v. Loan, etc., Associa-*

tion, 97 Ga. 172; 25 S. E. 826; *Gorham v. Felker*, 102 Ga. 260; 28 S. E. 1002; *Wynne v. Parke*, 89 Tex. 413; 34 S. W. 907; *Wells v. Ins. Co.*, 41 W. Va. 131; 23 S. E. 527.

⁴ *Rigby v. Lowe*, 125 Cal. 613; 58 Pac. 153; *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480; 32 S. E. 591; *Phoenix Ins. Co. v. Gray*, 107 Ga. 110; 32 S. E. 948; *Jones v. Brand*, 106 Ky. 410; 50 S. W. 679; *Hardwick v. Kirwan*, 91 Md. 285; 46 Atl. 987; *Norton v. Nevills*, 174 Mass. 243; 54 N. E. 537; *Mann v. Oil Co.*, 92 Tex. 377; 48 S. W. 567.

⁵ *Harris v. Banking Co.*, 91 Ga. 317; 18 S. E. 159.

⁶ *Schmidt v. Shaver*, 196 Ill. 108; 89 Am. St. Rep. 250; 63 N. E. 655.

⁷ *Alcorn v. Buschke*, 133 Cal. 655; 66 Pac. 15.

⁸ *Baldwin v. Tucker*, 112 Ky. 282; 65 S. W. 841.

So a principal is not bound where an agent with mere power to sell, inserts in a contract a clause for interest in case of delay in delivery,⁹ or makes specific representations that the threshing-machine sold by him has been shipped, thereby inducing the vendee to deliver his old machine in part payment, and thus leaving him without any threshing machine when needed.¹⁰ So if an insurance agent delivers a policy which by its terms is not to take effect until the first premium is paid, and the insured agrees to pay therefor by giving the agent credit for such premium on his private account, the insurance company is not liable if the agent does not account to it for such premium.¹¹ So if an insurance policy shows on its face that an agent has no authority to waive certain provisions thereof, an attempted waiver by an agent not having such authority in fact is invalid.¹² So while a rule of an express company that express orders must be signed by their local agent does not prevent recovery on express orders signed by a clerk in the office of the local agent, such rule not being known,¹³ yet if this clerk had solicited business outside the office and had made no charge therefore, the person buying such orders with knowledge of these facts must take notice that such business is outside the apparent authority of an express agent. So an agent who has merely power to sell cannot bind his principal by a contract of sale which provides for payment in something other than cash, such as lumber,¹⁴ second-hand machinery,¹⁵ or a note and a certificate of deposit.¹⁶ An agent with authority to inspect lumber cannot bind his principal by agreeing to accept lumber which he has not inspected.¹⁷ So

⁹ *Hardwick v. Kirwan*, 91 Md. 285; 46 Atl. 987.

¹⁰ *J. L. Case, etc., Co. v. Eichinger*, 15 S. D. 530; 91 N. W. 82.

¹¹ *Tomseeck v. Ins. Co.*, 113 Wis. 114; 57 L. R. A. 455; 88 N. W. 1013.

¹² *Thornton v. Ins. Co.*, 116 Ga. 121; 94 Am. St. Rep. 99; 42 S. E. 287; *Cook v. Ins. Co.*, 84 Mich. 12; 47 N. W. 568; *Cleaver v. Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; 32 N. W. 660.

¹³ *Rohrbaugh v. Express Co.*, 50 W. Va. 148; 88 Am. St. Rep. 849; 40 S. E. 398.

¹⁴ *J. A. Fay, etc., Co. v. Causey*, 131 N. C. 350; 42 S. E. 827.

¹⁵ *Elfring v. Birdsall Co.*, — S. D. —; 92 N. W. 29.

¹⁶ *Wilken v. Voss*, 120 Ia. 500; 94 N. W. 1123.

¹⁷ *Campbellsville Lumber Co. v. Spotswood (Ky.)*, 74 S. W. 235.

an agent with authority only to collect rents cannot bind his principal by a contract to lease.¹⁸ So a principal is not bound by the act of his agent after the authority of such agent is known to the third person to be revoked.¹⁹ Thus an agent originally authorized to sell realty, cannot bind his principal by accepting money from a vendee and putting him in possession, after such vendee knows that the principal has already sold the realty to another.²⁰ If the contract of the agent exceeds his authority, it will be held good as far as his authority extends if such part can be separated from the rest. Thus if an attorney in fact is authorized to execute a quit-claim deed only, a warranty deed executed by him will pass title, though the covenant of warranty will not bind the principal.²¹

§968. Ratification.—Nature and effect.

In addition to liability created originally by the contract of the agent, a principal may be liable by reason of his ratification of an unauthorized contract made by one who assumes to act as his agent, or who is his agent, but who exceeds his authority.¹ Thus if a wife signs her husband's name to a note without authority, he is bound thereby if he subsequently ratifies it.² The principal cannot ratify a contract which he could not have authorized originally. Thus where the principal is an administratrix, she cannot ratify a contract of an agent which she

¹⁸ Dieckman v. Weirich (Ky.), 73 S. W. 1119.

¹⁹ Florida, etc., R. R. v. Ashmore, 43 Fla. 272; 32 So. 832.

²⁰ Chandler v. Franklin, 65 S. C. 544; 44 S. E. 70.

²¹ Robinson v. Lowe, 50 W. Va. 75; 40 S. E. 454.

¹ Avakian v. Noble, 121 Cal. 216; 53 Pac. 559; Lynch v. Smyth, 25 Colo. 103; 54 Pac. 634; W. H. H. Peck Co. v. Gordon, 112 Mich. 487; 70 N. W. 1034; Hunter v. Cobe, 84 Minn. 187; 87 N. W. 612; *In re* Soulard's Estate, 141 Mo. 642; 42

S. W. 617; Kelly v. Thuey, 143 Mo. 422; 45 S. W. 300; reversing in banc, 37 S. W. 516; Daughters of American Revolution v. Schenley, 204 Pa. St. 572; 34 Atl. 366; (Supreme Assembly, etc.) 'Good Fellows v. Campbell, 17 R. I. 402; 13 L. R. A. 601; 22 Atl. 307; Knights of Pythias v. Cogbill, 99 Tenn. 28; 41 S. W. 340; Richmond, etc., Co. v. Ry. Co., 95 Va. 386; 28 S. E. 573; McDermott v. Jackson, 97 Wis. 64; 72 N. W. 375.

² Hewling v. Wilshire (Ky.), 61 S. W. 264.

could not have authorized.³ The principal has a reasonable time to ascertain the facts and return what he has received under such contract.⁴ Delay beyond a reasonable time amounts to acquiescence.⁵ Ratification once made with full knowledge of facts prevents subsequent disaffirmance.⁶ Since this is properly a ratification, no new consideration is necessary.⁷ Mere omission to discharge the agent for other alleged misconduct is not ratification,⁸ nor is a repudiation of the contract for an erroneous reason.⁹

§969. Methods of ratification.

Ratification may be made expressly,¹ even if the adversary parties have repudiated the contract,² as by insisting on new conditions which are accepted,³ or it may be implied from the conduct of the principal,⁴ as by accepting the proceeds of the contract.⁵ This rule is sometimes stated in the form that retention

³ Upton v. Dennis, — Mich. —; 94 N. W. 728.

⁴ McDermott v. Jackson, 102 Wis. 419; 78 N. W. 598; same case, 97 Wis. 64; 72 N. W. 375.

⁵ Georgia Home Ins. Co. v. Smithville (Tex. Civ. App.), 49 S. W. 412.

⁶ Hunter v. Cobe, 84 Minn. 187; 87 N. W. 612.

⁷ Plumb v. Curtis, 66 Conn. 154; 33 Atl. 998.

⁸ Fortune v. Stockton, 182 Ill. 454; 55 N. E. 367; affirming 82 Ill. App. 272.

⁹ Brown v. Henry, 172 Mass. 559; 52 N. E. 1073.

¹ Pope v. Armsby Co., 111 Cal. 159; 43 Pac. 589; Brown v. Wilson, 45 S. C. 519; 55 Am. St. Rep. 779; 23 S. E. 630; Johnson v. Mfg. Co., 103 Wis. 291; 79 N. W. 236.

² Tiedemann v. Ledermann Freres (1899), 2 Q. B. 66.

³ Robert, etc., Co. v. Mfg. Co., 173 Pa. St. 447; 34 Atl. 450.

⁴ Fant v. Campbell, 8 Okla. 586; 58 Pac. 741.

⁵ Goodman v. Winter, 64 Ala. 410; 38 Am. Rep. 13; Wagoner v. Silva, 139 Cal. 559; 73 Pac. 433; Duncan v. Kearney, 72 Conn. 585; 45 Atl. 358; Smith v. Holbrook, 99 Ga. 256; 25 S. E. 627; Booth v. Wiley, 102 Ill. 84; France v. Haynes, 67 Ia. 139; 25 N. W. 98; Noble v. White, 103 Ia. 352; 72 N. W. 556; Higbee v. Trumbauer, 112 Ia. 74; 83 N. W. 812; Fleischman v. Ver Does, 111 Ia. 322; 82 N. W. 757; Blaess v. Nichols Shepard Co., 115 Ia. 373; 88 N. W. 829; Cassady v. Ins. Co., 109 Ia. 539; 80 N. W. 521; State Bank v. Kelly, 109 Ia. 544; 80 N. W. 520; J. P. Calnan Construction Co. v. Brown, 110 Ia. 37; 81 N. W. 163; White v. Creamery Co., 108 Ia. 522; 79 N. W. 283; Russ v. Hansen, 119 Ia. 375; 93 N. W. 502; McKinstry v. Bank, 57 Kan. 279; 46 Pac. 302; Graves v. Cord (Ky.), 44 S. W. 665; Singer

of the proceeds of the contract estops the principal to deny the agency.⁶ Thus a vendor who receives and retains the price of machinery cannot avoid a warranty thereof made by the agent who sold it.⁷ So a vendee is liable for property bought for him by his agent without authority and received and accepted by him.⁸ Retaining property received under the agent's contract is not ratification where rejection is impossible, as where the material was built into the principal's house,⁹ or repairs were made upon property owned by the principal.¹⁰ Ratification may be effected by accepting services under the contract,¹¹ or suing thereon;¹² or by acquiescence therein with knowledge of the facts,¹³ if for such a length of time that third parties have in the meanwhile acted in reliance on such acquiescence;¹⁴ or by

Mfg. Co. v. Stephens (Ky.), 53 S. W. 525; Sokup v. Letellier, 123 Mich. 640; 82 N. W. 523; Payn v. Gidley, 122 Mich. 605; 81 N. W. 558; Payne v. Hackney, 84 Minn. 195; 87 N. W. 608; Anderson v. Johnson, 74 Minn. 171; 77 N. W. 26; Wright v. Church, 72 Minn. 78; 74 N. W. 1015; Day v. Miller, 1 Neb. (Un.) 107; 95 N. W. 359; Smith v. Barnard, 148 N. Y. 420; 42 N. E. 1054; Williams v. Lumber Co., 118 N. C. 928; 24 S. E. 800; Woodward v. Suydam, 11 Ohio 360; Welch v. Mfg. Co., 55 S. C. 568; 33 S. E. 739; Marks v. Taylor, 23 Utah 152; 63 Pac. 897; modified, 23 Utah 470; 65 Pac. 203; Field v. Doyon, 64 Wis. 560; 25 N. W. 653; Kriz v. Peege, 119 Wis. 105; 95 N. W. 108.

⁶ Lull v. Bank, 110 Ia. 537; 81 N. W. 784.

⁷ Blaess v. Nichols Shepard Co., 115 Ia. 373; 88 N. W. 829.

⁸ Haney, etc., Co. v. Institute, 113 Ga. 289; 38 S. E. 761.

⁹ Moyle v. Society, 16 Utah 69; 50 Pac. 806.

¹⁰ Forman v. The Liddesdale

(1900), A. C. 190 (repair of a ship).

¹¹ People's National Bank v. Geisthardt, 55 Neb. 232; 75 N. W. 582.

¹² Curnane v. Scheidel, 70 Conn. 13; 38 Atl. 875; Shoninger v. Peabody, 57 Conn. 42; 14 Am. St. Rep. 88; 17 Atl. 278; Warder, etc., Co. v. Cuthbert, 99 Ia. 681; 68 N. W. 917; Edgar v. Breck, 172 Mass. 581; 52 N. E. 1083; Plano Mfg. Co. v. Millage, 14 S. D. 331; 85 N. W. 594.

¹³ Market, etc., Co. v. Hellman, 109 Cal. 571; 42 Pac. 225; J. B. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628; 54 Atl. 1122; Glucose, etc., Co. v. Flinn, 184 Ill. 123; 56 N. E. 400; affirming 85 Ill. App. 131; Singer Mfg. Co. v. Flynn, 63 Minn. 475; 65 N. W. 923 (acquiescence for two years); Lyle v. Addicks, 62 N. J. Eq. 123; 49 Atl. 1121; Hanover National Bank v. American, etc., Co., 148 N. Y. 612; 51 Am. St. Rep. 721; 43 N. E. 72.

¹⁴ Smith v. Fletcher, 75 Minn. 189; 77 N. W. 800; Dewing v. Hutton, 48 W. Va. 576; 37 S. E. 670; Roundy v. Erspamer, 112 Wis. 181; 87 N. W. 1087.

payment under such contract,¹⁵ or by receiving money thereunder.¹⁶ Acquiescence for three years¹⁷ tends to show ratification. Mere failure to disavow an act of one who is not an agent does not amount to ratification unless such silence induces others to act in reliance upon the apparent validity of the transaction.¹⁸ But retention of a thing of no value as a deed made without principal's authority to a third person is not ratification.¹⁹ So refusal to receive the purchase money when tendered excuses the principal from making tender of the purchase notes.²⁰ To constitute ratification the money or property received must be received under the unauthorized contract. So if a lease made by an agent without authority is expressly repudiated by the principal, but he allows the tenant to remain from month to month at the rent fixed by the lease, this is not a ratification.²¹ If X, the agent of A, a steamship company, issues a bill of lading before receiving the goods, and A repudiates the contract as soon as it learns of it, A's act in taking property from X to secure A against any liability upon such bill is not ratification.²² So if the principal claims damages from his agent for making an unauthorized contract, this does not amount to a ratification.²³

If the conduct of another agent is relied upon as ratification, such other agent must himself have authority to perform or to ratify such act.²⁴

¹⁵ Mullaney v. Evans, 33 Or. 330; 54 Pac. 886; Anderson v. Surety Co., 196 Pa. St. 288; 46 Atl. 306.

¹⁶ Des Moines National Bank v. Meredith, 114 Ia. 9; 86 N. W. 46; Dillaway v. Alden, 88 Me. 230; 33 Atl. 981.

¹⁷ Cheshire Provident Institution v. Vandergrift, 1 Neb. (Un.) 339; 95 N. W. 615.

¹⁸ Robbins v. Blanding, 87 Minn. 246; 91 N. W. 844.

¹⁹ Bromley v. Aday, 70 Ark. 351;

68 S. W. 32. (In this case the abstract, too, was retained.)

²⁰ Cole v. Baker, — S. D. —; 91 N. W. 324.

²¹ Owens v. Swanton, 25 Wash. 112; 64 Pac. 921.

²² Lazard v. Transportation Co., 78 Md. 1; 26 Atl. 897.

²³ Jameson v. Colwell, 25 Ore. 199; 35 Pac. 245.

²⁴ Fay v. Slaughter, 194 Ill. 157; 88 Am. St. Rep. 148; 56 L. R. A. 564; 62 N. E. 592; Bohanan v. R. R., 70 N. H. 526; 49 Atl. 103.

§970. Necessity of full knowledge of facts.

In order to bind the principal finally a ratification must be made with full knowledge of the material facts. If made without such knowledge the principal may avoid both the ratification and the original contract, at least as to those who have not in good faith acted upon the ratification.¹ A sale is ratified by the principal's receipt of money which he had no reason to think came from any other source except the sale thus ratified;² but mere delivery of goods by the principal according to the terms of the contract made by his agent would not be a ratification unless 'he principal knew of the contract,'³ as where the goods had been sold with an unauthorized warranty.⁴ So if a claim agent agrees to pay one injured by the fault of the road a certain sum of money and employment for life in settlement of his claim, payment of such sum and employment of such person by the railroad for a limited time is not ratification of the contract for permanent employment unless known to the

¹ *Marsh v. Joseph* (1897), 1 Ch. 213; *Bennecke v. Ins. Co.*, 105 U. S. 355; *Bell v. Cunningham*, 3 Pet. (U. S.) 69; *Wheeler v. McGuire*, 86 Ala. 398; 2 L. R. A. 808; 5 So. 190; *Martin v. Hickman*, 64 Ark. 217; 41 S. W. 852; *Ballard v. Nye*, (Cal.), 69 Pac. 481; *Estrella Vineyard Co. v. Butler*, 125 Cal. 232; 57 Pac. 980; *Dean v. Hipp*, — Colo. App. —; 66 Pac. 804; *Oxford Lake Line v. Bank*, 40 Fla. 349; 24 So. 480; *Ludden, etc., Music House v. McDonald*, 117 Ga. 60; 43 S. E. 425; *Meyer v. Wegener*, 114 Ia. 74; 86 N. W. 49; *Beacon Trust Co. v. Souther*, 183 Mass. 413; 67 N. E. 345; *Thatcher v. Pray*, 113 Mass. 291; 18 Am. Rep. 480; *Combs v. Scott*, 12 All. (Mass.) 493; *Leonardson v. Troy Tp.*, 125 Mich. 209; 84 N. W. 63; *Godfrey v. Ins. Co.*, 70 Minn. 224; 73 N. W. 1; *Hunt v. Agricultural Works*, 69 Minn. 539; 72 N. W. 813; *Prentiss v. Nelson*, 69 Minn. 496; 72 N. W. 831; *Bul-*

lard v. DeGraff, 59 Neb. 783; 82 N. W. 4; *Henry, etc., Co. v. Halter*, 58 Neb. 685; 79 N. W. 616; *Cram v. Sickel*, 51 Neb. 828; 66 Am. St. Rep. 478; 71 N. W. 724; *Bierman v. Mills Co.*, 151 N. Y. 482; 56 Am. St. Rep. 636; 37 L. R. A. 799; 45 N. E. 856; *Stock Exchange Bank v. Williamson*, 6 Okla. 348; 50 Pac. 93; *Conser v. Coleman*, 31 Ore. 550; 50 Pac. 914; *American National Bank v. Cruger*, 91 Tex. 446; 44 S. W. 278; *Moyle v. Society*, 16 Utah 69; 50 Pac. 806; *Halsey v. Monteiro*, 92 Va. 581; 24 S. E. 258; *Armstrong v. Oakley*, 23 Wash. 122; 62 Pac. 499; *Knapp v. Smith*, 97 Wis. 111; 72 N. W. 349. *

² *Columbia, etc., Co. v. Tinsley* (Ky.), 60 S. W. 10.

³ *Estrella Vineyard Co. v. Butler*, 125 Cal. 232; 57 Pac. 980.

⁴ *Bierman v. Mills Co.*, 151 N. Y. 482; 56 Am. St. Rep. 636; 37 L. R. A. 799; 45 N. E. 856.

railroad.⁵ Mistake as to a collateral contract made with other parties as a means of performing the contract ratified, does not avoid a ratification.⁶

§971. Partial ratification impossible.

The principal must affirm or disaffirm the contract as an entirety. He cannot affirm the part beneficial to himself and disaffirm the rest.¹ Thus if he receives and retains property thereunder this amounts to a ratification of the entire contract, even if he expressly declares his intention of avoiding his liability.² So a principal cannot retain land bought for her by her agent and avoid liability for his constructive fraud and undue influence.³ So a client who accepts and retains the proceeds of a judgment cannot claim ignorance of the terms of the decree or want of authority in the attorney to enter it in such form.⁴ So a receipt of part of the property to be delivered

⁵ Bohanan v. R. R., 70 N. H. 526; 49 Atl. 103.

⁶ Brong v. Spence, 56 Neb. 638; 77 N. W. 54.

¹ Rader v. Maddox, 150 U. S. 128; Cochran v. Chitwood, 59 Ill. 53; Adams Express Co. v. Carnahan, 29 Ind. App. 606; 94 Am. St. Rep. 279; 64 N. E. 647; 63 N. E. 245; Travelers Ins. Co. v. Patten, 119 Ind. 416; 20 N. E. 790; Burke, etc., Co. v. Wells Fargo & Co., 7 Idaho 42; 60 Pac. 87; Coolidge v. Smith, 129 Mass. 554; St. Johns Mfg. Co. v. Munger, 106 Mich. 90; 58 Am. St. Rep. 468; 29 L. R. A. 63; 64 N. W. 3; Dodge v. Tullock, 110 Mich. 480; 68 N. W. 239; King v. Lumber Co., 80 Minn. 274; 83 N. W. 170; D. M. Osborn Co. v. Jordan, 52 Neb. 465; 72 N. W. 479; Hinman v. Mfg. Co., 65 Neb. 187; 90 N. W. 934; Hall v. Hopper, 64 Neb. 633; 90 N. W. 549; German National Bank v. Bank, 59 Neb. 7; 80 N. W. 48; Citizens' State Bank v.

Pence, 59 Neb. 579; 81 N. W. 623; Martin v. Humphrey, 58 Neb. 414; 78 N. W. 715; Farmer's, etc., Bank v. Bank, 49 Neb. 379; 68 N. W. 488; Pennsylvania, etc., Co. v. Cook, 123 Pa. St. 170; 16 Atl. 762; Fort v. Coker, 11 Heisk. (Tenn.) 579; Lane v. Black, 21 W. Va. 617; Strasser v. Conklin, 54 Wis. 102; 11 N. W. 254.

² Henry Vogt Machine Co. v. Ling-enfelter (Ky.), 62 S. W. 499; Boudreaux v. Feibleman, 105 La. 401; 29 So. 881; Coggins v. Higbie, 83 Minn. 83; 85 N. W. 930; Plano Mfg. Co. v. Nordstorm, 63 Neb. 123; 88 N. W. 164; Aultman Co. v. McDonough, 110 Wis. 263; 85 N. W. 980.

³ Stephens v. Ozbourne, 107 Tenn. 572; 89 Am. St. Rep. 957; 64 S. W. 902.

⁴ Julier v. Julier, 62 O. S. 90; 78 Am. St. Rep. 697; 56 N. E. 661. (In this case the decree was for alimony and barred the dower of the innocent and prevailing plaintiff

under a contract is a ratification of the entire contract.⁵ So he cannot enforce a note for an insurance policy taken by his agent and repudiate the agreement for rescission at the option of the maker under which such note was given.⁶ So the principal cannot enforce a loan and repudiate liability for usury.⁷ So a principal cannot retain property taken by his agent in payment of a debt due the principal and repudiate the contract under which it was given.⁸ But if the agent has made two or more independent contracts, the principal may affirm one and disaffirm the other.⁹

§972. Necessity of acting as agent.

The doctrine of ratification in agency applies only to the contracts of one who is an agent or who claims to act as agent. A contract made by one who is not an agent and does not claim to act as agent cannot be ratified.¹ Therefore, by the better reasoning a forgery cannot be ratified,² though there is authority to the contrary.³ If the party whose name is forged to a contract receives money thereunder he is estopped to deny his liability.⁴ However, if an agent forges his principal's signature to a certificate of stock, receives the money therefor, deposits it to his principal's account, and then embezzles it,

in return for which she received a larger allowance of alimony.)

⁵ *Daniels v. Brodie*, 54 Ark. 216; 11 L. R. A. 81; 15 S. W. 467.

⁶ *Andrews v. Robertson*, 111 Wis. 334; 54 L. R. A. 673; 87 N. W. 190.

⁷ *Robinson v. Blaker*, 85 Minn. 242; 89 Am. St. Rep. 541; 88 N. W. 845.

⁸ *Daniels v. Brodie*, 54 Ark. 216; 11 L. R. A. 81; 15 S. W. 467.

⁹ *Schollay v. Drug Co.*, 17 Colo. App. 126; 67 Pac. 182.

¹ *Keighley v. Durant* (1901), App. Cas. 240; reversing *Durant v. Roberts* (1900), 1 Q. B. 629; *Meritt v. Kewanee*, 175 Ill. 537; 51 N. E. 867; *Rawlings v. Neal*, 126 N. C. 271; 35 S. E. 597; *Williams v.*

Sterns, 59 O. S. 28; 51 N. E. 439; *Backhaus v. Buells*, 43 Ore. 558; 73 Pac. 342.

² *Henry v. Heeb*, 114 Ind. 275; 5 Am. St. Rep. 613; 16 N. E. 606; *Owsley v. Philips*, 78 Ky. 517; 39 Am. Rep. 258; *Workman v. Wright*, 33 O. S. 405; 31 Am. Rep. 546; *Shisler v. Vandike*, 92 Pa. St. 417; 37 Am. Rep. 702.

³ *Hefner v. Vandolah*, 62 Ill. 483; 14 Am. Rep. 106; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Central National Bank v. Copp*, 184 Mass. 328; 68 N. E. 334; *Commercial Bank v. Warren*, 15 N. Y. 577.

⁴ *Campbell v. Campbell*, 133 Cal. 33; 65 Pac. 134 (forgery of a note).

such receipt of money is not a ratification by the principal.⁵ A principal who accepts the benefits of a contract made for him by a duly authorized agent does not incur liability for the representations of a third person made to the adversary party without the knowledge of the agent.⁶ If an agent does not disclose the fact of his agency to the person with whom he deals, the principal may nevertheless enforce the contract,⁷ or may be held liable thereon.⁸ So if one who is really an agent does not disclose the fact of his agency and exceeds his authority his principal may ratify such contract.⁹

§973. Effect of ratification.—Adversary party.

Whether the principal's ratification of an unauthorized act of one acting or claiming to act as his agent can make the contract enforceable as against the adversary party, is a question upon which there is a divergence of authority. If the adversary party has received a thing of value under the contract which he retains, it seems to be generally held that the principal can affirm and hold the adversary party to his executory contract. Thus where unauthorized loans have been made by state agents evidenced by notes, it has been held that the state may affirm the loan and enforce the notes.¹ If the adversary party has not received anything of value under the contract, some jurisdictions hold that the principal can affirm and thus make the contract valid, even if the adversary party attempts to repudiate it.² Thus where an insurance agent inserted unauthorized clauses in the policy, it was held that if the insurance company ratified the contract the other party could not avoid it.³ In other juris-

⁵ *Fay v. Slaughter*, 194 Ill. 157; 88 Am. St. Rep. 148; 56 L. R. A. 564; 62 N. E. 592.

⁶ *Tecumseh v. Banking House*, 63 Neb. 163; 57 L. R. A. 811; 88 N. W. 186.

⁷ See §§ 606, 1236.

⁸ See §§ 606, 607.

⁹ *Hayward v. Langmaid*, 181 Mass. 426; 63 N. E. 912.

¹ *State v. Shaw*, 28 Ia. 67; *State v. Torinus*, 26 Minn. 1; 37 Am. Rep. 395; 49 N. W. 259.

² *Tiedeman v. Ledermann Freres* (1899), 2 Q. B. 66.

³ *Andrews v. Ins. Co.*, 92 N. Y. 596. "So long as the condition of the parties is unchanged, he cannot be prevented from such adoption because the other party to the con-

dictions it is held that as such contract is not binding on the principal it is not binding on the adversary party, and the principal's ratification cannot increase the liability of such adversary party.⁴ The view entertained of such transaction by the Wisconsin courts seems to be that it does not even amount to an offer by the adversary party to the principal; but unless he ratifies and the adversary party then assents to such contract, no liability exists. Where this view is correct, ratification by the principal before the adversary party dissents does not make the contract valid. If the principal ratifies after the adversary party repudiates the contract it has been held that no liability attaches. Where the principal, A, had given oral authority to an agent B, to sell realty, which under the local statute was invalid because not in writing, and B makes a contract for the sale of such realty to X, X may disaffirm before A ratifies, and in such case he will not be bound even if A subsequently attempts to ratify such contract.⁵ Of course if the principal does not ratify, no liability attaches to the adversary party.⁶ If the adversary party acquiesces in the principal's ratification the contract is binding upon both.⁷ Since the adversary can hold the agent, who exceeds his authority only on the theory that he has been damaged in not obtaining the liability of the principal which he had contracted for, the principal's ratification relieves the agent from liability to the adversary party,⁸ except where the agent has so contracted as to incur personal liability in any event.

tract may for any reason prefer to treat the contract as invalid." *Andrews v. Ins. Co.*, 92 N. Y. 596, 604. In this case ratification was made as soon as the clause in question was called to the attention of the company; but such attention was called thereto by the adversary party's attempt to avoid the contract.

⁴ *Townsend v. Corning*, 23 Wend. (N. Y.) 435. (A case of a sealed instrument, however: signed by the name of the agent alone.) *Atlee v.*

Bartholomew, 69 Wis. 43; 5 Am. St. Rep. 103; 33 N. W. 110; *Dodge v. Hopkins*, 14 Wis. 630.

⁵ *Baldwin v. Schiappacasse*, 109 Mich. 170; 66 N. W. 1091.

⁶ *Davis v. Walker*, 131 Ala. 204; 31 So. 554; *Shuttleworth v. Development Co. (Ky.)*, 61 S. W. 1012.

⁷ *Soames v. Spencer*, 1 Dowl. & R. 32.

⁸ *Bowen v. Morris*, 2 Taunt. 374; *Hale Elevator Co. v. Hale*, 201 Ill. 131; 66 N. E. 249; affirming 98 Ill. App. 430; *Roby v. Cossitt*, 78 Ill.

§974. Effect of ratification.—Third persons.

Ratification cannot destroy intervening rights of third persons.¹ Thus ratification cannot avoid an intervening chattel mortgage² or attachment.³ So, an unauthorized assignment was made; the alleged assignee sued on the claim; and subsequently such assignment was ratified. It was held that such ratification could not avail the assignee in that action.⁴

§975. Liability of agent.

An agent acting within the scope of his authority is not liable to third persons upon a contract made by him as agent for a principal whom he discloses, which does not by its terms purport to bind the agent personally,¹ as for the sale of a forged note,² or for receiving money which he has not paid over to his principal,³ or for money which he has paid over to his principal.*

The known agent of a corporation who is authorized by it to

638; *Ballou v. Talbot*, 16 Mass. 461; 8 Am. Dec. 146; *Lingenfelder v. Leschen*, 134 Mo. 55; 34 S. W. 1089; *Hopkins v. Everly*, 150 Pa. St. 117; 24 Atl. 624.

¹ *Read v. Buffum*, 79 Cal. 77; 12 Am. St. Rep. 131; 21 Pac. 555; *Wittenbrock v. Bellmer*, 57 Cal. 12; *Lampson v. Arnold*, 19 Ia. 479; *Clendenning v. Hawk*, 10 N. D. 90; 86 N. W. 114.

² *Clendenning v. Hawk*, 10 N. D. 90; 86 N. W. 114.

³ *Pollock v. Cohen*, 32 O. S. 514.

⁴ *Read v. Buffum*, 79 Cal. 77; 12 Am. St. Rep. 131; 21 Pac. 555.

¹ *Baldwin v. Bank*, 119 U. S. 643; *Whitney v. Wyman*, 101 U. S. 392; *Monticello Bank v. Bostwick*, 71 Fed. 641; *Gulf, etc., Co. v. R. R. Co.*, 121 Ala. 621; 25 So. 579; *Anderson v. Timberlake*, 114 Ala. 377; 62 Am. St. Rep. 105; 22 So. 431; *Tevis v. Savage*, 130 Cal. 411; 62 Pac. 611; *Merrill v. Williams*, 63

Cal. 70; *Stevenson v. Mathers*, 67 Ill. 123; *Lewis v. Harris*, 4 Met. (Ky.) 353; *Worthington v. Cowles*, 112 Mass. 30; *Huston v. Tyler*, 140 Mo. 252; 41 S. W. 795; 36 S. W. 654; *Sleeper v. Weymouth*, 26 N. H. 34; *American National Bank v. Wheelock*, 82 N. Y. 118; *Hall v. Lauderdale*, 46 N. Y. 70; *Kurzawski v. Schneider*, 179 Pa. St. 500; 36 Atl. 319; *Wilson v. Wold*, 21 Wash. 398; 75 Am. St. Rep. 846; 58 Pac. 223; *Johnson v. Welch*, 42 W. Va. 18; 24 S. E. 585; *Moody, etc., Co. v. Church*, 99 Wis. 49; *sub nomine*, *Moody, etc., Co. v. Leek*, 74 N. W. 572.

² *Bailey v. Galbreath*, 100 Tenn. 599; 47 S. W. 84.

³ *Huffman v. Newman*, 55 Neb. 713; 76 N. W. 409. (The third person suing to recover it.)

⁴ *Wilson v. Wold*, 21 Wash. 398; 75 Am. St. Rep. 846; 58 Pac. 223.

make *ultra vires* contracts incurs no personal liability thereby.⁵ So if the agent discloses his lack of authority and signs the name of his principal he is not liable.⁶ One who purports to contract as agent is liable if he contracts in excess of his authority, and thereby induces the party contracting with him to believe that he possesses such authority.⁷

While some courts try to limit this rule to cases in which the agent acted in bad faith or carelessly,⁸ the weight of authority as shown by the cases cited is to ignore such distinction. Thus an agent with authority only to arbitrate disputes about insurance policies issued by the principal, who submits other disputes to arbitration is personally liable for the amount of the award.⁹ The chief exception to the rule is in cases where the agent once possessed full authority to act, and subsequent events, unknown to him, and which could not have been ascertained with due diligence, such as the death of his principal,¹⁰ have revoked such authority. The agent is personally liable where he fails to disclose the fact of his agency,¹¹ or the identity

⁵ *Thilmany v. Bag Co.*, 108 Ia. 357; 75 Am. St. Rep. 259; 79 N. W. 261.

⁶ *Kansas National Bank v. Bay*, 62 Kan. 692; 54 L. R. A. 408; 64 Pac. 596.

⁷ *Frankland v. Johnson*, 147 Ill. 520; 37 Am. St. Rep. 234; 35 N. E. 480; *Terwilliger v. Murphy*, 104 Ind. 32; 3 N. E. 404; *Duffy v. Malinkrodt*, 81 Mo. App. 449; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506; *Argeringer v. Maenaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687; 21 N. E. 1022; (*Farmers', etc., Co.*) *Trust Co. v. Floyd*, 47 O. S. 525; 21 Am. St. Rep. 846; 12 L. R. A. 346; 26 N. E. 110; *Rosendorf v. Poling*, 48 W. Va. 621; 37 S. E. 555.

⁸ *Newman v. Sylvester*, 42 Ind. 106.

⁹ *Macdonald v. Bond*, 195 Ill. 122; 62 N. E. 881.

¹⁰ *Jenkins v. Atkins*, 1 Humph. (Tenn.) 294; 34 Am. Dec. 648.

¹¹ *Murphy v. Helmrich*, 66 Cal. 69; 4 Pac. 958; *Nelson Morris & Co., v. Malone*, 200 Ill. 132; 93 Am. St. Rep. 180; 65 N. E. 704; *Bickford v. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Scaling v. Knollin*, 94 Ill. App. 443; *Fritz v. Kennedy*, 119 Ia. 628; 93 N. W. 603; *Thompson v. Investment Co.*, 114 Ia. 481; 87 N. W. 438; *Lull v. Anamosa National Bank*, 110 Ia. 537; 81 N. W. 784; *Blackmore v. Fairbanks*, 79 Ia. 282; 44 N. W. 518; *Stevenson v. Polk*, 71 Ia. 278; 32 N. W. 340; *Jones v. Johnson*, 86 Ky. 530; 6 S. W. 582; *Jutt v. Brown*, 5 Litt. (Ky.) 1; 15 Am. Dec. 33; *Nolan v. Clark*, 91 Me. 38; 39 Atl. 344; *Brighan v. Herick*, 173 Mass. 460; 53 N. E. 906; *Bartlett v. Raymond*, 139 Mass. 275; 30 N. E. 91; *Mitchell v. Beck*, 88 Mich. 342; 50 N. W. 305; *Amans*

of his principal.¹² But the agent of an originally undisclosed principal is not personally liable on contracts made after his principal is disclosed.¹³

One who purports to contract as agent for a principal who has no legal existence or status is personally liable thereon,¹⁴ except where there is an express agreement against personal liability.¹⁵ Thus a personal liability rests upon a committee of citizens who have charge of constructing a highway as agents of a citizens' meeting,¹⁶ or on an agent of an unincorporated military company.¹⁷ Special illustrations of this doctrine are given elsewhere.¹⁸ The nature of the agent's liability in the foregoing cases is a question of some difficulty. If he has so contracted as to bind himself personally he can be held on the contract in any event, and the additional fact that he acted

v. Campbell, 70 Minn. 493; 68 Am. St. Rep. 547; 73 N. W. 506; Porter v. Merrill, 138 Mo. 555; 39 S. W. 798; Jackson v. McNatt (Neb.), 93 N. W. 425; Elliott v. Bodine, 59 N. J. L. 567; 36 Atl. 1038; McClure v. Trust Co., 165 N. Y. 108; 53 L. R. A. 153; 58 N. E. 777; De Remer v. Brown, 165 N. Y. 410; 59 N. E. 129; Argersinger v. Macnaughton, 114 N. Y. 535; 11 Am. St. Rep. 687; 21 N. E. 1022; Keokuk, etc., Co. v. Mfg. Co., 5 Okla. 32; 47 Pac. 484; Lindsay v. Pettigrew, 5 S. D. 500; 59 N. W. 726; Royce v. Allen, 28 Vt. 234; Poole v. Rice, 9 W. Va. 73; Morris v. Grocery Co., 46 W. Va. 197; 32 S. E. 997.

¹² Welch v. Goodwin, 123 Mass. 71; 25 Am. Rep. 24; William Lindeke Land Co. v. Levy, 76 Minn. 364; 79 N. W. 314; (overruling, Rowell v. Oleson, 32 Minn. 288; 20 N. W. 227); Long v. McKissick, 50 S. C. 218; 27 S. E. 636; Hughes v. Settle (Tenn. Ch. App.), 36 S. W. 577; Hoge v. Turner, 96 Va. 624; 32 S. E. 291.

¹³ Brackenridge v. Claridge, 91

Tex. 527; 43 L. R. A. 593; 44 S. W. 819; reversing, 42 S. W. 1005. Some authorities tend to restrict the liability of one who discloses his agency but conceals the identity of his principal to cases where the contract shows the intention of the agent to bind himself, a distinction however, generally repudiated.

¹⁴ Lewis v. Tilton, 64 Ia. 220; 52 Am. Rep. 436; 19 N. W. 911; Blakely v. Bennecke, 59 Mo. 193; Coddling v. Munson, 52 Neb. 580; 66 Am. St. Rep. 524; 72 N. W. 846; Winona Lumber Co. v. Church, 6 S. D. 498; 62 N. W. 107; Steele v. McElroy, 1 Sneed (Tenn.) 341.

¹⁵ Coddling v. Munson, 52 Neb. 580; 66 Am. St. Rep. 524; 72 N. W. 846; Comfort v. Graham, 87 Ia. 295; 54 N. W. 242; Heath v. Goslin, 80 Mo. 310; 50 Am. Rep. 505; But-ton v. Winslow, 52 Vt. 430.

¹⁶ Learn v. Upstill, 52 Neb. 271; 72 N. W. 213.

¹⁷ Blakely v. Bennecke, 59 Mo. 193.

¹⁸ See Executors, Guardians, Surviving Partners, Trustees, Receivers.

without authority should not relieve him from liability.¹⁹ If the contract does not purport to bind the agent personally, the logical view, entertained by a majority of the courts is that his liability is not on the contract as a principal in violation of its terms, but on the breach of the implied warranty of his authority, or in tort for his fraud and deceit.²⁰ Some authorities hold that the remedy is exclusively on the breach of warranty of authority,²¹ while others insist on the liability in tort.²²

Even if the agent discloses the fact of his agency and the identity of his principal he may nevertheless so contract as to bind himself individually.²³

§976. Rights of principal on contract.

A principal may, as a rule,¹ enforce by action in his own name contracts entered into for him by his agent,² even if the identity of the principal,³ or the fact of the agency⁴ were not disclosed

¹⁹ *Terwilliger v. Murphy*, 104 Ind. 32; 3 N. E. 404; *Andrews v. Tedford*, 37 Ia. 314; *Solomon v. Penoyar*, 89 Mich. 11; 50 N. W. 644; *Walker v. Bank*, 9 N. Y. 582.

²⁰ *Wallace v. Bently*, 77 Cal. 19; 11 Am. St. Rep. 231; 18 Pac. 788; *Hancock v. Yunker*, 83 Ill. 208; *Duncan v. Niles*, 32 Ill. 532; 83 Am. Dec. 293; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Brong v. Spence*, 56 Neb. 638; 77 N. W. 54; *Cole v. O'Brien*, 34 Neb. 68; 33 Am. St. Rep. 616; 51 N. W. 316; *Patterson v. Lippincott*, 47 N. J. L. 457; 54 Am. Rep. 178; 1 Atl. 506; *Whitt v. Madison*, 26 N. Y. 117; (*Farmers', etc., Co.*) *Trust Co. v. Floyd*, 47 O. S. 525; 21 Am. St. Rep. 846; 12 L. R. A. 346; 26 N. E. 110.

²¹ *Taylor v. Nostrand*, 134 N. Y. 108; 31 N. E. 346; *Cochran v. Baker*, 34 Or. 555; 56 Pac. 641; 52 Pac. 520; *Kroeger v. Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718.

²² *Hancock v. Yunker*, 83 Ill. 208; *Jefts v. York*, 10 Cush. (Mass.) 392; *Cole v. O'Brien*, 34 Neb. 68; 33 Am. St. Rep. 616; 51 N. W. 316; *McCurdy v. Rogers*, 21 Wis. 199; 91 Am. Dec. 468.

²³ *Dockarty v. Tillotson*, 64 Neb. 432; 89 N. W. 1050.

¹ For the exceptions see § 761.

² *Sullivan v. Shailor*, 70 Conn. 733; 40 Atl. 1054; *Sharp v. Jones*, 18 Ind. 314; 81 Am. Dec. 359; *Donahoe v. McDonald*, 92 Ky. 123; 17 S. W. 195; *Foster v. Graham*, 166 Mass. 202; 44 N. E. 129.

³ *Manker v. Telegraph Co.*, 137 Ala. 292; 34 So. 839; *Powell v. Wade*, 109 Ala. 95; 55 Am. St. Rep. 915; 19 So. 500; *Central of Georgia Ry. v. James*, 117 Ga. 832; 45 S. E. 223; *Kelly v. Thuey*, 143 Mo. 422; 45 S. W. 300; reversing in banc, 37 S. W. 516; *Jones v. Mfg. Co.*, 32 Wash. 375; 73 Pac. 359.

⁴ *Sullivan v. Shailor*, 70 Conn. 733; 40 Atl. 1054; *Conklin v. Leeds*,

when the contract was entered into. The adversary party cannot treat such non-disclosure as fraud.⁵

The undisclosed principal is subject to such defenses, counter-claims and set-offs as would be valid against the agent,⁶ though notice before payment, of a principal previously undisclosed, binds the adversary party from that time.⁷ This right does not exist where the property is not in the agent's possession.⁸ Thus, where the agent had not possession of the goods, he cannot agree that his debt shall be set off on the purchase price.⁹

58 Ill. 178; *Ilsley v. Merriam*, 7 Cush. (Mass.) 242; 54 Am. Dec. 721; *National Life Ins. Co. v. Allen*, 116 Mass. 398; *Foster v. Graham*, 166 Mass. 202; 44 N. E. 129; *Ludwig v. Gillespie*, 105 N. Y. 653; 11 N. E. 835; *King v. Batterson*, 13 R. I. 117; 43 Am. Rep. 13; *Foster v. Smith*, 2 Coldw. (Tenn.) 474; 88 Am. Dec. 604.

⁵ *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733; 32 L. R. A. 829; 24 S. E. 212.

⁶ *Ruiz v. Norton*, 4 Cal. 355; 60 Am. Dec. 618; *McConnell v. Land Co.*, 100 Ga. 129; 28 S. E. 80; *Al-*

lison v. Sutlive, 99 Ga. 151; 25 S. E. 11; *Stinson v. Gould*, 74 Ill. 80; *Tutt v. Brown*, 5 Litt. (Ky.) 1; 15 Am. Dec. 33; *Baxter v. Sherman*, 73 Minn. 434; 72 Am. St. Rep. 631; 76 N. W. 211; *Bernshouse v. Abbott*, 45 N. J. L. 531; 46 Am. Rep. 789; *Miller v. Sullivan*, 39 O. S. 79; *Belfield v. Supply Co.*, 189 Pa. St. 189; 69 Am. St. Rep. 799; 42 Atl. 131.

⁷ *Rice, etc., Co. v. Bank*, 185 Ill. 422; 56 N. E. 1062.

⁸ *Crosby v. Hill*, 39 O. S. 100.

⁹ *Bertoli v. Smith*, 69 Vt. 425; 38 Atl. 76.

CHAPTER XLIV.

AGENTS OF CORPORATIONS.

I. AGENTS OF PRIVATE CORPORATIONS.

§977. General principles of agency applicable to private corporations.

The principles which control the power of an agent or officer of a corporation to bind the corporation, are in general those which are applicable to other forms of agency. The chief peculiarities of this branch of the subject are as follows:

1. A corporation, being an artificial person, can act only through its agents. Accordingly, every contract entered into by a corporation must present in some form the question of agency. If the contract is within the scope of the agent's authority the corporation is bound thereby.¹ If the contract is within the scope of the agent's authority and the adversary party acts in good faith, the fact that the agent misappropriates the proceeds does not prevent the contract from being binding on the corporation.² On the other hand, if the contract is beyond the powers of the agent of the corporation and no considerations of estoppel exist, no recovery can be had against the corporation.³

2. All who deal with a corporation are, as is said elsewhere,⁴ bound to take notice of its charter. This may include the general laws concerning corporations. If the power of certain classes of agents of corporations is specified in the charter,

¹ Bank v. Griffin, 66 Ill. App. 577; Nichols v. R. R., 24 Utah 83; 91 Am. St. Rep. 778; 66 Pac. 768.

² Reagan v. Bank, 157 Ind. 623; 62 N. E. 701; 61 N. E. 575; Havens v. Bank, 132 N. C. 214; 95 Am. St. Rep. 627; 43 S. E. 639.

³ Sullivan v. Ry., 128 Ala. 77; 30 So. 528; Savannah, etc., Ry. v. Humphreys, 114 Ga. 681; 40 S. E. 711; Bristol Savings Bank v. Judd, 116 Ia. 26; 89 N. W. 93.

⁴ See § 1065 *et seq.*

persons dealing with the corporation are bound to take notice of such powers.⁵ If the power of the agent depends on the construction of the articles of incorporation the question of his authority is one of law, for the court.⁶ Strangers are not charged with presumptive knowledge of the by-laws of a corporation, either of a foreign⁷ or of a domestic corporation.⁸ Accordingly by-laws of a corporation, not in fact known to a person dealing with such corporation cannot limit the apparent authority of an agent of such corporation.⁹ A member of a corporation, such as a beneficial organization,¹⁰ is charged with knowledge of the by-laws. Thus a member of a benevolent association is bound to know that the secretary cannot waive a constitutional requirement and excuse such member from paying assessments on a benefit certificate issued in favor of such member on her husband's life, while she does not know whether such husband, being absent, is alive or dead.¹¹ Secret limitations on the apparent authority of an agent cannot affect a contract entered into by a stranger with the corporation in reliance on the apparent authority of such agent.¹²

3. The general business of most corporations is managed in about the same general way. Accordingly, custom and usage have annexed incidents to particular forms of corporate agency. These customs and usages have in some cases become so well established as to be recognized by the law. In such cases the

⁵ *Relfe v. Rundle*, 103 U. S. 222; *Groeltz v. Real Estate Co.*, 115 Ia. 602; 89 N. W. 21; *Bocock v. Iron Co.*, 82 Va. 913; 3 Am. St. Rep. 128; 1 S. E. 325.

⁶ *Groeltz v. Real Estate Co.*, 115 Ia. 602; 89 N. W. 21.

⁷ *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67.

⁸ *Ashley Wire Co. v. Steel Co.*, 164 Ill. 149; 56 Am. St. Rep. 187; 45 N. E. 410; *Smith v. Smith*, 62 Ill. 493.

⁹ *Domestic Building Association v. Guadiano*, 195 Ill. 222; 63 N. E. 98; *Groeltz v. Armstrong*, — Ia.

—; 99 N. W. 128; *Rathbun v. Snow*, 123 N. Y. 343; 10 L. R. A. 355; 25 N. E. 379; *Moyer v. Terminal Co.*, 41 S. C. 300; 44 Am. St. Rep. 709; 25 L. R. A. 48; 19 S. E. 651.

¹⁰ *Kocher v. Benevolent Legion*, 65 N. J. L. 649; 86 Am. St. Rep. 687; 52 L. R. A. 861; 48 Atl. 544.

¹¹ *Kocher v. Benevolent Legion*, 65 N. J. L. 649; 86 Am. St. Rep. 687; 52 L. R. A. 861; 48 Atl. 544.

¹² *Domestic Building Association v. Guadiano*, 195 Ill. 222; 63 N. E. 98; *Heinze v. Dock Co.*, 109 Wis. 99; 85 N. W. 145.

incidental powers of certain classes of agents are defined with greater accuracy as matters of law than they are in ordinary classes of agents.

§978. Stockholders.

The stockholders of a corporation represent the corporation at a regular stockholders' meeting, or, as modern authorities put it, constitute the corporation.¹ Ordinarily, whatever all the stockholders may do, a majority of them at a lawful meeting may do. However a solvent and going corporation cannot sell out its business with the consent of less than all its stockholders.² This power of the stockholders to bind the corporation is limited to their action at a regular meeting, however. A single stockholder, acting as an individual, has as such no implied power whatever to bind the corporation.³ This is true even if he is the chief stockholder.⁴

§979. Directors.

The board of directors, acting at lawful meetings, is the chief agency for directing and controlling the business of the corporation.¹ The acts of such board at a lawful meeting bind the corporation though no formal resolution to make the contract in question is adopted." The fact that no written record of the proceedings of the board of directors is kept does not

¹ *Crossette v. Jordan*, — Mich. —; 92 N. W. 782; *Burke v. Sidra Bay Co.*, 116 Wis. 137; 92 N. W. 568.

² *Elyton Land Co. v. Dowdell*, 113 Ala. 177; 59 Am. St. Rep. 105; 20 So. 981.

³ *Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109; 59 Am. St. Rep. 522; 68 N. W. 370.

⁴ *Jones v. Williams*, 139 Mo. 1; 61 Am. St. Rep. 436; 37 L. R. A. 682; 39 S. W. 486; 40 S. W. 353.

¹ *Mahoney Mining Co. v. Bank*, 104 U. S. 192; *Aliunde Consolidated Mining Co. v. Arnold*, —

Colo. App. —; 67 Pac. 28; *Eastern R. R. v. R. R.*, 111 Mass. 125; 15 Am. Rep. 13; *Trephagen v. South Omaha*, — Neb. —; 96 N. W. 248; *Beveridge v. R. R.*, 112 N. Y. 1; 2 L. R. A. 648; 19 N. E. 489; *Bradford Belting Co. v. Gibson*, 68 O. S. 442; 67 N. E. 888; *Columbia, etc., Co. v. Transportation Co.*, 32 Or. 532; 52 Pac. 513; *Wright v. Lee*, 2 S. D. 596; 51 N. W. 706; *Murray v. Beal*, 23 Utah 548; 65 Pac. 726.

² *Salem Iron Co. v. Iron Mines*, 112 Fed. 239; 50 C. C. A. 213; *Columbia, etc., Co. v. Transportation Co.*, 32 Or. 532; 52 Pac. 513.

prevent their conduct from binding the corporation.³ This power must, however, be exercised at lawful meetings. A single member of the board of directors has not as such any implied power to bind the corporation;⁴ nor have any number of members acting individually,⁵ even if they amount to a majority of the board.⁶ The board of directors is necessarily a body meeting only occasionally, and accordingly it has been held that it may delegate its power to a smaller committee of its own members, often known as the "executive committee."⁷

§980. President.

The original view of the position of the president was that he was merely the presiding officer of the board of directors. As such, he would not have any greater power to bind the corporation by his individual acts than any single director.¹ Thus if the articles of incorporation provide that the directors shall conduct the affairs of the corporation, and that they shall elect from their own number a president who shall have such duties

³ Jones v. Stoddart, — Ida. —; 67 Pac. 650; Murray v. Beal, 23 Utah 548; 65 Pac. 726.

⁴ New Haven, etc., Co. v. Hayden, 107 Mass. 525; Sias v. Lighting Co., 73 Vt. 35; 50 Atl. 554.

⁵ Nevada Nickel Syndicate v. Nickel Co., 96 Fed. 133; Kansas City, etc., Co. v. Devol, 72 Fed. 717; Alta Silver Co. v. Mining Co., 78 Cal. 629; 21 Pac. 373; Gashwiler v. Willis, 33 Cal. 11; 91 Am. Dec. 607; Morrison v. Gas Co., 91 Me. 492; 64 Am. St. Rep. 257; 40 Atl. 542; England v. Dearborn, 141 Mass. 590; 6 N. E. 837; Calumet Paper Co. v. Printing Co., 144 Mo. 331; 66 Am. St. Rep. 425; 45 S. W. 1115; Edwards v. Water Co., 21 Nev. 469; 34 Pac. 381; Columbia Bank v. Church, 127 N. Y. 361; 28 N. E. 29; People's Bank v. Church, 109 N. Y. 512; 17 N. E. 408; State v. Ben. Association, 42 O. S. 579;

Limer v. Traders' Co., 44 W. Va. 175; 28 S. E. 730.

⁶ Thompson v. West, 59 Neb. 677; 49 L. R. A. 337; 82 N. W. 13.

⁷ Union Pacific Ry. v. Ry., 163 U. S. 597; Andres v. Fry, 113 Cal. 124; 45 Pac. 534; Leavitt v. Mining Co., 3 Utah 265; 1 Pac. 356. *Contra*, Tempel v. Dodge, 89 Tex. 68; 32 S. W. 514; 33 S. W. 222.

¹ City Electric Street Ry. v. Bank, 62 Ark. 33; 54 Am. St. Rep. 282; 31 L. R. A. 535; 34 S. W. 89; Groeltz v. Real Estate Co., 115 Ia. 602; 89 N. W. 21; Titus v. R. R., 37 N. J. L. 98; Bangor, etc., Ry. v. Slate Co., 203 Pa. St. 6; 52 Atl. 40; Lyndon Mill Co. v. Institution, 63 Vt. 581; 25 Am. St. Rep. 783; 22 Atl. 575; St. Clair v. Rutledge, 115 Wis. 583; 95 Am. St. Rep. 964; 92 N. W. 234; Consolidated Water-Power Co. v. Nash, 109 Wis. 490; 85 N. W. 485.

as shall be prescribed by the by-laws, the president has, as such, no authority to bind the corporation in the absence of by-laws authorizing him to contract.² Under this view he cannot bind the corporation by signing its name to a note.³ The practical workings of modern corporations have in most cases necessitated a departure from this original view. The president is the chief executive officer of the corporation, in many cases by a special grant of such power to him.⁴ In other cases, without express grant of such power, he has in fact exercised such power with the acquiescence and approval of the corporation that the corporation is bound by his acts on the theory that it has held him out to the world as possessing such authority.⁵ This view of the power of the president is especially clear where the president, either by express authority or by the acquiescence of the corporation, assumes the powers of the general manager.⁶ Thus the president and manager can agree that the corporation will not plead the statute of limitations in consideration of delay,⁷ or may give a note, even if he is the payee, as long as the note is given for the benefit of the corporation,⁸ or employ a superintendent,⁹ or a cook for a mining camp.¹⁰ So a president who by acquiescence of the corporation has executed all the corporate instruments for years has implied power to bind the

² *Groeltz v. Real Estate Co.*, 115 Ia. 602; 89 N. W. 21.

³ *City Electric Street Ry. v. Bank*, 62 Ark. 33; 54 Am. St. Rep. 282; 31 L. R. A. 535; 34 S. W. 89.

⁴ *McCormick v. R. R.*, 130 Cal. 100; 62 Pac. 267; *National State Bank v. Bank*, 141 Ind. 352; 50 Am. St. Rep. 330; 40 N. E. 799.

⁵ *State National Bank v. Bank*, 168 Ill. 519; 48 N. E. 82; *National State Bank v. Tool Co.*, 157 Ind. 10; 60 N. E. 699; *White v. Creamery Co.*, 108 Ia. 522; 79 N. W. 283; *Jones v. Williams*, 139 Mo. 1; 61 Am. St. Rep. 436; 37 L. R. A. 682; 39 S. W. 486; 40 S. W. 353.

⁶ *Pettibone v. Town Co.*, 134 Cal. 227; 66 Pac. 218; *Wells Fargo Co.*

v. Enright, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439; *Ceeder v. Lumber Co.*, 86 Mich. 541; 24 Am. St. Rep. 134; 49 N. W. 575; *Africa v. Tribune Co.*, 82 Minn. 283; 83 Am. St. Rep. 424; 84 N. W. 1019; *Sandberg v. Mining Co.*, 24 Utah 1; 66 Pac. 360; *Meating v. Lumber Co.*, 113 Wis. 379; 89 N. W. 152.

⁷ *Wells Fargo Co. v. Enright*, 127 Cal. 669; 49 L. R. A. 647; 60 Pac. 439.

⁸ *Africa v. Tribune Co.*, 82 Minn. 283; 83 Am. St. Rep. 424; 84 N. W. 1019.

⁹ *Sandberg v. Mining Co.*, 24 Utah 1; 66 Pac. 360.

¹⁰ *Meating v. Lumber Co.*, 113 Wis. 379; 89 N. W. 152.

corporation by a mortgage.¹¹ The president has implied power to indorse negotiable paper owned by the corporation.¹² The president may bind the corporation by his acquiescence in a bill of sale executed by the manager.¹³ Unusual contracts in whole or in part outside the business of the corporation are without the implied authority of the president. Thus if without the usual business of the corporation he cannot sell property of the corporation,¹⁴ nor can he buy property for the corporation outside of its usual business.¹⁵ The president and actuary of an insurance company cannot employ a medical examiner for life.¹⁶ The president has no implied power to bind the corporation the benefits of which are to enure to him personally,¹⁷ or to another corporation in which he is interested as stockholder.¹⁸

§981. Vice president.

The vice president as such has no implied authority to bind the corporation if the president is capable of acting.¹ In cases of the absence of the president, or his incapacity to act, the vice president, acting as president, may exercise such powers ordinarily as the president might exercise.² In many corporations a special grant of power is made to one or more vice presidents. In such cases they may bind the corporation within the power thus granted to them. Without any express grant of power, the corporation may acquiesce in the assumption of the vice

¹¹ *National State Bank v. Tool* Co., 157 Ind. 10; 60 N. E. 699.

¹² *Jones v. Stoddart*, — Ida. —; 67 Pac. 650.

¹³ *Trent v. Sherlock*, 26 Mont. 85; 66 Pac. 700.

¹⁴ *Mott v. Danville Seminary*, 129 Ill. 403; 21 N. E. 927; *Asher v. Sutton*, 31 Kan. 286; 1 Pac. 535.

¹⁵ *Blen v. Mining Co.*, 20 Cal. 602; 81 Am. Dec. 132.

¹⁶ *Carney v. Ins. Co.*, 162 N. Y. 453; 76 Am. St. Rep. 347; 49 L. R. A. 471; 57 N. E. 78.

¹⁷ *Bowditch Furniture Co. v.*

Jones, 74 Conn. 149; 50 Atl. 41; *Wallace v. Packing Co.*, 25 Wash. 143; 64 Pac. 938.

¹⁸ *Bloch Queensware Co. v. Metzger*, 70 Ark. 232; 65 S. W. 929 (even if the two corporations have substantially the same stockholders).

¹ *Shavaliere v. Lumber Co.*, 128 Mich. 230; 87 N. W. 212.

² *American Exchange National Bank v. Ward*, 111 Fed. 782; 55 L. R. A. 356; 49 C. C. A. 611; *Fernald v. Telegraph Co.*, 31 Wash. 672; 72 Pac. 462.

president of certain powers, so that they are bound by his contracts made within the limits of these powers.

§982. Secretary, treasurer and cashier.

The secretary of a corporation has in the absence of special authority, no general power by virtue of his office, to bind the corporation.¹ The treasurer of a corporation has ordinarily authority to receive payments made to the corporation, and to pay out money subject to the instruction of his superior officers. If the corporation acquiesces in his assuming other duties, such as those of manager,² it is bound by his contracts within the scope of such power. The cashier of a bank has no authority to draw a draft in the name of his principal in payment of his own debt.³ He cannot bind the bank by representations as to the solvency of a third person in a transaction in which the bank is not concerned.⁴

§983. General manager.

The general manager of a corporation has power to bind the corporation by such contracts as are an appropriate means of carrying on the ordinary business of the corporation.¹ Thus the manager of a newspaper may charter a yacht, as a means for obtaining news during war.² The general manager of a corporation may employ an attorney, where such employment is a proper means of carrying on the business of the corporation.³ He has no authority to indorse a check given to the corporation,⁴

¹ Read v. Buffum, 79 Cal. 77; 12 Am. St. Rep. 131; 21 Pac. 555.

² Magowan v. Groneweg, 14 S. D. 543; 86 N. W. 626.

³ Campbell v. Bank, 67 N. J. L. 301; 91 Am. St. Rep. 438; 51 Atl. 497.

⁴ Taylor v. Bank, 174 N. Y. 181; 95 Am. St. Rep. 564; 66 N. E. 726.

¹ Sun, etc., Association v. Moore, 183 U. S. 642; affirming, 101 Fed. 591; 41 C. C. A. 506; Baird Lumber Co. v. Devlin, 124 Ala. 245; 27 So. 425; Kansas City v. Cullinan,

65 Kan. 68; 68 Pac. 1099; Frost v. Machine Co., 133 Mass. 563.

² Sun, etc., Association v. Moore, 183 U. S. 642; affirming, 101 Fed. 591; 41 C. C. A. 506.

³ General manager of insurance company, Fidelity, etc., Co. v. Field (Neb.), 89 N. W. 249 (even if in violation of his actual instructions from the corporation).

⁴ Jackson Paper Co. v. Bank, 199 Ill. 151; 93 Am. St. Rep. 113; 49 L. R. A. 657; 65 N. E. 136.

nor to borrow money for the corporation,⁵ nor has he authority to bind the corporation by a bill of sale of the corporate property.⁶ A manager with general powers cannot bind the corporation by an agreement to pay the hospital bills of one injured through the fault of the corporation.⁷ The forewoman of a laundry cannot employ a physician for an injured employee,⁸ nor can a foreman in charge of carpenter work.⁹ There is some difference of opinion on this question, however. Agents much lower in rank than general manager have been held to have authority to employ medical assistance in emergencies. A conductor may, in the absence of a higher official, employ a physician to render services to an employee injured in the company's business.¹⁰ A conductor cannot employ additional surgeons if the first is competent and able to attend to the needs of the injured.¹¹ So one under direction to get the company's surgeon, cannot employ additional physicians.¹² Even a general manager cannot employ a physician to attend to an employee injured outside the scope of his employment;¹³ and a conductor has no authority from the railroad corporation to employ a physician to attend to a trespasser.¹⁴

§984. Ratification.

A contract made by an agent of a corporation in excess of his authority, may be ratified by some higher agent who has

⁵ Breed v. Bank, 4 Colo. 481.

⁶ Trent v. Sherlock, 26 Mont. 85; 66 Pac. 700.

⁷ King v. Mfg. Co., 183 Mass. 301; 67 N. E. 330; Spelman v. Milling Co., 26 Mont. 76; 91 Am. St. Rep. 402; 55 L. R. A. 640; 66 Pac. 597.

⁸ Holmes v. McAllister, 123 Mich. 493; 48 L. R. A. 396; 82 N. W. 220.

⁹ Godshaw v. Struck, 109 Ky. 285; 51 L. R. A. 668; 58 S. W. 781.

¹⁰ Arkansas, etc., Co. v. Loughridge, 65 Ark. 300; 45 S. W. 907; Indianapolis, etc., Co. v. Morris, 67

Ill. 295; Terre Haute, etc., Co. v. McMurray, 98 Ind. 358; 49 Am. Rep. 752; Terre Haute, etc., Co. v. Stockwell, 118 Ind. 98; 20 N. E. 650. *Contra*, Sevier v. Ry. Co., 92 Ala. 258; 9 So. 405; Tucker v. Ry. Co., 54 Mo. 177.

¹¹ Louisville, etc., Co. v. Smith, 121 Ind. 353; 6 L. R. A. 320; 22 N. E. 775.

¹² Smith v. Ry. Co., 104 Ia. 147; 73 N. W. 581.

¹³ Chase v. Swift, 60 Neb. 696; 83 Am. St. Rep. 552; 84 N. W. 86.

¹⁴ Adams v. Ry., 125 N. C. 565; 34 S. E. 642.

authority to make such a contract.¹ Thus the stockholders of a corporation at a lawful meeting, may ratify the acts of the board of directors in excess of their authority.² The directors may ratify the acts of some inferior agent of the corporation.³ Ratification has substantially the same meaning in this branch of the law as in the ordinary law of agency.

§985. What amounts to ratification.

An express approval of a contract, and an adoption of it, is of course a ratification. Acquiescence in the contract with full knowledge of the facts, amounts to ratification if the adversary party is thereby induced to perform the contract or otherwise alter his position in reliance upon such apparent ratification.¹ Retaining the benefits of the unauthorized contract with full knowledge of the material facts is a ratification; as where the corporation receives and retains property² or ac-

¹ *Smith v. Water-Works*, 73 Conn. 626; 48 Atl. 754; *National, etc., Association v. Bank*, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619; *Germania, etc., Co.'s Assignee v. Hargis* (Ky.), 64 S. W. 516; *Cadillac State Bank v. Heading Co.*, 129 Mich. 15; 88 N. W. 67; *Seymour v. Association*, 144 N. Y. 333; 26 L. R. A. 859; 39 N. E. 365; *North Point, etc., Co. v. Utah, etc., Co.*, 16 Utah 246; 67 Am. St. Rep. 607; 40 L. R. A. 851; 52 Pac. 168.

² *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 432; 31 L. R. A. 457; 37 N. E. 444.

³ *Salem Iron Co. v. Iron Mines*, 112 Fed. 239; 50 C. C. A. 213; *Germania, etc., Co.'s Assignee v. Hargis* (Ky.), 64 S. W. 516; *Cadillac State Bank v. Heading Co.*, 129 Mich. 15; 88 N. W. 67; *Webster v. Whitworth* (Tenn. Ch. App.), 63 S. W. 290.

¹ *Domenico v. Packers' Association*, 112 Fed. 554; *Newport, etc.,*

Co. v. Lunyon, 69 Ark. 287; 62 S. W. 1047; *Blood v. Water Co.*, 134 Cal. 361; 66 Pac. 317; *Mills v. Mining Co.*, 132 Cal. 95; 64 Pac. 122; *Illinois, etc., Bank v. Ry.*, 117 Cal. 332; 49 Pac. 197; *Streeten v. Robinson*, 102 Cal. 542; 36 Pac. 946; *Smith v. Water-Works*, 73 Conn. 626; 48 Atl. 754; *Marion Trust Co. v. Investment Co.*, 27 Ind. App. 451; 87 Am. St. Rep. 257; 61 N. E. 688; *Neosho Valley Investment Co. v. Hannum*, 63 Kan. 621; 66 Pac. 631; *Herring v. Turnpike-Road Co.* (Ky.), 63 S. W. 576; *Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109; 59 Am. St. Rep. 522; 68 N. W. 370; *Murray v. Beal*, 23 Utah 548; 65 Pac. 726.

² *Mills v. Mining Co.*, 132 Cal. 95; 64 Pac. 122; *Marion Trust Co. v. Investment Co.*, 27 Ind. App. 451; 87 Am. St. Rep. 257; 61 N. E. 688; *Neosho Valley Investment Co. v. Hannum*, 63 Kan. 621; 66 Pac. 631; *Herring v. Turnpike-Road Co.*

cepts services³ rendered thereunder. So allowing a default judgment to be taken on the unauthorized contract,⁴ or giving a note in renewal of an unauthorized note,⁵ amounts to a ratification thereof. The burden of showing a ratification of an unauthorized contract is on the party alleging it.⁶ Conduct on the part of a corporation without full knowledge of the facts does not amount to ratification, even if such conduct is of a character which would amount to ratification if full knowledge existed.⁷ Thus an unauthorized agreement by the secretary and treasurer to pay a commission if he secured a purchaser for certain property of the corporation is not ratified by the fact that the president of the corporation, without knowledge of such contract, joins with the assignee for the benefit of creditors in petitioning the court for a sale to a purchaser secured under such contract.⁸ So an unauthorized contract to pay the house rent of an employe, as well as his wages, is not ratified by payment of such wages if the corporation does not know of the agreement to pay house rent.⁹ Partial ratification is impossible.¹⁰

§986. Effect of ratification.

On ratification the contract is as binding upon the corporation as if it had been originally within the scope of the agent's authority.¹ However, the corporation cannot, by ratification of an unauthorized contract, destroy intervening rights. Thus

(Ky.), 63 S. W. 576; *Murray v. Beal*, 23 Utah 548; 65 Pac. 726.

³ *Domenico v. Packers' Association*, 112 Fed. 554; *Newport, etc., Co. v. Lunyon*, 69 Ark. 287; 62 S. W. 1047; *Streeten v. Robinson*, 102 Cal. 542; 36 Pac. 946.

⁴ *Nebraska, etc., Bank v. Ferguson*, 49 Neb. 109; 59 Am. St. Rep. 522; 68 N. W. 370.

⁵ *Smith v. Water-Works*, 73 Conn. 626; 48 Atl. 754.

⁶ *Alabama National Bank v. O'Neil*, 128 Ala. 192; 29 So. 688.

⁷ *Extension, etc., Co. v. Skinner*,

28 Colo. 237; 64 Pac. 198; *Savannah, etc., Ry. v. Humphrey*, 114 Ga. 681; 40 S. E. 711; *Spelman v. Mill Co.*, 26 Mont. 76; 91 Am. St. Rep. 402; 55 L. R. A. 640; 66 Pac. 597.

⁸ *Extension, etc., Co. v. Skinner*, 28 Colo. 237; 64 Pac. 198.

⁹ *Savannah, etc., Co. v. Humphreys*, 114 Ga. 681; 40 S. E. 711.

¹⁰ *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; 91 N. W. 376.

¹ *Citizens' Gaslight Co. v. Wakefield*, 161 Mass. 432; 31 L. R. A. 457; 37 N. E. 444.

an unauthorized assignment cannot be ratified after the assignee has commenced action thereon so as to prevent the defendant from setting up the invalidity of the assignment.² So ratification of an unauthorized assignment for the benefit of creditors cannot defeat the intervening lien of an execution,³ nor can ratification of an unauthorized bill of sale defeat the intervening lien of an attachment.⁴ If a corporation, upon learning that an unauthorized contract has been made, repudiates it, it must restore whatever it has received under such contract. It is error to give the corporation two years and six months to repay the purchase money when it avoids an unauthorized sale of land, made by its president.⁵

II. AGENTS OF PUBLIC CORPORATIONS.

§987. Agents of public corporations.

Contracts entered into on behalf of the government or a public corporation by some one who claims to act as an officer or agent thereof presents some marked points of contrast to ordinary contracts of private agents. If, as is usually the case, the powers and duties of the public agent are prescribed by law, all who deal with such agent are charged with knowledge of his powers, whether they have such knowledge in fact or not.¹ There can, therefore, be no agency by estoppel in such cases.² No liability, therefore, is imposed upon a government or public

² *Read v. Buffum*, 79 Cal. 77; 12 Am. St. Rep. 131; 21 Pac. 555.

³ *Friedman v. Leshner*, 198 Ill. 21; 92 Am. St. Rep. 255; 64 N. E. 736 (given by the vice-president, the president being dead).

⁴ *Trent v. Sherlock*, 26 Mont. 85; 66 Pac. 700 (given by the general manager).

⁵ *Fitzhugh v. Land Co.*, 81 Tex. 306; 16 S. W. 1078.

¹ *Madison v. Newsome*, 39 Fla. 149; 22 So. 270; *Fries v. Porch*, 49 Ia. 351; *Marshall County v. Cook*, 38 Ill. 44; 87 Am. Dec. 282; *Mc-*

Caslin v. State, 99 Ind. 428; *Jewell Belting Co. v. Bertha*, — Minn. —; 97 N. W. 424; *Lincoln v. McNeal*, 60 Neb. 613; 83 N. W. 847; *Smith v. Epping*, 69 N. H. 558; 45 Atl. 415; *Day, etc., Co. v. State*, 68 Tex. 526; 4 S. W. 865.

² *Mullan v. State*, 114 Cal. 578; 34 L. R. A. 262; 46 Pac. 670; *Wormstead v. Lynn*, 184 Mass. 425; 68 N. E. 841; *Dube v. Peck*, 22 R. I. 443, 467; 48 Atl. 477; *Carolina National Bank v. State*, 60 S. C. 465; 85 Am. St. Rep. 865; 38 S. E. 629.

corporation by reason of a contract entered into on its behalf by an agent acting in excess of the authority conferred upon him by the law.³ Hence if a council has no authority to let contracts, an ordinance directing to whom a contract for printing shall be let is void.⁴ A statute providing that selectmen shall have their expenses when engaged in public business gives them no power to bind the city by a contract for their meals.⁵ So a contract entered into by a mayor without authority does not bind the city.⁶ Power to collect convict hire is not power to accept notes therefor and then to bind the state by indorsing them over.⁷ If a clerk is authorized to indorse on mortgage bonds issued by a water-works company the statement that the city will pay interest on such bonds in lieu of hydrant rentals up to the amount of three thousand dollars, the amount of rentals contracted for, his certificate that the city will pay interest as it matures does not impose any liability on the city.⁸ If a board or other corporate body has power to bind the public corporation it must do so by action as a board. Hence a member of a council has no authority to retain an attorney for the city.⁹ So knowledge of a member of a school board that a given surety has signed the treasurer's bond to take effect only if other sureties sign is not notice to the board of that fact, where such member acquired such knowledge while acting in a private capacity to secure sureties for such bond.¹⁰ The govern-

³ *Mulnix v. Ins. Co.*, 23 Colo. 71; 33 L. R. A. 827; 46 Pac. 123; *Driscoll v. New Haven*, 75 Conn. 92; 52 Atl. 618; *Fairplay School Township v. O'Neal*, 127 Ind. 95; 26 N. E. 686; *Goddard v. Lowell*, 179 Mass. 496; 61 N. E. 53; *Board of Education v. Robinson*, 81 Minn. 305; 83 Am. St. Rep. 374; 84 N. W. 105; *Carolina National Bank v. State*, 60 S. C. 465; 85 Am. St. Rep. 865; 38 S. E. 629; *Nash v. Knoxville*, 108 Tenn. 68; 64 S. W. 1062; *McCurdy v. Rogers*, 21 Wis. 197; 91 Am. Dec. 468.

⁴ *Goddard v. Lowell*, 179 Mass. 496; 61 N. E. 53.

⁵ *Heublein v. New Haven*, 75 Conn. 545; 54 Atl. 298.

⁶ *Indiana Road-Machine Co. v. Sulphur Springs* (Tex. Civ. App.), 63 S. W. 908; (*City of*) *Tyler v. Adams* (Tex. Civ. App.), 62 S. W. 119.

⁷ *Carolina National Bank v. State*, 60 S. C. 465; 85 Am. St. Rep. 865; 38 S. E. 629.

⁸ *Painter v. Norfolk*, 62 Neb. 330; 87 N. W. 31.

⁹ *Root v. Topeka*, 63 Kan. 129; 65 Pac. 233.

¹⁰ *Board of Education v. Robinson*, 81 Minn. 305; 83 Am. St. Rep. 374; 84 N. W. 105.

ment or municipality may be liable for the benefits received by reason of the unauthorized contract, which it would not have received otherwise. A board empowered to take charge of some municipal work and pay for the same out of certain funds has no power to bind the city generally by its contracts for machinery and the like, but it may make valid charges against such funds.¹¹ There is no liability for benefits which are no greater than those which would have been received had the officer done his duty. Thus an agent who was authorized to collect convict-hire in money accepted notes therefor, payable to the state, and indorsed them, depositing the money thus received to the credit of the state. It was held that on non-payment of the notes the state was not liable as indorser, since the agent had no authority so to indorse; nor was it liable in quasi-contract for money had and received.¹² The rule that a contract by an unauthorized officer has no binding effect operates against the municipality as well as for it. If a contract is tendered which is not approved by the council as required by statute, such contract has no validity. Therefore if a bidder refuses to accept such contract he does not thereby forfeit a deposit made by him to secure his bid.¹³ Since all who deal with public agents are charged with knowledge of their authority, the agent is not personally liable if, acting in good faith, he exceeds his authority. Thus certain bonds were issued under a statute which was subsequently held unconstitutional. It was held that no liability attached personally to the public agents who sold such bonds, received the money therefor, and applied it as provided for by such statute.¹⁴ A contract entered into by a *de facto* public officer is as valid as if he were also an officer *de jure*.¹⁵

¹¹ Kerr v. Bellefontaine, 59 O. S. City, 129 Mich. 65; 87 N. W. 1032.
446; 52 N. E. 1024.

¹² Carolina National Bank v. 549; 48 N. W. 411.
State, 60 S. C. 465; 85 Am. St.
Rep. 865; 38 S. E. 629.

¹³ Chicago, etc., Co. v. West Bay Charles, 106 La. 65; 30 So. 289.

¹⁴ Powell v. Heisler, 45 Minn.
¹⁵ Waite v. Santa Cruz, 184 U. S.
302; Lake Charles, etc., Co. v. Lake

CHAPTER XLV.

CONTRACTS OF PERSONS ACTING IN FIDUCIARY CAPACITY.

I. TRUSTEES.

§988. Trustee cannot bind beneficiary personally.

A trustee is one in whom is vested the legal title to property, the equitable interest in which belongs to another.¹ A trustee has as such no power to bind a *cestui que trust* personally.² Thus a *cestui que trust* is not liable personally to an attorney employed by a trustee.³ If the beneficiaries authorize the trustee to contract on their behalf they are personally liable on his contract.⁴ This liability exists, however, by reason of his character of agent and not by reason of his character of trustee. Thus trustees of a dry trust cannot bind their beneficiaries by assuming a mortgage, so as to recover from them for money paid on such mortgage.⁵

§989. Power to bind trust estate.

A trustee has no power to bind the estate by his contracts, if such power is not given to him by the instrument creating the trust.¹ So a trustee cannot bind the estate by a judgment

¹ "A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another." Ogden Ry. Co. v. Wright, 31 Or. 150-153; 49 Pac. 975.

² Hartley v. Phillips, 198 Pa. St. 9; 47 Atl. 929.

³ Truesdale v. Philadelphia, etc., Co., 63 Minn. 49; 65 N. W. 133.

⁴ Hanover National Bank v. Cocke, 127 N. C. 467; 37 S. E. 507.

⁵ Winslow v. Young, 94 Me. 145; 47 Atl. 149.

¹ Taylor v. Davis, 110 U. S. 330; Sanders v. Warehouse Co., 107 Ga. 49; 32 S. E. 610; Flournoy v. John-

bond given in a matter outside the estate.² This rule is sometimes said not to apply to cases where the consideration is of such a nature as to render the estate liable.³ If power to bind the estate is given to the trustee by the instrument creating the trust, his contracts made by virtue of such provision will bind the estate.⁴ Power to a trustee by will to carry on business is power to bind the estate by debts thus incurred.⁵ Power to mortgage authorizes the trustee to bind the estate by a building and loan association contract.⁶

§990. Personal liability of trustee.

Unless a trustee clearly provides against it, he is personally liable on contracts made by him as trustee,¹ even if he refers

son, 7 B. Mon. (Ky.) 693; Hines v. Potts, 56 Miss. 346; New v. Nicoll, 73 N. Y. 127; 29 Am. Rep. 111. "The general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable and the remedy is against him personally." New v. Nicoll, 73 N. Y. 127, 130; 79 Am. Rep. 111.

² Williams v. Tozer, 185 Pa. St. 302; 64 Am. St. Rep. 650; 39 Atl. 947.

³ Sanders v. Warehouse Co., 107 Ga. 49; 32 S. E. 610.

⁴ Wagnon v. Pease, 104 Ga. 417; 30 S. E. 895; Riggins v. Adair, 105 Ga. 727; 31 S. E. 743; Bailie v. Loan Association, 100 Ga. 20; 28 S. E. 274; Judge v. Pfaff, 171 Mass. 195; 50 N. E. 524; Packard v. Kingman, 109 Mich. 497; 67 N. W. 551; United States Trust Co. v. Roche, 116 N. Y. 120; 22 N. E. 265.

⁵ Wadsworth v. Arnold, 24 R. I. 32; 51 Atl. 1041.

⁶ Cottingham v. Loan Association,

114 Ga. 940, 944; 41 S. E. 72, 74.

¹ Taylor v. Davis, 110 U. S. 330; Hewitt v. Phelps, 105 U. S. 393; Duvall v. Craig, 2 Wheat. (U. S.) 45; Bloom v. Wolfe, 50 Ia. 286; Farmers' and Traders' Bank v. Deposit Co., 108 Ky. 384; 56 S. W. 671; Gill v. Carmine, 55 Md. 339; Odd Fellows Hall Association v. McAllister, 153 Mass. 292; 11 L. R. A. 172; 26 N. E. 862; Mayo v. Moritz, 151 Mass. 481; 24 N. E. 1083; Mitchell v. Whitlock, 121 N. C. 166; 28 S. E. 292; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460; 41 L. R. A. 252; 75 N. W. 911; Ogden Ry. Co. v. Wright, 31 Or. 150; 49 Pac. 975; Fehlinger v. Wood, 134 Pa. St. 517; 19 Atl. 746; McDowall v. Reed, 28 S. C. 466; 6 S. E. 300; McIntyre v. Williamson, 72 Vt. 183; 82 Am. St. Rep. 929; 47 Atl. 786. "When a trustee contracts as such, unless he is bound, no one else is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee." Taylor v. Davis, 110 U. S. 330, 335; quoted Germania

to himself in the contract as trustee² or adds "trustee" to his signature.² Thus a trustee is personally liable on his indorsement of negotiable paper payable to himself as trustee.⁴ Thus if one covenants in his own name, adding "as trustee," he is personally liable.⁵ An assignee for the benefit of creditors is personally bound on contracts in which he refers to himself as trustee, unless there is an express provision to the contrary.⁶ Even if the instrument creating the trust gives the trustee power to bind the estate, he is personally liable on such contracts unless he contracts for exemption from personal liability;⁷ and this principle has been applied even where there is a provision in the instrument creating the trust that the trustee is to be free from personal liability.⁸ He may contract for freedom from personal liability,⁹ but such immunity must be contracted for when the original liability is incurred. A subsequent promise not to hold the receiver liable personally is unenforceable as without consideration.¹⁰ A trustee is not personally responsible for debts incurred by his predecessor for the benefit of the estate.¹¹

Bank v. Michaud, 62 Minn. 459, 465; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70.

² Gibson v. Gray, 17 Tex. Civ. App. 646; 43 S. W. 922.

³ Ogden Ry. Co. v. Wright, 31 Or. 150; 49 Pac. 975; McIntyre v. Williamson, 72 Vt. 183; 82 Am. St. Rep. 929; 47 Atl. 786. *Contra*, no personal liability was held to exist where the trustee gave his note for money borrowed for the estate signed "A, trustee for B." Printup v. Trammel, 25 Ga. 240.

⁴ Tradesmen's National Bank v. Looney, 99 Tenn. 278; 63 Am. St. Rep. 830; 38 L. R. A. 837; 42 S. W. 149 (even if he adds "trustee" to his signature).

⁵ Duvall v. Craig, 2 Wheat. (U. S.) 45.

⁶ Gibson v. Gray, 17 Tex. Civ. App. 646; 43 S. W. 922.

⁷ Connally v. Lyons, 82 Tex. 664; 27 Am. St. Rep. 935; 18 S. W. 799.

⁸ American, etc., Co. v. Converse, 175 Mass. 449; 56 N. E. 594. But where the deed authorizes trustee to borrow money, a covenant by trustee to pay the mortgage debt does not bind him personally. Glenn v. Allison, 58 Md. 527.

⁹ New v. Nicoll, 73 N. Y. 127; 79 Am. Rep. 111.

¹⁰ New v. Nicoll, 73 N. Y. 127; 79 Am. Rep. 111.

¹¹ Baxter v. McDonnell, 155 N. Y. 83; 40 L. R. A. 670; 49 N. E. 667 (a bishop received trust property from his predecessor).

§991. Liability of estate for benefits received.

While a trustee cannot create debts against the trust, the creditors can subject the rents and profits of the trust estate to their claims as far as their loans were advantageous to such trust estate,¹ or they may be remitted by subrogation to the trustee's claim against the estate,² especially if he is insolvent³ or a non-resident.⁴ In settling accounts the trustee will be allowed his reasonable expenses incurred in managing the trust,⁵ or incurred with the consent of the beneficiaries,⁶ and it is held that he has a lien therefor.⁷

II. EXECUTORS AND ADMINISTRATORS.

§992. General want of power to bind estate.

Executors and administrators are officers of the court appointed for the purpose of settling decedent's estates. In the absence of statutory provision or of authority given by will they have, in general, no power to bind the estates of their decedents by their own contracts so as to change any pre-existing liability which might have been enforced without such contract, or to incur additional liability,¹ even if for the benefit of such estate.

¹ Neal v. Bleckley, 51 S. C. 506; 29 S. E. 249. To the same effect is Sanders v. Warehouse Co., 107 Ga. 49; 32 S. E. 610; Kupferman v. McGehee, 63 Ga. 250.

² Mosely v. Norman, 74 Ala. 422; Steele v. Steele, 64 Ala. 438; 38 Am. Rep. 15.

³ Clapton v. Gholson, 53 Miss. 466.

⁴ Norton v. Phelps, 54 Miss. 467.

⁵ A trustee may deduct reasonable expenses for a foreclosure suit and for investigating the title to property. Wordin's Appeal, 71 Conn. 531; 71 Am. St. Rep. 219; 42 Atl. 659. A trustee cannot be paid for legal services rendered by himself.

Marks v. Semple, 111 Ala. 637; 20 So. 791.

⁶ Casey v. Lockwood, 24 R. I. 72; 52 Atl. 803 (where the remaindermen authorized the trustee to pay the funeral expenses of the life-tenant).

⁷ Kofold v. Gordon, 122 Cal. 314; 54 Pac. 1115.

¹ Taylor v. Crook, 130 Ala. 354; 96 Am. St. Rep. 26; 34 So. 905; Pike v. Thomas, 62 Ark. 223; 54 Am. St. Rep. 292; 35 S. W. 212; Tucker v. Grace, 61 Ark. 410; 33 S. W. 530; Sterrett v. Barker, 119 Cal. 492; 51 Pac. 695; Schlicker v. Hemenway, 110 Cal. 579; 52 Am. St. Rep. 116; 42 Pac. 1063; Taylor

Where no authority to contract on behalf of the estate exists, the order of the court is ineffectual to create such power.² Thus executors cannot create debts against the estate,³ even by borrowing money to pay the debts of the estate, or by giving their notes therefor,⁴ or by indorsing notes of the estate,⁵ or by accepting a draft,⁶ or by giving a note for a debt barred by limitations in the life of decedent.⁷ The executor cannot bind the estate by a contract for legal services,⁸ as by a contract to pay a con-

v. Mygatt, 26 Conn. 184; Wilson v. Mason, 158 Ill. 304; 49 Am. St. Rep. 162; 42 N. E. 134; Clark v. Ross, 96 Ia. 402; 65 N. W. 340; Chicago Lumber Co. v. Tomlinson, 54 Kan. 770; 39 Pac. 694; Baker v. Moor, 63 Me. 443; Davis v. French, 20 Me. 21; 37 Am. Dec. 36; Durkin v. Langley, 167 Mass. 577; 46 N. E. 119; Kingman v. Soule, 132 Mass. 285; Luscomb v. Ballard, 5 Gray (Mass.) 403; 66 Am. Dec. 374; Smith v. Brennan, 62 Mich. 349; 4 Am. St. Rep. 867; 28 N. W. 892; Brown v. Farnham, 55 Minn. 27; 56 N. W. 352; Stirling v. Winter, 80 Mo. 141; Richardson v. Palmer, 24 Mo. App. 480; Doolittle v. Willet, 57 N. J. L. 398; 31 Atl. 385; Schmittler v. Simon, 101 N. Y. 554; 54 Am. Rep. 737; 5 N. E. 452; Austin v. Munro, 47 N. Y. 360; Ferrin v. Myrick, 41 N. Y. 315; Lucht v. Behrens, 28 O. S. 231; 22 Am. Rep. 378; Patterson v. Craig, 1 Baxt. (Tenn.) 291; Fine v. Freeman, 83 Tex. 529; 17 S. W. 783; 18 S. W. 963; Rich v. Sowles, 64 Vt. 408; 15 L. R. A. 850; 28 Atl. 723; Adams v. Adams, 16 Vt. 228; Fitzhugh v. Fitzhugh, 11 Gratt. (Va.) 300; 62 Am. Dec. 653.

² Valley National Bank v. Crosby, 108 Ia. 651; 79 N. W. 383.

³ Germania Bank v. Michaud, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70; Cur-

tis v. Bank, 39 O. S. 579; McGrath v. Barnes, 13 S. C. 328; 36 Am. Rep. 687; Rich v. Sowles, 64 Vt. 408; 15 L. R. A. 850; 23 Atl. 723.

⁴ Christian v. Morris, 50 Ala. 585; Sterrett v. Barker, 119 Cal. 492; 51 Pac. 695; Cornthwaite v. Bank, 57 Ind. 268; Valley National Bank v. Crosby, 108 Ia. 651; 79 N. W. 383; Rice v. Strange (Ky.), 72 S. W. 756; Ellis v. Merriman, 5 B. Mon. (Ky.), 297; Rittenhouse v. Ammerman, 64 Mo. 197; 27 Am. Rep. 215; First National Bank v. Collins, 17 Mont. 433; 52 Am. St. Rep. 695; 43 Pac. 499; Morehead Banking Co. v. Morehead, 122 N. C. 318; 30 S. E. 331; Smith v. Hayward, 5 Ohio N. P. 501; Boyd v. Johnston, 89 Tenn. 284; 14 S. W. 804; Gregory v. Leigh, 33 Tex. 813; Robertson v. Breckenridge, 98 Va. 569; 37 S. E. 8.

⁵ Johnston v. Bank, 37 Miss. 526.

⁶ Perry v. Cunningham, 40 Ark. 185.

⁷ Claghorn's Estate, 181 Pa. St. 600; 59 Am. St. Rep. 680; 37 Atl. 918.

⁸ Pike v. Thomas, 62 Ark. 223; 54 Am. St. Rep. 292; 35 S. W. 212; Tucker v. Grace, 61 Ark. 410; 33 S. W. 530; Argo v. Blondel, 100 Ia. 353; 69 N. W. 534; Wait v. Holt, 58 N. H. 467; Parker v. Day, 155 N. Y. 383; 49 N. E. 1046;

tingent fee in the event of the recovery for the death of the decedent.⁹ Accordingly the court cannot fix the amount which an administrator must pay for legal services.¹⁰

Some courts seem to hold that an executor may bind the estate by a reasonable contract for attorney fees,¹¹ as to pay a reasonable contingent fee for recovery for the death of decedent,¹² or to pay one-third of the amount recovered of a claim against a foreign government.¹³

The estate is not liable for the price of property bought for the estate,¹⁴ as on a contract to buy realty;¹⁵ nor on a contract by the executrix to refund money received by her on a sale of her decedent's realty which she could not complete;¹⁶ nor on a warranty of property sold;¹⁷ nor on a contract to sell realty, not made as provided by statute;¹⁸ nor on a contract for services for the estate.¹⁹ An executor cannot create debt

Platt v. Platt, 105 N. Y. 488; 12 N. E. 22; *McBride v. Brucker*, 5 Ohio C. C. 12; 3 Ohio C. D. 7; *Mellen v. West*, 5 Ohio C. C. 89; 3 Ohio C. D. 46; *Miller v. Tracy*, 86 Wis. 330; 56 N. W. 866.

⁹ *Tucker v. Grace*, 61 Ark. 410; 33 S. W. 530; *Rickel v. Ry. Co.*, 112 Ia. 148; 83 N. W. 957; *Thomas v. Moore*, 52 O. S. 200; 39 N. E. 803.

¹⁰ *State v. District Court*, 25 Mont. 33; 63 Pac. 717. A note by brothers of the decedent to an attorney to prosecute the murderer of decedent is not a charge against the estate. *Alexander v. Alexander*, 120 N. C. 472; 27 S. E. 121.

¹¹ *Alexander v. Bates*, 127 Ala. 328; 28 So. 415; *McIntire v. McIntire*, 14 App. D. C. 337; *Gairdner v. Tate*, 110 Ga. 456; 35 S. E. 697.

¹² *Lee v. Van Voorhis*, 78 Hun (N. Y.) 575; *In re McCullough's Estate*, 31 Or. 86; 49 Pac. 886.

¹³ *Mackie v. Howland*, 3 App. D. C. 461.

¹⁴ *Daily v. Daily*, 66 Ala. 266 (food for stock of estate); *Yarborough v. Ward*, 34 Ark. 204; *Wilson v. Mason*, 158 Ill. 304; 49 Am. St. Rep. 162; 42 N. E. 134; *Durkin v. Langley*, 167 Mass. 577; 46 N. E. 119; *West v. Dean*, 15 Ohio C. C. 261.

¹⁵ *Wilson v. Mason*, 158 Ill. 304; 49 Am. St. Rep. 162; 42 N. E. 134.

¹⁶ *Hall v. Wilkinson*, 35 W. Va. 167; 12 S. E. 1118.

¹⁷ *Bauerle v. Long*, 187 Ill. 475; 52 L. R. A. 643; 58 N. E. 458; *Huffman v. Hendry*, 9 Ind. App. 324; 53 Am. St. Rep. 351; 36 N. E. 727; *Dunlap v. Robinson*, 12 O. S. 530; *Lockwood v. Gilson*, 12 O. S. 526; *Arnold v. Donaldson*, 46 O. S. 73; 18 N. E. 540.

¹⁸ *Bauerle v. Long*, 187 Ill. 475; 52 L. R. A. 643; 58 N. E. 458.

¹⁹ *In re Page*, 57 Cal. 238; *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. 358; *Daingerfield v. Smith*, 83 Va. 81; 1 S. E. 599.

against the estate by accepting a deed to his decedent.²⁰ The beneficiaries of decedent's estate cannot, however, affirm the contract of the administrator in part and avoid it in part. Thus where an administrator without order of the court lent money of the estate to a corporation, the beneficiaries could not, in the absence of fraud or collusion, hold the directors of such corporation personally liable for such money as trustees.²¹

§993. Statutory power to bind estate.

While some courts use language which seems to admit of a considerably greater power of executors to bind the estate than the preceding authorities recognize,¹ the cases where the contract of the executor is of any force against the estate may be reduced to two classes. First, he may contract as far as the statute gives him power to contract expressly or impliedly.² He may compromise claims;³ he may bind the estate by a consent judgment on a just claim;⁴ he may extend the time for paying off a mortgage;⁵ he may ratify an indorsement made for decedent by his wife where the proceeds were part of the estate before the death of decedent;⁶ and as the estate is liable for breach of a contract made by decedent,⁷ he may complete a contract for the erection of a building and thereby incur expenses.⁸ So, by statutory provision, he may employ an attorney to defend the will in contest,⁹ or may without¹⁰ or with leave of

²⁰ Shives v. Johnson (Ky.), 38 S. W. 694.

²¹ Wilson v. Stevens, 129 Ala. 630; 87 Am. St. Rep. 86; 29 So. 678.

¹ Mackie v. Howland, 3 App. D. C. 461; Scott v. Meadows, 16 Lea (Tenn.) 290; Jack v. Cassin, 9 Tex. Civ. App. 228; 28 S. W. 832; Williams v. Howard, 10 Tex. Civ. App. 527; 31 S. W. 835.

² Wilburn v. McCalley, 63 Ala. 436; Brown v. Eggleston, 53 Conn. 110; 2 Atl. 321; Brown v. Farnham, 55 Minn. 27; 56 N. W. 352; Price v. McIver, 25 Tex. 769; 78 Am. Dec. 558.

³ Mulville v. Ins. Co., 19 Mont. 95; 47 Pac. 650.

⁴ Sheldon v. Warner, 59 Mich. 444; 26 N. W. 667.

⁵ Campbell v. Linder, 50 S. C. 169; 27 S. E. 648 (though a deed in form).

⁶ Seaver v. Weston, 163 Mass. 202; 39 N. E. 1013.

⁷ Parker v. Barlow, 93 Ga. 700; 21 S. E. 213.

⁸ Bambrick v. Church Association, 53 Mo. App. 225.

⁹ Fenner v. McCan, 49 La. Ann. 600; 21 So. 768.

¹⁰ Baker v. Cauthorn, 23 Ind.

court¹¹ employ an attorney; he may on order of court borrow money on mortgage to pay debts and legacies;¹² or may take a note and mortgage on realty sold by him.¹³ In view of his general power to sell personalty of the estate, he may pledge personalty for a loan advanced by one who, in good faith, believes that the loan is obtained for the benefit of the estate.¹⁴ In short, wherever his promise is co-extensive with his liability in his official capacity, his promise is enforceable against the estate.¹⁵

§994. Power created by will to bind estate.

Second, the will may confer power to bind the estate by contract;¹ as to borrow money to carry on business.² Power to carry on a plantation,³ to keep an estate together,⁴ to manage a mine,⁵ or to raise money,⁶ or to defer the sale of a business for

App. 611; 77 Am. St. Rep. 443; 55 N. E. 963; Jackson v. Leech, 113 Mich. 391; 71 N. W. 846. By statute in West Virginia attorney fees are "as binding on the estate as a debt created by the decedent in life—more so." Crim v. England, 46 W. Va. 480, 484; 76 Am. St. Rep. 826; 33 S. E. 310. And giving notes therefor signed as "administrator of the estate" of decedent does not discharge this liability.

¹¹ Wassell v. Armstrong, 35 Ark. 247.

¹² Hart v. Allen, 166 Mass. 78; 44 N. E. 116.

¹³ Jelke v. Goldsmith, 52 O. S. 499; 49 Am. St. Rep. 730; 40 N. E. 167.

¹⁴ Smith v. Ayer, 101 U. S. 320; Carter v. Bank, 71 Me. 448; 36 Am. Rep. 338; Gottberg v. Bank, 131 N. Y. 595; 30 N. E. 41; Hemmy v. Hawkins, 102 Wis. 56; 72 Am. St. Rep. 863; 78 N. W. 177.

¹⁵ Ashby v. Ashby, 7 Barn. & C. 444; Haynes v. Forshaw, 11 Hare

93; Brown v. Farnham, 55 Minn. 27; 56 N. W. 352.

¹ Ames v. Holderbaum, 44 Fed. 224.

² Whitman's Estate, 195 Pa. St. 144; 45 Atl. 673.

³ Primm v. Mensing, 14 Tex. Civ. App. 395; 38 S. W. 382.

⁴ Brannon v. Ober, 106 Ga. 168; 32 S. E. 16.

⁵ He may sink a shaft, though it results in loss. Waddell's Estate, 196 Pa. St. 294; 46 Atl. 304.

⁶ Fletcher v. Banking Co., 111 Ga. 300; 78 Am. St. Rep. 164; 36 S. E. 767. Under a power by will "to raise a sufficient amount of money for this purpose in such way as seems best to him," he can borrow and give a mortgage, even though the amount thus borrowed exceeds the debts, and can bind the estate by a promise to pay attorney fees. Fletcher v. Banking Co., 111 Ga. 300; 78 Am. St. Rep. 164; 36 S. E. 767.

a certain time⁷ each confers power to borrow or create debts. Where power is given to carry on business it has been held that trade debts bind only the money in the business; not the estate in general;⁸ and power by will to use the *corpus* of the property, is not power to borrow.⁹ However, a power given by will to an executrix "to conduct for such time as she may see fit the business in which I may be engaged at my death," has been held to confer power to subject the entire estate to debts contracted for the purpose of continuing such business.¹⁰ A power to the executor to sell is not power to warrant.¹¹

§995. Personal liability of executors.

Executors are liable personally upon contracts which they attempt to make in their official capacity when they cannot bind the estate, unless they specifically contract against a personal liability.¹ They are liable personally on their notes,²

⁷ *In re Crowther* (1895), 2 Ch. 56.

⁸ *Frey v. Eisenhardt*, 116 Mich. 160; 74 N. W. 501; citing *Altheimer v. Hunter*, 56 Ark. 159; 19 S. W. 496; *Laible v. Ferry*, 32 N. J. Eq. 791; *Lucht v. Behrens*, 28 O. S. 231; 22 Am. Rep. 378.

⁹ *McMillan v. Cox*, 109 Ga. 42; 34 S. E. 341.

¹⁰ *Furst v. Armstrong*, 202 Pa. St. 348; 90 Am. St. Rep. 653; 51 Atl. 996.

¹¹ *Bauerle v. Long*, 187 Ill. 475; 52 L. R. A. 643; 58 N. E. 458.

¹ *Tucker v. Grace*, 61 Ark. 410; 33 S. W. 530; *Melone v. Ruffino*, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93; *In re Page*, 57 Cal. 238; *Mitchell v. Hazen*, 4 Conn. 495; 10 Am. Dec. 169; *De Coudres v. Trust Co.*, 25 Ind. App. 271; 81 Am. St. Rep. 95; 58 N. E. 90; *Mills v. Kuykendall*, 2 Blackf. (Ind.) 47; *Luscomb v. Ballard*, 5 Gray (Mass.) 403; 66 Am. Dec. 374; *Sumner v.*

Williams, 8 Mass. 162; 5 Am. Dec. 83; *Germania Bank v. Michaud*, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70; *First National Bank v. Collins*, 17 Mont. 433; 52 Am. St. Rep. 695; 43 Pac. 499; *Doolittle v. Willet*, 57 N. J. L. 398; 31 Atl. 385; *Parker v. Day*, 155 N. Y. 383; 49 N. E. 1046; *Moorehead Banking Co. v. Moorehead*, 122 N. C. 318; 30 S. E. 331; *Thomas v. Moore*, 52 O. S. 200; 39 N. E. 803; *West v. Dean*, 15 Ohio C. C. 261; *Hall v. Wilkinson*, 35 W. Va. 167; 12 S. E. 1118.

² *Lynch v. Kirby*, 65 Ga. 279; *Dunne v. Deery*, 40 Ia. 251; *Winter v. Hite*, 3 Ia. 142; *White v. Thompson*, 79 Me. 207; 9 Atl. 118; *Germania Bank v. Michaud*, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70; *First National Bank v. Collins*, 17 Mont. 433; 52 Am. St. Rep. 695; 43 Pac. 499.

even if they sign in their official capacity,³ as by signing "as executor,"⁴ or by signing "The Estate of E. Langevin by Achille Michaud, Administrator,"⁵ or by accepting a draft, "accepted to be paid when funds are received for the estate. C. Carter, Administrator."⁶ The executor or administrator is liable personally, even if the note signed by him as executor and the like is given to take up a debt of the decedent.⁷ So an executor is personally liable on his acceptance of an order drawn on him payable out of the rentals of the estate.⁸ So where A, as administrator of B's estate, bought a team to operate B's farm, and A signed the letter whereby the contract of sale was made, "A, administrator," A was held liable personally.⁹ If they secure the note by mortgaging part of the estate they are personally liable for a deficiency after foreclosure, this not being a waiver of personal liability.¹⁰ Where they sign as executors, "but not personally,"¹¹ or where there is no new consideration and the note is in the hands of the payee,¹² there is no personal liability on the contract, if the estate is properly administered. As to payee the executor may be relieved on a note in settlement of his decedent's claim by showing a deficiency in decedent's estate.¹³ An executor is liable for commission on a loan which was not con-

³ *Dunne v. Deery*, 40 Ia. 251; *Boyd v. Johnston*, 89 Tenn. 284; 14 S. W. 804.

⁴ *Hopson v. Johnson*, 110 Ga. 283; 34 S. E. 848; *Morehead Banking Co. v. Morehead*, 116 N. C. 410; 21 S. E. 190; *In re Claghorn's Estate*, 181 Pa. St. 600; 59 Am. St. Rep. 680; 37 Atl. 918; *Boyd v. Johnston*, 89 Tenn. 284; 14 S. W. 804.

⁵ *Germania Bank v. Michaud*, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70.

⁶ *Carter v. Thomas*, 3 Ind. 213.

⁷ *Cornthwaite v. Bank*, 57 Ind. 268; *In re Claghorn's Estate*, 181 Pa. St. 600; 59 Am. St. Rep. 680; 37 Atl. 918.

⁸ *Perry v. Cunningham*, 40 Ark. 185.

⁹ *Rich v. Sowles*, 64 Vt. 408; 15 L. R. A. 850; 23 Atl. 723.

¹⁰ *De Coudres v. Trust Co.*, 25 Ind. App. 271; 81 Am. St. Rep. 95; 58 N. E. 90.

¹¹ *Morehead Banking Co. v. Morehead*, 116 N. C. 413; 21 S. E. 191.

¹² *Germania Bank v. Michaud*, 62 Minn. 459; 54 Am. St. Rep. 653; 30 L. R. A. 286; 65 N. W. 70.

¹³ *McGrath v. Barnes*, 13 S. C. 328; 36 Am. Rep. 687; *Boyd v. Johnston*, 89 Tenn. 284; 14 S. W. 804; *East Tennessee, etc., Co. v. Gaskell*, 2 Lea (Tenn.) 742.

summated because the executor could not get a proper order of court to mortgage the realty.¹⁴ An executor who carries on decedent's business is personally liable for new debts thus incurred.¹⁵ He is personally liable on his contract for sawing decedent's lumber.¹⁶ In some cases the personal liability of the executor may exist even if the executor is authorized by will to carry on a business and to incur debts. Even if the will authorizes the executor to carry on "some legitimate business," the executor is personally liable for debts incurred in such business.¹⁷ The executor is not, however, personally liable unless the contract purports to have been made with him. If an executor signs in his official capacity in indorsing a note owned by decedent, which note the executor is transferring to a vendee thereof under authority of law, he incurs no personal liability.¹⁸ By statute an executor may be free from certain kinds of liability imposed on him.¹⁹

§996. Liability of estate for benefits received.

The rule that an executor cannot bind the estate by his contract is intended for the protection of the estate. It is not intended to operate as a confiscation of anything of value which the estate may receive under such contract. In an accounting with the estate the executor must be credited with the value which has actually enured to the estate under such contract. The executors may reimburse themselves for debts of the estate paid by them.¹ Thus, if executors who might have sold realty of their decedent to pay his debts which exceed his personalty, pay such debts out of their own funds they may be reimbursed

¹⁴ *Moxon v. Jones*, 128 Cal. 77; 303; 43 L. R. A. 831; 52 N. E. 60 Pac. 516. 1067.

¹⁵ *Alsop v. Mather*, 8 Conn. 584; 21 Am. Dec. 703; *Wild v. Davenport*, 48 N. J. L. 129; 57 Am. Rep. 552; 7 Atl. 295.

¹⁶ *Botts v. Barr*, 95 Ind. 243.

¹⁷ *Willis v. Sharp*, 113 N. Y. 586; 4 L. R. A. 493; 21 N. E. 705.

¹⁸ *Grafton Savings Bank v. Wing*, 172 Mass. 513; 70 Am. St. Rep.

¹⁹ As for costs: *Bruning v. Golden*, 159 Ind. 199; 64 N. E. 657; *Moise's Succession*, 107 La. 717; 31 So. 990.

¹ *Peter v. Beverly*, 10 Pet. (U.S.) 532; *Bolton v. Myers*, 146 N. Y. 257; 40 N. E. 737; affirming 83 Hun (N. Y.) 259.

thereafter out of the proceeds of the realty.² So an executor who pays a judgment against decedent out of his own funds may be reimbursed out of the estate.³ So an executor who has given his own note for a debt of his decedent may be reimbursed out of the estate for the amount paid by him on such note.⁴ This right, however, is not an indirect means of enforcing the contract. The measure of recovery is the benefit to the estate; and not the contract itself. Thus executors cannot recover interest on money borrowed by them to pay debts of the estate before they were due, which did not draw interest.⁵ If the property or services furnished by the adversary party has in fact enured to the benefit of the estate, there is some authority for holding that the creditor of the executor may apply to the court of probate powers for an order to the executor to pay the claim out of the estate, which application will, in a proper case, be allowed;⁶ and more for holding that equity may enforce payment out of the estate, not strictly speaking on the contract, but for a reasonable compensation for the value of the services to the estate, or the property received by it.⁷ Thus if the executor borrows money, giving a note signed with his own name "as executor for" the decedent and uses such money to pay debts of the estate, the creditor may recover from the estate in such amount as has actually been expended to pay the debts of the estate.⁸ Since the amount recovered by the creditor is not credited to the executor this is in effect

² Bolton v. Myers, 146 N. Y. 257; 40 N. E. 737.

³ Pursel v. Pursel, 14 N. J. Eq. 511.

⁴ Peter v. Beverly, 10 Pet. (U. S.) 532; Douglas v. Fraser, 2 McCord Eq. (S. C.) 105.

⁵ Nicholson v. Whitlock, 57 S. C. 36; 35 S. E. 412.

⁶ Kasson's Estate, 119 Cal. 489; 51 Pac. 706; Long v. Rodman, 58 Ind. 58; Baker v. Cauthorn, 23 Ind. App. 611; 77 Am. St. Rep. 443; 55 N. E. 963. *Contra*, Pike v. Thomas, 62 Ark. 223; 54 Am. St. Rep. 292;

35 S. W. 212 (overruling Turner v. Tapscott, 30 Ark. 312; Yarbrough v. Ward, 34 Ark. 204); Ferrin v. Myrick, 41 N. Y. 315.

⁷ Hewitt v. Phelps, 105 U. S. 393; Mosely v. Norman, 74 Ala. 422; Pike v. Thomas, 65 Ark. 437; 47 S. W. 110; Norton v. Phelps, 54 Miss. 467; Thompson v. Smith, 64 N. H. 412; 13 Atl. 639; Leible v. Ferry, 32 N. J. Eq. 791; Willis v. Sharp, 113 N. Y. 586; 4 L. R. A. 493; 21 N. E. 705.

⁸ Dunne v. Deery, 40 Ia. 251.

a method of subjecting whatever claim the executor may have against the estate to the payment of such claim. This right usually exists only when the executor is personally insolvent.

III. GUARDIANS.

§997. Contracts of guardians.

Guardians are officers of the court for the purpose of managing the estates of persons who are in law considered incapable of managing their own property. In the absence of statutory authority they have no power to bind such estates by their contracts so as to modify pre-existing liability, which may be enforced against such estate irrespective of such contract.¹ A guardian cannot charge the estate by carrying on business on his ward's capital and credit,² or form a corporation on behalf of his ward out of a partnership in which the ward had an interest,³ or bind the estate by a covenant of quiet enjoyment,⁴ or subject the estate of the ward to a lien for labor or materials,⁵ or borrow money on the credit of the estate,⁶ even to

¹ Chestnut v. Tyson, 105 Ala. 149; 53 Am. St. Rep. 101; 16 So. 723; Fish v. McCarthy, 96 Cal. 484; 31 Am. St. Rep. 237; 31 Pac. 529; Morse v. Hinckley, 124 Cal. 154; 56 Pac. 896; Wright v. Byrne, 129 Cal. 614; 62 Pac. 176; Brown v. Eggleston, 53 Conn. 110; 2 Atl. 231; Baird v. Steadman, 39 Fla. 40; 21 So. 572; Nichols v. Sargent, 125 Ill. 309; 8 Am. St. Rep. 378; 17 N. E. 475; Sperry v. Fanning, 80 Ill. 371; Lewis v. Edwards, 44 Ind. 333; Lindsay v. Stevens, 5 Dana (Ky.) 104; Massachusetts General Hospital v. Fairbanks, 132 Mass. 414; Rollins v. Marsh, 128 Mass. 116; Wood v. Truax, 39 Mich. 628; Reading v. Wilson, 38 N. J. Eq. 446; Hardy v. Bank, 61 N. H. 34; Warren v. Bank, 157 N. Y. 259; 68 Am. St. Rep. 777; 43 L. R. A. 256; 51 N. E. 1036; Fessenden v.

Jones, 52 N. C. 14; 75 Am. Dec. 445; Shepard v. Hanson, 9 N. D. 249; 83 N. W. 20. *Contra*, Robinson v. Hersey, 60 Me. 225; Price's Appeal, 116 Pa. St. 410; 9 Atl. 856.

² Warren v. Bank, 157 N. Y. 259; 68 Am. St. Rep. 777; 43 L. R. A. 256; 51 N. E. 1036.

³ Weld v. Mfg. Co., 86 Wis. 549; 86 Wis. 552; 57 N. W. 378; 57 N. W. 374.

⁴ Chestnut v. Tyson, 105 Ala. 149; 53 Am. St. Rep. 101; 16 So. 723.

⁵ Fish v. McCarthy, 96 Cal. 484; 31 Am. St. Rep. 237; 31 Pac. 529.

⁶ Wright v. Byrne, 129 Cal. 614; 62 Pac. 176 (the ward is not personally liable therefor); Buie's Estate v. White, 94 Mo. App. 367; 68 S. W. 101.

take up debts of the estate,⁷ nor can he bind the ward's estate by a contract to pay attorneys' fees.⁸ If the statute does not authorize such contract to employ an attorney the order of the court cannot validate it.⁹ So money borrowed by a guardian and expended for his ward is not a consideration for a note given by the succeeding guardian.¹⁰ The contract of one not a guardian is, of course, not binding on the estate.¹¹ So a general judgment against the guardian cannot be enforced out of the ward's property.¹² An attorney who acts as guardian *ad litem* cannot have any greater compensation than the allowance made to him by the court having jurisdiction of the case in which such services were rendered.¹³ One who is employed as attorney by a guardian *ad litem* may have such compensation as the court before which such case is tried may allow if reasonable in amount.¹⁴ The guardian is personally liable in such contracts,¹⁵ unless he has expressly relieved himself from personal liability by the terms of the contract,¹⁶ though in a proper case he may be reimbursed out of the estate for such

⁷ Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888 (the note was signed "John Blazzard by Joseph H. Hurd, his general guardian").

⁸ Morse v. Hinckley, 124 Cal. 154; 56 Pac. 896; Cole v. Superior Court, 63 Cal. 86; 49 Am. Rep. 78; Glasgow v. McKinnon, 79 Tex. 116; 14 S. W. 1050; Richardson v. Tyson, 110 Wis. 572; 84 Am. St. Rep. 937; 86 N. W. 250. (For other phases of this litigation, see Tyson v. Richardson, 103 Wis. 397; 79 N. W. 439; Tyson v. Tyson, 94 Wis. 225; 68 N. W. 1015.)

⁹ Glasgow v. McKinnon, 79 Tex. 116; 14 S. W. 1050; Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

¹⁰ Wright v. Byrne, 129 Cal. 614; 62 Pac. 176.

¹¹ Columbia, etc., Co. v. Lewis,

190 Pa. St. 558; 190 Pa. St. 577; 42 Atl. 1094; 42 Atl. 1117.

¹² Baird v. Steadman, 39 Fla. 40; 21 So. 572.

¹³ Englebert v. Troxell, 40 Neb. 195; 42 Am. St. Rep. 665; 26 L. R. A. 177; 58 N. W. 852.

¹⁴ Richardson v. Tyson, 110 Wis. 572; 84 Am. St. Rep. 937; 86 N. W. 250.

¹⁵ Chestnut v. Tyson, 105 Ala. 149; 53 Am. St. Rep. 101; 16 So. 723; Hunt v. Maldonado, 89 Cal. 636; 27 Pac. 56; Sperry v. Fanning, 80 Ill. 371; Rollins v. Marsh, 128 Mass. 116; Forster v. Fuller, 6 Mass. 58; 4 Am. Dec. 87; Hardy v. Bank, 61 N. H. 34; Shepard v. Hanson, 9 N. D. 249; 83 N. W. 20; Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

¹⁶ Morse v. Hinckley, 124 Cal. 154; 56 Pac. 896.

expense,¹⁷ and he has an equitable lien on the estate for such expenses.¹⁸ Even if the guardian designates himself in the contract "as guardian" he is personally liable.¹⁹ A guardian may, however, provide for freedom from personal liability and full effect must be given to such stipulation.²⁰

Conversely the interest of a guardian in a contract which he has made in his own name is a personal interest and not an interest as guardian.²¹ Thus he can sue in his own name on a note payable to himself, the consideration of which was property of the ward,²² can release a guarantor on a note payable to himself,²³ and the ward cannot bring suit thereon.²⁴ But in some states the ward may avoid the entire contract and hold the person who borrows money of the estate from the guardian with knowledge of the facts, as trustee.²⁵ A guardian is not liable on a contract made by the infant even for necessities.²⁶

Statutory provisions may confer upon a guardian power to bind the estate by his contracts with reference thereto.²⁷ He can contract for the location of a land certificate, the locator

¹⁷ Curran v. Abbott, 141 Ind. 492; 50 Am. St. Rep. 337; 40 N. E. 1091; (insurance) Sims v. Billington, 50 La. Ann. 968; 24 So. 637; (money) Merkel's Estate, 154 Pa. St. 285; 26 Atl. 428.

¹⁸ Curran v. Abbott, 141 Ind. 492; 50 Am. St. Rep. 337; 40 N. E. 1091.

¹⁹ Sperry v. Fanning, 80 Ill. 371; Forster v. Fuller, 6 Mass. 58; 4 Am. Dec. 87; Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

²⁰ Nichols v. Sargent, 125 Ill. 309; 8 Am. St. Rep. 378; 17 N. E. 475.

²¹ Thompson v. Duncan, 85 Ga. 542; 11 S. E. 860. *Contra*, that the guardian cannot sell notes payable to himself or bearer as guardian, without an order of the court. See Gillespie v. Crawford (Tex. Civ. App.), 42 S. W. 621; Strong v. Strauss, 40 O. S. 87.

²² McLean v. Dean, 66 Minn. 369; 69 N. W. 140.

²³ Ditmar v. West, 7 Ind. App. 637; 35 N. E. 47.

²⁴ Brewster v. Seeger, 173 Mass. 281; 53 N. E. 814 (citing Hippee v. Pond, 77 Ia. 235; 42 N. W. 192; Gard v. Neff, 39 O. S. 607. (Proposition of text not passed upon in this case.) Chitwood v. Cromwell, 12 Heisk. (Tenn.) 658; Zachary v. Gregory, 32 Tex. 452).

²⁵ Easton v. Somerville, 111 Ia. 164; 82 Am. St. Rep. 502; 82 N. W. 475.

²⁶ Overton v. Beavers, 19 Ark. 623; 70 Am. Dec. 610; Baird v. Steadman, 39 Fla. 40; 21 So. 572; McNabb v. Clipp, 5 Ind. App. 204; 31 N. E. 858; Spring v. Woodworth, 4 All. (Mass.) 326; Pendexter v. Cole, 66 N. H. 556; 22 Atl. 560.

²⁷ United States Mortgage Co. v. Sperry, 138 U. S. 313.

to be paid a part of the land,²⁸ or can lease,²⁹ or borrow money to discharge liens on order of the court.³⁰ The general power of a guardian over personalty, together with the provisions found in most statutes empower a guardian to compromise claims,³¹ though an order of court may be necessary.³² A guardian's contract with the stockholders of an insolvent national bank in which the ward holds stock for raising funds to pay the debts of the bank with as little expense as possible,³³ and his surrender of a life insurance policy,³⁴ have been held valid. He cannot arbitrate where his interest is adverse to his ward's.³⁵ In some cases the guardian has been allowed to bind the estate of his ward without an order of court; as where a guardian employed a doctor to save the ward's life.³⁶

If the property has been applied to the use of the estate equity may enforce at least a reasonable compensation therefor out of the estate,³⁷ but this relief will not be given if the property was not applied to the use of the estate.³⁸ So attorneys employed by the guardian may receive a reasonable compensation for the benefits which have resulted to the estate from such services.³⁹

IV. RECEIVERS.

§998. Contracts under order of court.

A receiver is an officer of the court, especially appointed, to whom is committed the control and management of property

²⁸ *Ellis v. Stone*, 4 Tex. Civ. App. 157; 23 S. W. 405.

²⁹ *Windon v. Stewart*, 43 W. Va. 711; 28 S. E. 776.

³⁰ *Ray v. McGinnis*, 81 Ind. 451.

³¹ *Manion v. Ry. Co.*, 99 Ky. 504; 36 S. W. 530; *Worthington v. Worthington (Ky.)*, 35 S. W. 1039.

³² *Johnson's Appeal*, 71 Conn. 590; 42 Atl. 662; *Davis v. Beall*, 21 Tex. Civ. App. 183; 50 S. W. 1086.

³³ *Hanover National Bank v. Cocke*, 127 N. C. 467; 37 S. E. 507.

³⁴ *Maclay v. Assurance Society*, 152 U. S. 499.

³⁵ *Fortune v. Killebrew*, 86 Tex. 172; 23 S. W. 976.

³⁶ *Williams v. Bonner*, 79 Miss. 664; 31 So. 207.

³⁷ *James v. Lane*, 33 N. J. Eq. 30.

³⁸ *Noble v. Runyon*, 85 Ill. 618.

³⁹ *Caldwell v. Young*, 21 Tex. 800. *Contra*, *Reading v. Wilson*, 38 N. J. Eq. 446.

which is in the custody of the law. As he is not the agent of either party he cannot bind either personally by his contracts,¹ nor can his acts amount to ratification by them.² The only question then, is as to his right to make contracts which will be a lien on the trust funds in his charge, and will not bind him personally. Contracts made by a receiver in his official capacity and under order of court, are "*sui generis*."³ Under proper circumstances a receiver acting under order of the court may incur debts, which will not bind him personally but will be a lien upon the fund.⁴ If no rights of lien-holders intervene, the receiver of a private corporation may be authorized to borrow money and make such debt a first lien upon certain trust property; as by pledging collateral to secure a loan.⁵ So the court may by its order make a debt incurred by the receiver a lien upon the product manufactured by the receiver.⁶ The assent of creditors to the appointment of a receiver and to the powers conferred upon him may prevent them from attacking the validity of contracts made by him under such powers. If the court when having power to act, has authorized a receiver to make certain contracts and has properly made the debt arising from such contract a lien upon certain property, the court cannot revoke such power after such contract has been made. "Contracts of a receiver made with express or implied authority cannot be annulled at the pleasure of the court."⁷ If the receiver of a going concern enters into a contract with a bank for borrowing money and depositing collateral security, and such contract is made under order of court and with con-

¹ Farmers' Loan Co. v. R. R. Co., 31 Or. 237; 65 Am. St. Rep. 822; 38 L. R. A. 424; 48 Pac. 706.

² Groveland Improvement Co. v. Supply Co., 25 Wash. 344; 87 Am. St. Rep. 755; 65 Pac. 529 (especially if the receiver is ignorant of the facts giving the party a right to avoid).

³ Vanderbilt v. R. R., 43 N. J. Eq. 669; 12 Atl. 188.

⁴ Girard, etc., Co. v. Cooper, 51 Fed. 332; Vanderbilt v. R. R., 43

N. J. Eq. 669; 12 Atl. 188; State Bank v. Machine Co., 99 Va. 411; 86 Am. St. Rep. 891; 39 S. E. 141.

⁵ Clarke v. Banking Co., 54 Fed. 556; State Bank v. Machine Co., 99 Va. 411; 86 Am. St. Rep. 891; 39 S. E. 141.

⁶ American, etc., Co. v. German, 126 Ala. 194; 85 Am. St. Rep. 21; 28 So. 603.

⁷ State Bank v. Machine Co., 99 Va. 411, 417; 86 Am. St. Rep. 891; 39 S. E. 141.

sent of the creditors, the court must on the final settlement allow the bank priority as to such collateral.⁸ No personal liability exists against the receiver while acting under order of the court.⁹ Thus if the receiver employs an attorney in his official capacity, and the court sanctions such employment and fixes the compensation of the attorney, the latter cannot maintain an action against the receiver personally.¹⁰ The compensation of an attorney thus employed is to be fixed by the court.¹¹ If a corporation is dissolved the receiver may, under order of the court, complete a contract entered into by such corporation and collect compensation therefor under the contract.¹² The receiver of a corporation is not liable officially on a lease made by the corporation unless he adopts such lease.¹³ If he takes possession of the leased premises he is liable for a reasonable compensation, but not on the covenants of the lease as an assignee of the term.¹⁴ A creditor who wrongfully procures the appointment of a receiver and prolongs the receivership unreasonably may be required, if he has received all the funds collected by the receiver, to pay the rent of premises used by the receiver.¹⁵

§999. Power to displace prior liens.—Receiver of private corporation.

Where the receiver is authorized by the court to make contracts and to charge them upon the trust fund, the question is often presented: Can debts incurred by a receiver under order of the court displace specific prior liens upon part or all

⁸ State Bank v. Machine Co., 99 Va. 411; 86 Am. St. Rep. 891; 39 S. E. 141.

⁹ Vanderbilt v. R. R., 43 N. J. Eq. 669; 12 Atl. 188.

¹⁰ Walsh v. Raymond, 58 Conn. 251; 18 Am. St. Rep. 264; 20 Atl. 464.

¹¹ Stuart v. Boulware, 133 U. S. 78.

¹² Florence, etc., Co. v. Hanby, 101 Ala. 15; 13 So. 343.

¹³ Tradesmen's Publishing Co. v. Car-Wheel Co., 95 Tenn. 634; 49 Am. St. Rep. 943; 31 L. R. A. 593; 32 S. W. 1097.

¹⁴ Bell v. Protective League, 163 Mass. 558; 47 Am. St. Rep. 481; 28 L. R. A. 452; 40 N. E. 857.

¹⁵ Link Belt Machinery Co. v. Hughes, 195 Ill. 413; 59 L. R. A. 673; 63 N. E. 186; affirming, 95 Ill. App. 323.

of the property held by the receiver. If the corporation is a private corporation the court cannot authorize the receiver to incur debts which shall displace existing liens unless the lienholder consents thereto.¹ So if the lienholder objects to the authority given to the receiver to carry on business,² or if he is not a party to the suit in which the receiver is appointed,³ his lien has priority over debts incurred by the receiver. A prior mortgage if duly recorded,⁴ or a vendor's lien,⁵ have under these circumstances been given priority over the debts incurred by the receiver. Neither his certificates,⁶ nor his simple contract debts,⁷ can be preferred to such prior liens. The court cannot authorize a receiver of a private corporation to carry on a business and incur debts which displace prior liens. Thus the court cannot so authorize the receiver to carry on the hotel business.⁸ This power has, however, been exercised when it is advantageous to all parties concerned to sell

¹ Doe v. Transportation Co., 78 Fed. 62; Hanna v. Trust Co., 70 Fed. 2; 30 L. R. A. 201; Fidelity, etc., Co. v. Iron Co., 68 Fed. 623; Farmers', etc., Co. v. Coal Co., 50 Fed. 481; 16 L. R. A. 603; Belknap Savings Bank v. Land Co., 28 Colo. 326; 64 Pac. 212; Lamar, etc., Co. v. Bank, 28 Colo. 344; 64 Pac. 210; International Trust Co. v. Coal Co., 27 Colo. 246; 83 Am. St. Rep. 59; 60 Pac. 621; Hooper v. Trust Co., 81 Md. 559; 29 L. R. A. 262; 32 Atl. 505; Farmers', etc., Co. v. Telegraph Co., 148 N. Y. 315; 51 Am. St. Rep. 690; 31 L. R. A. 403; 42 N. E. 707; Raht v. Attrill, 106 N. Y. 423; 60 Am. Rep. 456; 13 N. E. 282; United States Investment Corporation v. Portland Hospital, 40 Or. 523; 56 L. R. A. 627; 64 Pac. 644; 67 Pac. 194; Merriam v. Mining Co., 37 Or. 321; 56 Pac. 75; 58 Pac. 37; 60 Pac. 997.

² Hanna v. Trust Co., 70 Fed. 2; 30 L. R. A. 201.

³ International Trust Co. v. Coal

Co., 27 Colo. 246; 83 Am. St. Rep. 59; 60 Pac. 621.

⁴ Hanna v. Trust Co., 70 Fed. 2; 30 L. R. A. 201; Farmers', etc., Co. v. Coal Co., 50 Fed. 481; 16 L. R. A. 603; International Trust Co. v. Coal Co., 27 Colo. 246; 83 Am. St. Rep. 59; 60 Pac. 621; United States Investment Corporation v. Portland Hospital, 40 Or. 523; 56 L. R. A. 627; 64 Pac. 644; 67 Pac. 194.

⁵ Hooper v. Trust Co., 81 Md. 559; 29 L. R. A. 262; 32 Atl. 505.

⁶ Metropolitan Trust Co. v. Ry., 100 Fed. 897; Hanna v. Trust Co., 70 Fed. 2; 30 L. R. A. 201; Farmers', etc., Co. v. Coal Co., 50 Fed. 481; 16 L. R. A. 603; International Trust Co. v. Coal Co., 27 Colo. 246; 83 Am. St. Rep. 59; 60 Pac. 621; Hooper v. Trust Co., 81 Md. 559; 29 L. R. A. 262; 32 Atl. 505.

⁷ United States Investment Corporation v. Portland Hospital, 40 Or. 523; 56 L. R. A. 627; 64 Pac. 644; 67 Pac. 194.

⁸ Makeel v. Hotchkiss, 190 Ill.

the business as a going concern.⁹ Even in case of private corporations it seems to be held that expenses incurred by the receiver in preserving the property may be given priority over pre-existing liens.¹⁰ However, if certain employees who have not been paid, threaten to burn property of which the receiver has charge, and he thereupon issues certificates for a loan with which he pays such employees, this is not an expense for preserving the property, in the proper sense of the term, since the receiver should invoke the protection of the law.¹¹ On the other hand, if the receiver is appointed at the instance of a lienholder, proper expenses of the receivership have priority over such lien.¹² So if the lienor consents that the debts of the receivership shall have priority over his lien, effect will be given to such agreement.¹³ Since contracts of the receiver of a private corporation cannot affect the rights of a prior lienholder who does not acquiesce in the receivership, it follows that such creditor cannot take advantage of such contract. So where a receiver took out insurance on certain property and collected such insurance when such property was burned, it was held that a creditor who had levied on such property and had never acquiesced in the receivership or authorized such insurance, cannot have the insurance money subjected to his claim as a prior lien thereon.¹⁴

311; 83 Am. St. Rep. 131; 60 N. E. 524; Lane v. Hotel Co., 190 Pa. St. 230; 42 Atl. 697.

⁹ Knickerbocker v. Mining Co., 172 Ill. 535; 64 Am. St. Rep. 54; 50 N. E. 330; Ellis v. Water Co., 86 Tex. 109; 23 S. W. 858. Hotel Cake v. Mohun, 164 U. S. 311; Thornton v. R. R., 94 Ala. 353; 10 So. 442. Manufacturing corporation. Blythe v. Gibbons, 141 Ind. 332; 35 N. E. 557; Grainger v. Paper Co., 105 Ky. 683; 49 S. W. 477.

¹⁰ Cake v. Mohun, 164 U. S. 311; Beckwith v. Carroll, 56 Ala. 12;

Makeel v. Hotchkiss, 190 Ill. 311; 83 Am. St. Rep. 131; 60 N. E. 524 (obiter); Karn v. Iron Co., 86 Va. 754; 11 S. E. 431.

¹¹ Raht v. Attrill, 106 N. Y. 423; 60 Am. Rep. 456; 13 N. E. 282.

¹² Shelburn Coal Mining Co. v. Delashmutt, 21 Ind. App. 257; 52 N. E. 102; Gallagher v. Gingrich, 105 Ia. 237; 74 N. W. 763; Ellis v. Water Co., 86 Tex. 109; 23 S. W. 858.

¹³ Reinhard v. Investment Co., 94 Fed. 901.

¹⁴ McLaughlin v. Bank, 22 Utah 473; 54 L. R. A. 343; 63 Pac. 589.

§1000. Receiver of quasi-public corporation.

The receiver of a quasi-public corporation may, if acting under order of a court having jurisdiction, incur debts in order to carry on the business, which debts may be given priority over prior liens. This principle is most frequently applied to debts created by receivers of railway companies.¹ Thus acting under order of the court he may issue certificates, and the debts thus evidenced may be made a first lien on the trust property displacing prior liens thereon.² Under special circumstances the expenses of completing a road may be made a lien prior to a pre-existing mortgage.³ The receiver should be given authority to issue certificates which displace prior liens only in case the lienor is a party to the suit,⁴ and is given notice of the application.⁵ While this is undoubtedly the safer practice, it seems that if those who furnish money or property to the receiver are willing to take the risk of the final action of the court, prior notice is not necessary; it being sufficient if notice is given before the final order is made.⁶ The general power of a receiver of a railroad to bind the trust-fund by his contracts is limited to expenses incurred in the ordinary daily administration of the railroad.⁷ Thus without special authority from the court he cannot bind the fund by accepting a lease of general offices for a term of years which extends beyond the receivership,⁸ nor can he be allowed expenditures incurred

¹ Kneeland v. Luce, 141 U. S. 491; Morgans, etc., Co. v. R. R., 137 U. S. 171; Kneeland v. Trust Co., 136 U. S. 89; Union Trust Co. v. Ry., 117 U. S. 434; Miltenberger v. Ry., 106 U. S. 286; Barton v. Barbour, 104 U. S. 126; Wallace v. Loomis, 97 U. S. 146; Vilas v. Page, 106 N. Y. 439; 13 N. E. 743.

² Union Trust Co. v. Ry., 117 U. S. 434; Swann v. Clark, 110 U. S. 602; Shaw v. R. R., 100 U. S. 605; Browning v. Kelly, 124 Ala. 645; 27 So. 391; Illinois, etc., Bank v. Ry., 115 Cal. 285; 47 Pac. 60; Fletcher v. Waring, 137 Ind. 159;

36 N. E. 896; Hoover v. Ry., 29 N. J. Eq. 4; State v. R. R., 6 Lea (Tenn.) 353; Vermont, etc., R. R. v. R. R., 50 Vt. 500.

³ First National Bank v. Ewing, 103 Fed. 168.

⁴ Metropolitan Trust Co. v. Ry., 100 Fed. 897.

⁵ Osborne v. Colliery Co., 96 Va. 58; 30 S. E. 446.

⁶ Union Trust Co. v. Ry., 117 U. S. 434.

⁷ Cowdrey v. R. R., 93 U. S. 352.

⁸ Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554.

in defeating a proposed subsidy, from a city to aid in constructing a parallel road.⁹ The power of a court to authorize a receiver to incur obligations which shall incur private liens has been recognized as existing in corporations of a quasi-public character other than railroads, such as electric lighting companies which are under contract to furnish light for the public,¹⁰ or to telephone and telegraph companies.¹¹

§1001. Contracts not under order of court.

A receiver is personally liable upon his contracts made in his official capacity unless he makes them under order of the court appointing him; or by virtue of statutory authority; or unless there is in his contract an express stipulation against personal liability.¹ Thus he is liable on his notes, though issued for the benefit of the receivership.² Without an order of the court the receiver cannot make his contracts a lien on the trust fund,³ though if he is reimbursed therefor his creditors might undoubtedly be subrogated to his rights. While precaution demands that a receiver have authority of the court for liabilities incurred and expenditures made by him before he acts, no technical rule requires confiscation of the receiver's individual

⁹ *Cowdrey v. R. R.*, 93 U. S. 352.

¹⁰ *Illinois Trust Co. v. Ry.*, 89 Fed. 235.

¹¹ *Keelyn v. Telegraph Co.*, 90 Fed. 29.

¹ *Vilas v. Page*, 106 N. Y. 439; 13 N. E. 743.

² *Peoria, etc., Works v. Hickey*, 110 Ia. 276; 80 Am. St. Rep. 296; 81 N. W. 473. The note was given for property that went into the stock of which receiver had control. The note was signed "Jas. Hickey, Receiver." Reformation was denied. In its opinion the court said: "As the receiver had no authority to execute the notes in suit, he had no principal against whom plaintiff might maintain an action, and, unless he is bound, no

one is responsible. If the debt was properly incurred, he will be allowed the amount paid out on his accounting. Plaintiff's right of action, if it has any, is on the defendant's promise. Like the executor, the assignee, the guardian and the administrator, he has no responsible principal behind for whom he may promise, and he alone is liable on the contract." *Peoria, etc., Works v. Hickey*, 110 Ia. 276, 279; 80 Am. St. Rep. 296; 81 N. W. 473.

³ *Union Trust Co. v. Midland Co.*, 117 U. S. 434; *Cowdrey v. R. R.*, 93 U. S. 352; *Lehigh, etc., Co. v. R. R.*, 35 N. J. Eq. 426; *Wyckoff v. Scofield*, 103 N. Y. 630; 9 N. E. 498; *Hand v. R. R.*, 17 S. C. 219.

property if he makes proper expenditures or incurs proper liabilities without an order of the court. What the court could authorize in advance it may subsequently ratify if the receiver and those dealing with him are willing to take such risk. Accordingly the receiver should be reimbursed out of the property for his reasonable expenses incurred in such receivership;⁴ and he should be reimbursed for contract liabilities incurred by him on contract for the benefit of the estate, if fair and reasonable.⁵

V. CONTRACTS OF PROMOTERS.

§1002. Contracts of promoters not binding on corporation.

There cannot be a valid contract without two parties thereto. Accordingly, a contract made by the promoters of a corporation before the corporation is created cannot bind the corporation.¹ So a contract to locate the place of business of the corporation,

⁴ Knickerbocker v. Mining Co., 172 Ill. 535; 64 Am. St. Rep. 54; 50 N. E. 330.

⁵ Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554; Vanderbilt v. R. R., 43 N. J. Eq. 669; 12 Atl. 188.

¹ Winters v. Mining Co., 57 Fed. 287; Moore, etc., Co. v. Hardware Co., 87 Ala. 206; 13 Am. St. Rep. 23; 6 So. 41; San Joaquin, etc., Co. v. West, 94 Cal. 399; 29 Pac. 785; Ruby, etc., Co. v. Gurley, 17 Colo. 199; 29 Pac. 668; New York, etc., R. R. v. Ketchum, 27 Conn. 170; Park v. Woodmen of America, 181 Ill. 214; 54 N. E. 932; Western, etc., Mfg. Co. v. Cousley, 72 Ill. 531; Gent v. Ins. Co., 107 Ill. 652; Smith v. Parker, 148 Ind. 127; 45 N. E. 770; Davis, etc., Co. v. Creamery Co., 10 Ind. App. 42; 37 N. E. 549; Carey v. Mining Co., 81 Ia. 674; 47 N. W. 882; Tryber v. Cold

Storage Co., 67 Kan. 489; 73 Pac. 83; Holyoke Envelope Co. v. Envelope Co., 182 Mass. 171; 65 N. E. 54; Abbott v. Hapgood, 150 Mass. 248; 15 Am. St. Rep. 193; 5 L. R. A. 586; 22 N. E. 907; Penn Match Co. v. Hapgood, 141 Mass. 145; 7 N. E. 22; Durgin v. Smith, — Mich. —; 94 N. W. 1044; Battelle v. Pavement Co., 37 Minn. 89; 33 N. W. 327; Hill v. Gould, 129 Mo. 106; 30 S. W. 181; Davis v. Creamery Co., 48 Neb. 471; 67 N. W. 436; Munson v. R. R., 103 N. Y. 58; 8 N. E. 355; Tift v. Bank, 141 Pa. St. 550; 21 Atl. 660; Weatherford, etc., Co. v. Granger, 86 Tex. 350; 40 Am. St. Rep. 837; 24 S. W. 795; Bash v. Mining Co., 7 Wash. 122; 34 Pac. 462; Buffington v. Bardon, 80 Wis. 635; 50 N. W. 776; Standard, etc., Co. v. Publishing Co., 87 Wis. 127; 58 N. W. 238.

made by the promoters,² or to appoint a custodian of corporate funds,³ or to pay a bonus for selling stock,⁴ does not bind the corporation of its own force; nor can such a contract be enforced by the corporation.⁵ So an executory agreement to take a certain amount of the capital stock,⁶ or a contract giving a refusal to the corporation of all stock sold by promoters,⁷ cannot be enforced by the corporation, without further action on its part. So a contract by the creditors of a corporation to take in payment of their debts, notes to be issued by a corporation to be formed is without consideration.⁸ If the promoter makes a contract on behalf of the corporation for the purchase of certain property, and countermands it subsequently; and accordingly the corporation does not ratify such contract and does not receive anything of value under it, the corporation is not liable for such breach.⁹

§1003. Effect of acceptance by corporation.

An attempted contract made on behalf of a corporation to be formed subsequently, by a promoter thereof, may be treated as at least equivalent to a continuing offer, and if not revoked by the adversary party, and accepted by the corporation when it is formed, it becomes a valid contract.¹ So the corporation's

² *Park v. Woodmen of America*, 181 Ill. 214; 54 N. E. 932.

³ *San Joaquin, etc., Co. v. West*, 94 Cal. 399; 29 Pac. 785.

⁴ *Tift v. Bank*, 141 Pa. St. 550; 21 Atl. 660; *Weatherford, etc., Co. v. Granger*, 86 Tex. 350; 40 Am. St. Rep. 837; 24 S. W. 795.

⁵ *Plaquemines, etc., Co. v. Buck*, 52 N. J. Eq. 219; 27 Atl. 1094; *Ireland v. Reduction Co.*, 20 R. I. 190; 38 L. R. A. 299; 38 Atl. 116. A deed to the "incorporators" does not vest the legal title in the corporation. *McCandless v. Acid Co.*, 112 Ga. 291; 37 S. E. 419.

⁶ *Dayton, etc., Co. v. Coy*, 13 O. S. 84. *Contra*, a contract of subscription to stock may be enforced

by the corporation even if not in compliance with the statute. *Marysville, etc., Co. v. Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215; 29 Pac. 126.

⁷ *Ireland v. Milling, etc., Co.*, 20 R. I. 190; 38 L. R. A. 299; 38 Atl. 116.

⁸ *Providence Albertype Co. v. Kent & Stanley Co.*, 19 R. I. 561; 35 Atl. 152.

⁹ *Bank v. Orgill*, — Miss. —; 34 So. 325.

¹ *Bridgeport, etc., Co. v. Meader*, 72 Fed. 115; 18 C. C. A. 451; affirming, 69 Fed. 225; 15 C. C. A. 694; *Old Colony Trust Co. v. Dubuque, etc., Co.*, 89 Fed. 794; *Davis v. Dexter, etc., Co.*, 52 Kan. 693;

taking an assignment of a contract for the purchase of certain realty, and issuing stock to those who have contributed money for the purchase of such realty is an acceptance of the contract.² A corporation which is formed to carry on the business of a partnership and which does carry on such business is presumed to adopt its contracts.³ Thus if the partnership had guaranteed certain titles as part of its business of loaning money as agent, the corporation formed to carry on such business cannot make any charge for services in perfecting such title.⁴ If a firm incorporates and all the assets of the firm are turned over to such corporation, the latter becomes liable for the debts of the former.⁵ Acceptance may be made by conduct as well as by words. Receiving benefits under such a contract with knowledge of its terms is an acceptance of the offer thus made, if it is possible for the corporation to choose between receiving and returning such benefits,⁶ such as using a machine bought before incorporation and making a part payment thereon,⁷ or accepting and using the proceeds of a loan,⁸ or receiving and using material, labor, and taking possession of a building rented for the corporation,⁹ or taking possession of mining claims leased to it.¹⁰ Where property bought in this way is received a mortgage given thereon in the name of the corporation is valid in equity.¹¹ So a corporation which has

35 Pac. 776; *Red Wing Hotel Co. v. Friedrich*, 26 Minn. 112; 1 N. W. 827; *Pitts v. Mercantile Co.*, 75 Mo. 221; *Seymour v. Cemetery Association*, 144 N. Y. 333; 26 L. R. A. 859; 39 N. E. 365; *Oakes v. Water Co.*, 143 N. Y. 430; 26 L. R. A. 544; 38 N. E. 461; *Rathbun v. Snow*, 123 N. Y. 343; 10 L. R. A. 355; 25 N. E. 379; *Schreyer v. Mills Co.*, 29 Or. 1; 43 Pac. 719.

² *Esper v. Miller*, 131 Mich. 334; 91 N. W. 613.

³ *North American, etc., Co. v. Mortgage Co.*, 83 Fed. 796; 28 C. C. A. 88.

⁴ *North American, etc., Co. v.*

Mortgage Co., 83 Fed. 796; 28 C. C. A. 88.

⁵ *Andres v. Morgan*, 62 O. S. 236; 78 Am. St. Rep. 710; 56 N. E. 875.

⁶ *Huron, etc., Co. v. Kittleson*, 4 S. D. 520; 57 N. W. 233.

⁷ *Bridgeport, etc., Co. v. Meader*, 72 Fed. 115; 18 C. C. A. 451; affirming, 69 Fed. 225; 15 C. C. A. 694.

⁸ *Schreyer v. Mills Co.*, 29 Or. 1; 43 Pac. 719.

⁹ *Kaepler v. Creamery Co.*, 12 S. D. 483; 81 N. W. 907.

¹⁰ *Wall v. Smelting Co.*, 20 Utah 474; 59 Pac. 399.

¹¹ *Bridgeport, etc., Co. v. Meader*, 72 Fed. 115; 18 C. C. A. 451.

received the benefit of a mortgage cannot avoid it on the ground that it was executed before one half of the capital stock had been paid in, contrary to the requirements of the statute.¹² If the promoters, who made the contract for the corporation, become stockholders, directors, and officers, the corporation is charged with their knowledge.¹³ Thus a president of a corporation,¹⁴ or a president and general manager may ratify a contract made by himself for the corporation before it was organized.¹⁵ A transaction of this sort is, properly speaking, a new contract, made by acceptance of an outstanding offer.¹⁶ Thus delivery of a subscription to a promoter is in effect delivery to the corporation when subsequently formed.¹⁷ Accordingly since this is in effect an offer until accepted by the corporation, the adversary party may withdraw such offer at any time before the corporation accepts it.¹⁸ Some courts, however, speak of this as a ratification of the contract.¹⁹ Authorities differ as to whether a corporation can be charged with expenses necessary to its very existence, such as attorney fees for incorporating, irrespective of its own agreement to pay therefor after incorporation.²⁰ Even if the services necessary to the

¹² Wood v. Water Works Co., 44 Fed. 146; 12 L. R. A. 168.

¹³ Rogers v. Land Co., 134 N. Y. 197; 32 N. E. 27; Kaeppler v. Creamery Co., 12 S. D. 483; 81 N. W. 907.

¹⁴ Kaeppler v. Creamery Co., 12 S. D. 483; 81 N. W. 907.

¹⁵ Oakes v. Water Co., 143 N. Y. 430; 26 L. R. A. 544; 38 N. E. 461. *Contra*, the directors cannot accept such a contract so as to bind the corporation. Tift v. Bank, 141 Pa. St. 550; 21 Atl. 660.

¹⁶ Reichwald v. Hotel, 106 Ill. 439; McArthur v. Printing Co., 48 Minn. 319; 31 Am. St. Rep. 653; 51 N. W. 216; Richardson v. Graham, 45 W. Va. 134; 30 S. E. 92; Pratt v. Match Co., 89 Wis. 406; 62 N. W. 84.

¹⁷ Minneapolis Threshing Machine

Co. v. Davis, 40 Minn. 110; 12 Am. St. Rep. 701; 3 L. R. A. 796; 41 N. W. 1026.

¹⁸ Consolidated Water-Power Co. v. Nash, 109 Wis. 490; 85 N. W. 485.

¹⁹ Davis v. Montgomery, etc., Co. (Ala.), 8 So. 496; Stanton v. New York, etc., Co., 59 Conn. 272; 21 Am. St. Rep. 110; 22 Atl. 300; Bruner v. Brown, 139 Ind. 600; 38 N. E. 318; Oakes v. Cattaraugus, etc., Co., 143 N. Y. 430; 26 L. R. A. 544; 38 N. E. 461; Seymour v. Cemetery, 144 N. Y. 333; 26 L. R. A. 859; 39 N. E. 365; Pittsburg, etc., Co. v. Quintrell, 91 Tenn. 693; 20 S. W. 248.

²⁰ That it is liable. Freeman Implement Co. v. Osborn, 14 Colo. App. 488; 60 Pac. 730; Farmers' Bank v. Smith, 105 Ky. 816; 88 Am. St.

formation of the corporation are rendered by a promoter,²¹ and even if he becomes an officer and director,²² he can recover for special services outside of his line of duty as such director. A note given by a corporation for services rendered in procuring its incorporation is enforceable as on sufficient consideration.²³ In some jurisdictions it is held that a corporation cannot even adopt such contract or accept such offer.²⁴ The Massachusetts cases are not properly in point. *Pennsylvania, etc., Co. v. Hapgood*,²⁵ was a suit by the corporation against parties who had broken a contract with promoters of the corporation; which suit failed because there was "no allegation of acceptance" on the part of the corporation. *Abbott v. Hapgood*²⁶ was a suit on the same contract by promoters. The observation as to the power of the corporation to adopt was pure dictum.

§1004. Personal liability of promoters.

Promoters are liable personally upon their contracts,¹ and this liability is said in some cases to be in the nature of partnership liability.² The promoters are not relieved of liability on their contracts because the corporation adopts them, unless there was an agreement to that effect.³ Thus where one in

Rep. 341; 49 S. W. 810; *Taussig v. R. R.*, 166 Mo. 28; 89 Am. St. Rep. 674; 65 S. W. 969. That it is not liable. *Weatherford, etc., Co. v. Granger*, 86 Tex. 350; 40 Am. St. Rep. 837; 24 S. W. 795; reversing, 23 S. W. 425.

²¹ *Farmers', Bank v. Smith*, 105 Ky. 816; 88 Am. St. Rep. 341; 49 S. W. 810.

²² *Taussig v. R. R.*, 166 Mo. 28; 89 Am. St. Rep. 674; 65 S. W. 969.

²³ *Smith v. Water Works*, 73 Conn. 626; 48 Atl. 754.

²⁴ *North Sidney, etc., Co. v. Higgins (P. C.)* (1899), A. C. 263; *Abbott v. Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193; 5 L. R. A. 586; 22 N. E. 907; *Pennsylvania, etc., Co. v. Hapgood*, 141 Mass. 145; 7 N.

E. 22. "The corporation after its organization cannot become a party to the contract even by adoption or ratification of it," *Abbott v. Hapgood*, 150 Mass. 248, 252; 15 Am. St. Rep. 193; 5 L. R. A. 586; 22 N. E. 907; citing *Kelner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. Ins. Co.*, 12 C. B. (N. S.) 694; *Melhado v. Ry.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125.

²⁵ 141 Mass. 145; 7 N. E. 22.

²⁶ 150 Mass. 248; 15 Am. St. Rep. 193; 5 L. R. A. 586; 22 N. E. 907.

¹ *Mosier v. Parry*, 60 O. S. 388; 54 N. E. 364.

² *Ryland v. Hollinger*, 117 Fed. 216; 54 C. C. A. 248.

³ *Roberts, etc., Mfg. Co. v. Schlick*, 62 Minn. 332; 64 N. W. 826; *Queen*

business orders goods, and the business is then incorporated; and the goods are actually delivered to and received by the corporation, the person originally ordering the goods may be held liable.⁴ If the agreement releases the promoters and purports to bind the corporation, the promoters are not liable, but the corporation which they organize is liable, as where a contract with partners provided that they were to incorporate and that the corporation should be liable on the contract.⁵ The promoters may be reimbursed by the corporation to the extent of their legitimate expenses on behalf of the corporation.⁶ Thus promoters of a college, who agree to pay interest on a subscription to obtain it for the college may recover the sums thus advanced.⁷

City, etc., Co. v. Crawford, 127 Mo. 356; 30 S. W. 163.

⁴ **Henderson Woolen Mills v. Edwards**, 84 Mo. App. 448.

⁵ **Chicago, etc., Co. v. Talbotton**,

etc., Co., 106 Ga. 84; 31 S. E. 809.

⁶ **Hayward v. Leeson**, 176 Mass. 310; 49 L. R. A. 725; 57 N. E. 656.

⁷ **Morton v. College**, 100 Ky. 281, 35 L. R. A. 275; 38 S. W. 1.

CHAPTER XLVI.

VOLUNTARY ASSOCIATIONS.

§1005. Contracts of voluntary associations.

A voluntary association consists of a number of natural persons, united together without being incorporated, for some purpose other than carrying on a profession or business, or making profits.¹ It usually takes the form of internal organization of a corporation not for profit, and exists for the same purposes as such corporations.² The mere fact of membership in a voluntary association does not of itself render each member liable for contracts entered into by such association.³ Thus an association of pilots, having no power to contract for pilot fees is not bound by a contract of a member on their behalf.⁴ Subscribers to a law and order league's guaranty fund are not personally liable to an attorney retained by its officers even if they know and approve of such employment.⁵ A member is not liable for debts incurred before he became a member.⁶ In order to hold

¹ *Grand Grove v. Garibaldi Grove*, 130 Cal. 116; 80 Am. St. Rep. 80; 62 Pac. 486; *Lewis v. Tilton*, 64 Ia. 220; 52 Am. Rep. 436; 19 N. W. 911; *Brown v. Stoerkel*, 74 Mich. 269; 3 L. R. A. 430; 41 N. W. 921; *Burt v. Lathrop*, 52 Mich. 106; 17 N. W. 716; *Abels v. McKeen*, 18 N. J. Eq. 462; *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818; *Kalbitzer v. Goodhue*, 52 W. Va. 435; 44 S. E. 264.

² "Associations of this character are not bodies politic or corporate; nor are they recognized by the law as persons. They are mere aggre-

gates of individuals, called, for convenience, like partnerships, by a common name." *Grand Grove v. Garibaldi Grove*, 130 Cal. 116, 119; 80 Am. St. Rep. 80; 62 Pac. 486.

³ *Clark v. O'Rourke*, 111 Mich. 108; 66 Am. St. Rep. 389; 69 N. W. 147; *McFadden v. Leeka*, 48 O. S. 513; 28 N. E. 874.

⁴ *The City of Reading*, 103 Fed. 696.

⁵ *McCabe v. Goodfellow*, 133 N. Y. 89; 17 L. R. A. 204; 30 N. E. 728.

⁶ *Hornberger v. Orchard*, 39 Neb. 639; 58 N. W. 425.

a member for a contract of such an association it must be shown that he either authorized it or ratified it. He may authorize such contract in three ways: First, he may join the association understanding that a part of its objects was making such contracts.⁷ Thus a member of a polo team who joins understanding that certain expenses were to be incurred in which he should share is liable thereon.⁸ Second, he may specifically authorize the contract in question.⁹ Third, his authority may be shown by the fact that he was instrumental in making the contract.¹⁰ Thus persons who sign as directors,¹¹ or as treasurer,¹² or allow their names to be used as officers,¹³ or themselves make the contract as a committee,¹⁴ bind themselves personally. Thus subscribers to a fund as a bonus to induce a factory to locate in their town are not liable for the contracts of an alleged association with no definite members, formed at a citizens' meeting, to secure such location.¹⁵ A member may ratify contracts expressly, or impliedly as by accepting benefits which he knows or should know were obtained by such contract. Such an association cannot go out of existence, with contracts outstanding.¹⁶

The members of the association may enforce a contract en-

⁷ Lawler v. Murphy, 58 Conn. 294; 8 L. R. A. 113; 20 Atl. 457; McKenney v. Bowie, 94 Me. 397; 47 Atl. 918; Clark v. O'Rourke, 111 Mich. 108; 66 Am. St. Rep. 389; 69 N. W. 147.

⁸ Bennett v. Lathrop, 71 Conn. 613; 71 Am. St. Rep. 222; 42 Atl. 634.

⁹ Winona Lumber Co. v. Church, 6 S. D. 498; 62 N. W. 107.

¹⁰ Comfort v. Graham, 87 Ia. 295; 54 N. W. 242; Kierstead v. Bennett, 93 Me. 328; 45 Atl. 42; Fredendall v. Taylor, 23 Wis. 538; 99 Am. Dec. 203.

¹¹ Pelton v. Place, 71 Vt. 430; 46 Atl. 63.

¹² Kierstead v. Bennett, 93 Me. 328; 45 Atl. 42.

¹³ Murray v. Walker, 83 Ia. 202; 48 N. W. 1075. *Contra*, by statute, members of a G. A. R. post are not personally liable though they make the contracts in person for the post. Pain v. Sample, 158 Pa. St. 428; 27 Atl. 1107.

¹⁴ McKinnie v. Postles (Del.). 54 Atl. 798.

¹⁵ Cheney v. Goodwin, 88 Me. 563; 34 Atl. 420.

¹⁶ Camden, etc., Co. v. Guarantors, etc., 59 N. J. L. 328; 35 Atl. 796; Roper v. Burke, 83 Ala. 193; 30 So. 439; McFadden v. Murphy, 149 Mass. 341; 21 N. E. 868; Lafond v. Deems, 81 N. Y. 507; Strickland v. Prichard, 37 Vt. 324.

tered into with the association as made for their benefit.¹⁷ So where a superior labor organization took away the charter of an inferior association, the latter can sue on causes of action accruing in its favor.¹⁸ If a member of the association is liable in one of these ways, he cannot avoid liability because the contracting party did not know his name or identity.¹⁹

A difficulty in enforcing a contract against a voluntary association is found in the fact that the association can not be sued by name, but the individual members in the jurisdiction of the court must be made parties,²⁰ unless by statute the association may be sued by its name. The statutory right to sue an association by name does not abrogate the Common Law right to sue the individual members,²¹ nor does it give a member a right to sue the association.²² Members of an association who are jointly liable cannot sue the association on a policy.²³ So the adjuster of a voluntary association of dredgers who divides the work cannot sue the association because he does not get his share of their earnings.²⁴

A note by a fluctuating society, signed individually by trustees, is considered in equity as a charge on their property,²⁵ and an association though it has no power to borrow, may pledge a claim against an insolvent trust company for its deposits.²⁶

¹⁷ *Senour v. Maschinot* (Ky.), 31 S. W. 481; *Local Union, etc., v. Barrett*, 19 R. I. 663; 36 Atl. 5; *Ackermann v. Schuetzen Verein* (Tex. Civ. App.), 60 S. W. 366.

¹⁸ *Wicks v. Monihan*, 130 N. Y. 232; 14 L. R. A. 243; 29 N. E. 139.

¹⁹ *Lawler v. Murphy*, 58 Conn. 294; 8 L. R. A. 113; 20 Atl. 457.

²⁰ *Allnut v. Lancaster*, 76 Fed. 131.

²¹ *Jenkinson v. Wysner*, 125 Mich. 89; 83 N. W. 1012.

²² *Huth v. Humboldt Stamm*, 61 Conn. 227; 23 Atl. 1084.

²³ *Perry v. Cobb*, 88 Me. 435; 49 L. R. A. 389; 34 Atl. 278.

²⁴ *Potter v. Dredging Co.*, 59 N. J. Eq. 422; 46 Atl. 537.

²⁵ *Society of Shakers v. Watson*, 68 Fed. 730; 15 C. C. A. 632.

²⁶ *Commonwealth v. Trust Co.*, 161 Mass. 550; 37 N. E. 757.

CHAPTER XLVII.

THE GOVERNMENT.

§1006. **Contracts of the United States.**

The United States is a government of limited powers, possessing only such as are expressly or impliedly conferred upon it by the Constitution of the United States. It has full power to contract when such contract is a suitable and appropriate method of carrying such powers into execution.¹ The United States is liable for interfering with the work of a contractor,² or for arbitrary and unreasonable conduct of its engineers,³ but not for damages for a delay not due the United States.⁴ The United States may be liable on an implied contract for office rent,⁵ or for use and occupation.⁶ Under claim of implied contract the United States cannot be held for infringement of a patent,⁷ or for damage on an elevator in postoffice build-

¹ Langford v. United States, 95 Fed. 933; United States v. Utz, 80 Fed. 818; Starin v. United States, 31 Ct. Cl. 65; Myerle v. United States, 31 Ct. Cl. 105; Haliday v. United States, 33 Ct. Cl. 453; Gregory v. United States, 33 Ct. Cl. 434; Salisbury v. United States, 28 Ct. Cl. 52; Salisbury v. United States, 28 Ct. Cl. 404.

² Kelly v. United States, 31 Ct. Cl. 361.

³ Collins v. United States, 35 Ct. Cl. 122.

⁴ United States v. Bliss, 172 U. S. 321; Churchyard v. United States, 100 Fed. 920.

⁵ Swigett v. United States, 78 Fed. 456.

⁶ Clifford v. United States, 34 Ct. Cl. 223.

⁷ Schillinger v. United States, 155 U. S. 163; Russell v. United States, 35 Ct. Cl. 154. No implied contract to pay for a patent arises where patentor introduces it into public service, and pattern, working drawings and machines were paid for by the government. Gill v. United States, 160 U. S. 426. Though where the patent is used with the understanding that payment is to be made therefor an implied contract exists. United States v. Mfg. Co., 156 U. S. 552; Talbert v. United States, 25 Ct. Cl. 141. A local postmaster cannot be enjoined from using a patented machine fur-

ing,⁸ or for fees voluntarily overpaid in by a consul-general,⁹ nor for attorneys' fees where the suit was brought in the name of the United States but the attorneys looked to their clients for their fees.¹⁰

The chief peculiarity of United States contracts is the practical difficulty in enforcing them against the government. From the very nature of a government, having no political superior, enforcing payment of its debts is war, actual or threatened. Permission to sue may be given by the state, either by general or by special statutes. The United States has established the Court of Claims and thus given permission to be sued therein on contracts,¹¹ but not in a state court.¹² The Court of Claims can also entertain actions against the United States in quasi-contracts; such as actions to recover payments illegally exacted by duress or compulsion of law.¹³ The statute creating the Court of Claims does not, however, change the nature of the liability of the United States. Payments made voluntarily cannot be recovered in this court.¹⁴ If the claim is not on contract the sole remedy is to appeal to Congress.¹⁵

The United States in giving permission to be sued may impose such conditions as it sees fit. In consenting to be sued, it may restrict the compensation of attorneys;¹⁶ or provide against any compensation;¹⁷ or it may require claims to be paid direct to claimants and not to attorneys.¹⁸ It may provide for

nished by the government as this is really an action against the United States. *International, etc., Co. v. Bruce*, 194 U. S. 601 (decided by a divided court).

⁸ *Bigby v. United States*, 103 Fed. 597.

⁹ *United States v. Wilson*, 168 U. S. 273.

¹⁰ *Coleman v. United States*, 152 U. S. 96.

¹¹ See Court of Claims cases in this section.

¹² *Stanley v. Schwalby*, 162 U. S. 255.

¹³ *Swift Company v. United States*, 111 U. S. 22; *United States*

v. Ellsworth, 101 U. S. 170; *United States v. Lawson*, 101 U. S. 164.

¹⁴ *United States v. Edmonston*, 181 U. S. 500; *United States v. Wilson*, 168 U. S. 273.

¹⁵ *German Bank v. United States*, 148 U. S. 573.

¹⁶ *Ball v. Halsell*, 161 U. S. 72.

¹⁷ A statute that no part of money repaid to a state in refunding direct taxes shall go to an attorney binds the state and the agent or attorney of the state. *Wailes v. Smith*, 157 U. S. 271.

¹⁸ *Spalding v. Vilas*, 161 U. S. 483.

priority of payment of its own debts,¹⁹ and may set off damages for delay against the contract compensation.²⁰ The legislative department may also provide directly for enforcing contracts. An appropriation made by Congress for paying a claim is final.²¹ In the absence of special restrictions the ordinary rules of contract law, such as the rules of commercial paper,²² apply to contracts with the United States; and Common-Law rules of evidence apply to actions thereon.²³

The United States has also provided that contractors cannot assign claims against the United States, and the allowance of such assignment by a disbursing officer gives it no validity.²⁴ This prohibition does not apply to claims against officers, as to a claim against a post-office inspector for money seized by him but not then turned over to the postmaster-general,²⁵ or drafts of deputies accepted by a marshal,²⁶ nor does it apply to a pledge of a crop of sugar including the bounty,²⁷ nor to a transfer by one partner to another of all the partnership property including such claim,²⁸ nor to an assignment of a claim against the United States to a receiver ordered by a court of chancery,²⁹ nor to the purchase of a claim sold in bankruptcy.³⁰ This statute is solely for the protection of the government, and if the government sees fit to recognize the assignment³¹, or if the

¹⁹ *State v. Foster*, 5 Wyo. 199; 29 L. R. A. 226; 38 Pac. 926.

²⁰ *Satterlee v. United States*, 30 Ct. Cl. 31.

²¹ *United States v. Louisville*, 169 U. S. 249. Where New York borrowed from her canal fund to raise troops, a U. S. statute to repay the "costs, charges and expenses properly incurred" includes such loan and interest paid thereon. *United States v. New York*, 160 U. S. 598.

²² *Wells Fargo & Co. v. United States*, 45 Fed. 337.

²³ *Allen v. United States*, 28 Ct. Cl. 141.

²⁴ *Greenville Savings Bank v. Lawrence*, 76 Fed. 545; 22 C. C. A. 646; U. S. Rev. St. § 3477; *Hitch-*

cock v. United States, 27 Ct. Cl. 185; *Harris v. United States*, 27 Ct. Cl. 177.

²⁵ *United States v. Ferguson*, 78 Fed. 103.

²⁶ *Douglas v. Wallace*, 161 U. S. 346.

²⁷ *Barrow v. Milliken*, 74 Fed. 612; 20 C. C. A. 559.

²⁸ *Jernegan v. Osborn*, 155 Mass. 207; 39 N. E. 520.

²⁹ *Price v. Forrest*, 173 U. S. 410; *Redfield v. United States*, 27 Ct. Cl. 393; *Price v. Forrest*, 54 N. J. Eq. 669; 35 Atl. 1075; *Forrest v. Price*, 52 N. J. Eq. 16; 29 Atl. 215.

³⁰ *McKay v. United States*, 27 Ct. Cl. 422.

³¹ *Hobbs v. McLean*, 117 U. S.

question arises solely between assignor and assignee,³² the assignment is valid.

So in claims where specified forms of assignment are required informality in assignment, though "absolutely void" by statute, does not invalidate it as between the parties, but the assignee may enforce his lien after payment by the government to the assignor.³³

§1007. Contracts of a State of the Union.

Each of the states of the Union is a government possessing general and unlimited powers, except such as are expressly or impliedly denied to it by the Constitution of the United States. Within the sphere of its powers it may make such contracts as it wishes.¹ A state contract possesses the usual incidents of contracts. Thus a contract between the governor and a private partnership for public printing is assignable and the assignee may mandamus college officials for "copy," and sureties on that bond are not released by such assignment.² It is held, however, that a state is not liable for interest unless it has agreed to pay it.³ So the state may employ an agent to prosecute a claim against the United States.⁴

The people of the state, being the ultimate sovereign power therein, may in the state constitution restrict the contractual power of the various departments of the state. Thus they

567; *Goodman v. Niblack*, 102 U. S. 556; *Lopez v. United States*, 24 Ct. Cl. 84; 2 L. R. A. 571; *Dulaney v. Scudder*, 94 Fed. 6; 36 C. C. A. 52; *Thayer v. Pressey*, 175 Mass. 225; 56 N. E. 5.

³² *Dexter v. Meigs*, 47 N. J. Eq. 488; 21 Atl. 114; *In re Hone*, 153 N. Y. 522; 47 N. E. 798. The statute does not apply where the work was finished by the creditors of the contractor, and one of the creditors secured all the money and applied it to his claim; other creditors garnisheed. *Fewell v. Surety Co.*, 80 Miss. 782; 28 So. 755.

³³ *York v. Conde*, 147 N. Y. 486; 42 N. E. 193; U. S. R. S. § 3477.

¹ *Poole v. Fleeger*, 11 Pet. (U. S.) 185; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Kaufmann v. Cooper*, 46 Neb. 644; 65 N. W. 796; *Van Dusen v. State*, 11 S. D. 318; 77 N. W. 201.

² *Leader Printing Co. v. Lowry*, 9 Okl. 89; 59 Pac. 242.

³ *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624; 11 L. R. A. 370; 26 N. E. 778.

⁴ *Davis v. Massachusetts*, 164 Mass. 241; 30 L. R. A. 743; 41 N. E. 292.

may limit the amount of the debt to be contracted for specified purposes,⁵ or may require advertisement for bids, in the absence of which no liability even in *quantum meruit* will arise.⁶ A constitutional provision that bids must be let to the lowest responsible bidder does not refer to incidental matters, such as printing proceedings of the general assembly from day to day, for which advertising is impracticable.⁷ A limitation on the amount of indebtedness does not apply to a warrant payable only out of a specific fund.⁸ So the people may by the constitution forbid all contracts except those made in pursuance of some statute.⁹

The peculiarity of the contracts of a state, like those of the United States, is that they cannot be enforced against the state unless the state consents thereto.¹⁰ A branch of the state government, such as a state university,¹¹ cannot be sued except by statutory authority.¹² The rule that a state cannot be sued without its own consent cannot be evaded by bringing a suit in the nature of mandamus against a state officer the effect of which will be to enforce a contract against the state.¹³ Thus an architect submitting plans for state capitol cannot have specific performance, as the state is the real party defendant.¹⁴ But while mandamus will not lie without statutory authority

⁵ *In re Contracting of State Debt*, 21 Colo. 399; 41 Pac. 1110.

⁶ *Mulnix v. Ins. Co.*, 23 Colo. 71; 33 L. R. A. 827; 46 Pac. 123.

⁷ *Stone v. Publishing Co. (Ky.)*, 55 S. W. 725.

⁸ *Allen v. Grimes*, 9 Wash. 424; 37 Pac. 662.

⁹ *Locke v. State*, 140 N. Y. 480; 35 N. E. 1076; *Stanton v. State*, 5 S. D. 515; 59 N. W. 738.

¹⁰ *Denning v. State*, 123 Cal. 316; 55 Pac. 1000; *Hope v. Board of Liquidation*, 41 La. Ann. 535; 6 So. 819; *Coxe v. State*, 144 N. Y. 396; 39 N. E. 400; *Sayre v. State*, 123 N. Y. 291; 25 N. E. 163; *Northwestern, etc., Bank v. State*, 18 Wash. 73; 42 L. R. A. 33; 50 Pac. 586.

¹¹ *Oklahoma, etc., College v. Willis*, 6 Okla. 593; 40 L. R. A. 677; 52 Pac. 921.

¹² *University of Illinois v. Bruner*, 175 Ill. 307; 51 N. E. 687; affirming 66 Ill. App. 665; distinguishing, *Thomas v. University*, 71 Ill. 310.

¹³ *Fitts v. McGhee*, 172 U. S. 516; *In re Ayers*, 123 U. S. 433; *Hagood v. Southern*, 117 U. S. 52; *Mills Publishing Co. v. Larrabee*, 78 Ia. 97; 42 N. W. 593; *People v. Dulaney*, 96 Ill. 503; *Board v. Gannt*, 76 Va. 455; *Miller v. Board, etc.*, 46 W. Va. 192; 76 Am. St. Rep. 811; 32 S. E. 1007.

¹⁴ *Cope v. Hastings*, 183 Pa. St. 300; 38 Atl. 717.

against state officials in cases in which the state is really a party as an indirect means of enforcing a state contract it will lie to compel a board to let a contract which it has awarded, if the proceedings have been regular, and the letting is a mere ministerial act.¹⁵

The legislature may ratify specific contracts.¹⁶ Where shrubbery and trees were planted on the grounds of a state college under an unauthorized contract with the board of regents, the state was held liable for a reasonable value therefor where without ratifying it the state passively enjoyed the benefit of such contract.¹⁷ A contract which cannot be enforced at any time or by any means is of course an anomaly. At the same time these are genuine contracts, though unenforceable without the consent of the state. This may be seen from the following considerations: (1) The principle that a state cannot be sued is not especially applicable to state contracts. It also prevents recovery in quasi-contract. So a county which overpaid its taxes cannot sue the state for them¹⁸ unless by statutory authority.¹⁹ The same principle prevents recovery in tort. (2) The state may grant permission to bring suit against it. This permission does not create the liability sought to be enforced.²⁰

Statutory permission to sue includes breaches of contract occurring before the passage of such statute,²¹ and implies that the case will be governed by the usual rules of law.²² Thus statutes of limitation will apply, and the court will not recommend the payment of what would otherwise be a just claim.²³ Power given to a court to allow "legal rights" against the state

¹⁵ *State v. Toole*, 26 Mont. 22; 91 Am. St. Rep. 386; 55 L. R. A. 644; 66 Pac. 496 (but relief was here refused as bids had not been advertised for properly).

¹⁶ *Brown v. State*, 14 S. D. 219; 84 N. W. 801; *Geo. H. Fuller Dock Co. v. State*, 6 Ida. 315; 55 Pac. 857.

¹⁷ *Jewell Nursery Co. v. State*, 5 S. D. 623; 59 N. W. 1025.

¹⁸ *Attorney General v. Bay*

County, 106 Mich. 662; 64 N. W. 570.

¹⁹ *White v. Smith*, 117 Ala. 232; 23 So. 525.

²⁰ *Denning v. State*, 123 Cal. 316; 55 Pac. 1000.

²¹ *Chapman v. State*, 104 Cal. 690; 43 Am. St. Rep. 158; 38 Pac. 457.

²² *Harris v. State*, 9 S. D. 453; 69 N. W. 825.

²³ *Cowles v. State*, 115 N. C. 173; 20 S. E. 384.

does not include mere moral obligations neither legal nor equitable.²⁴ Permission to sue on a contract is not ratification thereof.²⁵ A statutory right to sue a state can be revoked unless rights have vested thereunder.²⁶ If a state gives its consent to be sued it may impose such conditions as it pleases, as that the action can be brought only in a state court.²⁷ So if the state gives a certain remedy against itself by statute only that remedy can be had.²⁸ So permission to sue on certain classes of claims does not confer the right to sue on other classes. An injury suffered by a fall of seats used to view horse racing on the grounds of a fair under state control cannot be treated as a breach of implied contract with the state.²⁹ (3) Under the Constitution of the United States³⁰ the judicial power of the United States extends to controversies between two or more states and between a state and citizens of another state. The supreme court of the United States has original jurisdiction of cases in which a state shall be a party. While the convention that drafted the Constitution seems to have believed that this grant of power did not give to an individual the right to sue a state, the Supreme Court decided that it did, and the action of assumpsit was allowed.³¹ In consequence of that decision the eleventh amendment to the Constitution of the United States was adopted, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United

²⁴ *Western, etc., Ry. v. State*, (Ga.), 14 L. R. A. 438.

²⁵ *Carolina National Bank v. State*, 60 S. C. 465; 85 Am. St. Rep. 865; 38 S. E. 629. (A superintendent of the penitentiary had taken notes for convict hire, and endorsed them to the bank. It was held that as he had no authority to take them, the state was not liable on his indorsement, or for money had and received.) *Nichols v. State*, 11 Tex. Civ. App. 327; 32 S. W. 452 (defective advertisement for bids).

²⁶ *Maury v. Commonwealth*, 92 Va. 310; 23 S. E. 757.

²⁷ *Smith v. Reeves*, 178 U. S. 436.

²⁸ *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.

²⁹ *Melvin v. State*, 121 Cal. 16; 53 Pac. 416. (In this case the statute specifically forbade an appropriation of money for horse-races.) Citing *Gibbons v. United States*, 8 Wall. (U. S.) 269.

³⁰ Art. III., § 2.

³¹ *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.

States by citizens of another state or by citizens or subjects of a foreign state." While this restricts the jurisdiction of the Supreme Court in cases brought by a natural person, it leaves it unaffected in suits brought against a state by the United States or another state of the Union. The Supreme Court of the United States may therefore enforce contracts made between two states of the Union.³² So if a natural person buys bonds issued by one state and donates them absolutely to another state, the latter state may sue the former on them, even if the purpose of the assignment was to enable the state to maintain such action, as long as it was for the benefit of the state.³³ However, if the assignment of bonds to the state is not absolute, but merely for the purpose of enabling it to sue for the benefit of the real owners of the bonds the state cannot maintain the action.³⁴ So the United States may sue a state in the action of debt on bonds issued by the latter,³⁵ or it may sue a state for an accounting and money.³⁶ (4) While an individual cannot maintain an action against a state on a contract made with it, he can assert rights which he has acquired by virtue of such contracts; such as a contract for taxing a railroad in a certain manner.³⁷ So in an action to which the state is not a party, rights existing by virtue of a contract made by a state may be asserted and enforced, as under a contract between two states.³⁸

³² *Virginia v. Tennessee*, 148 U. S. 503.

³³ *South Dakota v. North Carolina*, 192 U. S. 286.

³⁴ *New Hampshire v. Louisiana*, 108 U. S. 76.

³⁵ *United States v. North Carolina*, 136 U. S. 211.

³⁶ *United States v. Michigan*, 190 U. S. 379.

³⁷ *Stearns v. Minnesota*, 179 U. S. 223.

³⁸ *Poole v. Fleegler*, 11 Pet. (U. S.) 185; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

CHAPTER XLVIII.

PUBLIC CORPORATIONS.

§1008. Nature and classes of public corporations.

A public corporation is a corporation formed by the state for purposes of local government and administration.¹ Public corporations are divided into municipal corporations and the organizations of less extensive powers, such as counties, school districts and the like known as quasi corporations. Municipal corporations are those public corporations which have extensive powers of local government, including the power of making local laws. Quasi corporations have limited powers of government or administration, and lack the power of making local laws.² The difference in powers between municipal corporations and quasi corporations often leads to important distinctions in the validity of their contracts. The difference in name is unimportant. A county may be included under the term "municipal or other corporation."³

§1009. Notice of powers of public corporations.

All persons dealing with a public corporation are bound to take notice of the statutes creating it and conferring power upon it, and the mandatory statutes which prescribe the manner in which it may exercise its power.¹ Thus where bonds

¹ *The Mayor of Nashville v. Ray*, 19 Wall. (U. S.) 468; *Richards v. Clarksburg*, 30 W. Va. 491; 4 S. E. 774.

² *Schweiss v. Court*, 23 Nev. 226; 34 L. R. A. 602; 45 Pac. 289.

³ *Central, etc., Co. v. Wright*, 164 U. S. 327. So may a school district. *Curry v. District Township*, 62 Ia. 102; 17 N. W. 191.

¹ *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton Co.*, 10 Wall. 676; *German Savings Bank v. Franklin Co.*, 128 U. S. 526; *Barrett v. Dennison*, 145 U. S. 135; *Nesbitt v. Riverside, etc., District*, 144 U. S. 610; *National Bank, etc., v. Granada*, 54 Fed. 100; *Coffin v. Kearney Co.*, 57 Fed. 137; *Manhattan Co. v. Ironwood*, 74 Fed. 535;

were issued under a statute which fixed the levy at ten mills per annum for thirteen years, a sum insufficient to pay the bonds in full, the court said that all bondholders "were bound to take notice of the extent of the taxing district, and of the value of the property therein, and with those facts before them they acted at their peril as far as the property owners in this special taxing district are concerned."² So bonds of a school district are void if for purpose for which it can not borrow money.³

§1010. Power of public corporations to make contracts.

Where there is no specific statutory provision it is usually said that a public corporation has an implied power to make contracts necessary to enable it to exercise the powers and perform the duties which are conferred or imposed upon it by law.¹ It has even been held that if no provision therefor is made by statute a city has implied power to contract for light-

20 C. C. A. 642; *Sutro v. Dunn*, 74 Cal. 593; 16 Pac. 505; *Smith, etc., Co. v. Denver*, 20 Colo. 84; 36 Pac. 844; *Law v. People*, 87 Ill. 385; *McPherson v. Foster*, 43 Ia. 48; 22 Am. Rep. 215; *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Ia. 250; 90 N. W. 746; *Murphy v. Louisville*, 9 Bush (Ky.) 189; *Osgood v. Boston*, 165 Mass. 281; 43 N. E. 108; *State v. Ry. Co.*, 80 Minn. 108; 50 L. R. A. 656; 83 N. W. 32; *Raton Waterworks Co. v. Raton*, 9 N. M. 70; 49 Pac. 898; reversed on another point, 174 U. S. 360; *Commissioners of Wilkes Co. v. Call*, 123 N. C. 308; 44 L. R. A. 252; 31 S. E. 481; *McPeeters v. Blankenship*, 123 N. C. 651; 31 S. E. 876; *Roberts v. Fargo*, 10 N. D. 230; 86 N. W. 726; *People's Bank v. School District*, 3 N. D. 496; 28 L. R. A. 642; 57 N. W. 787; *Wellston v. Morgan*, 65 O. S. 219; 62 N. E. 127; *Diggs v. Lobsitz*, 4 Okla. 232;

43 Pac. 1069; *Ecroyd v. Coggeshall*, 21 R. I. 1; 79 Am. St. Rep. 741; 41 Atl. 260; *Livingston v. School District*, 9 S. D. 345; 69 N. W. 15.

² *Miller v. Hixson*, 64 O. S. 39, 56; 59 N. E. 749.

³ *Board of Education, etc., v. Blodgett*, 155 Ill. 441; 46 Am. St. Rep. 348; 31 L. R. A. 70; 40 N. E. 1025.

¹ *French v. Paving Co.*, 181 U. S. 324; *Alabama, etc., Co. v. Reed*, 124 Ala. 253; 82 Am. St. Rep. 166; 27 So. 19; *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358; *Oakland v. Water Front Co.*, 118 Cal. 160; 50 Pac. 277; *Heilbron v. Cuthbert*, 96 Ga. 312; 23 S. E. 206; *Agnew v. Brall*, 124 Ill. 312; 16 N. E. 230; *Board, etc., of Perry Co. v. Gardner*, 155 Ind. 165; 57 N. E. 908; *Mills Co. v. R. R. Co.*, 47 Ia. 66; *Mitchell v. Negaunee*, 113 Mich. 359; 67 Am. St. Rep. 468; 38 L. R. A. 157; 71

ing² or for water.³ These cases, however, represent a rather extreme view. Power of a municipal corporation is usually to be deduced, expressly or impliedly, from statutory provisions.

§1011. Effect of statute on power to contract.

The powers of public corporations are now provided for in most states by statute. Where such statutes are drawn with such detail that it is evidently the intention of the legislature to make complete provision for the power of cities to make contracts, the question of the existence of such power turns upon the construction of such statutes.¹ Where the statutes completely provide for what purposes and in what manner a public corporation may contract, no implied power to contract exists.²

§1012. Effect of statute on power to make implied contracts.

A public corporation may incur liability on implied contract if it could make an express contract of the same nature, and if the statute does not prescribe the exclusive method of making such contracts.¹ Thus where a city causes part of the elec-

N. W. 646; *State v. Martin*, 27 Neb. 441; 43 N. W. 244; *Oakley v. Atlantic City*, 63 N. J. L. 127; 44 Atl. 651; *Hoffman v. Pawnee County*, 3 Okla. 325; 41 Pac. 566; *Reuting v. Titusville*, 175 Pa. St. 512; 34 Atl. 916; *Jones v. Camden*, 44 S. C. 319; 51 Am. St. Rep. 819; 23 S. E. 141; *Richmond, etc., Co. v. West Point*, 94 Va. 668; 27 S. E. 460; *Sheafe v. Seattle*, 18 Wash. 298; 51 Pac. 385; *Tiede v. Schneidt*, 105 Wis. 470; 81 N. W. 826.

² *Lake Charles, etc., Co. v. Lake Charles*, 106 La. 65; 30 So. 289; *Pawcett v. Mt. Airy*, 134 N. C. 125; 45 S. E. 1029.

³ *Lake Charles, etc., Co. v. Lake Charles*, 106 La. 65; 30 So. 289.

¹ *Jacksonville, etc., Co. v. Jacksonville*, 36 Fla. 229; 51 Am. St. Rep. 24; 30 L. R. A. 540; 18 So. 677; *Danville v. Water Co.*, 178 Ill. 299;

69 Am. St. Rep. 304; 53 N. E. 118; *Wellston v. Morgan*, 65 O. S. 219; 62 N. E. 127; *Markley v. Mineral City*, 58 O. S. 430; 65 Am. St. Rep. 776; 51 N. E. 28; *Gas and Water Co. v. Elyria*, 57 O. S. 374; 49 N. E. 335; *Citizens' Bank v. Terrell*, 78 Tex. 450; 14 S. W. 1003; *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 822; 25 S. E. 1001.

² *Wellston v. Morgan*, 65 O. S. 219; 62 N. E. 127; *Gas and Water Co. v. Elyria*, 57 O. S. 374; 49 N. E. 335.

¹ *Austin v. Bartholomew*, 107 Fed. 349; 46 C. C. A. 327; *Brush, etc., Co. v. Montgomery*, 114 Ala. 433; 21 So. 960; *Buck v. Eureka*, 124 Cal. 61; 56 Pac. 612; *New Athens v. Thomas*, 82 Ill. 259; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. (Ky.) 41.

tricity furnished, to be used in lighting public buildings, and refuses to designate the lights to be removed and notifies the company not to remove any, it is liable for the electricity furnished in excess of the contract amount.² So it may be liable on an implied contract for attorneys' fees.³ If the statute prescribes the method of making a contract, a city cannot be held liable on an implied contract, not entered into according to statute.⁴ If there is no power to make an express contract there can be no implied contract.⁵ Thus where by statute there can be no contract between the city and an official, a pound master can have no claim on an implied contract for premises furnished as a pound.⁶ Thus in the absence of statute a county is not liable to an acquitted defendant for costs in a criminal case,⁷ nor to compensate attorneys for defendant on appeal,⁸ nor for physician's services at an inquest,⁹ nor for compensation for a sheriff's posse.¹⁰ So as he is not a peace officer a deputy marshal can have no fees for arrest of vagrants under the statute.¹¹ The statute may impose a liability on the county for services rendered by a member of a board of health of a village to the poor during an epidemic of smallpox.¹² A limitation on the amount of indebtedness ap-

² Brush, etc., Co. v. Montgomery, 114 Ala. 433; 21 So. 960.

³ Buck v. Eureka, 124 Cal. 61; 56 Pac. 612.

⁴ Zottman v. San Francisco, 20 Cal. 96; 81 Am. Dec. 96; Detroit v. Robinson, 38 Mich. 108; Wellston v. Morgan, 65 O. S. 219; 62 N. E. 127.

⁵ Berka v. Woodward, 125 Cal. 119; 73 Am. St. Rep. 31; 45 L. R. A. 420; 57 Pac. 777; Spitzer v. Blanchard, 82 Mich. 234; 46 N. W. 400.

⁶ Macy v. Duluth, 68 Minn. 452; 71 N. W. 687.

⁷ Eisen v. Multnomah County, 31 Or. 134; 49 Pac. 730.

⁸ State v. Young, 104 Ia. 730; 74

N. W. 693. Nor is it liable for defendant's attorney fees unless the statute is complied with. De Long v. Muskegon County, 111 Mich. 568; 69 N. W. 1115.

⁹ Galveston County v. Ducie, 91 Tex. 665; 45 S. W. 798.

¹⁰ Sears v. Gallatin County, 20 Mont. 462; 40 L. R. A. 405; 52 Pac. 204, citing Anderson v. Jefferson County, 25 O. S. 13; Chapin v. Ferry, 3 Wash. 386; 15 L. R. A. 116; 28 Pac. 754; Randles v. Waukesha County, 96 Wis. 629; 71 N. W. 1034.

¹¹ Twinim v. Lucas County, 104 Ia. 231; 73 N. W. 473.

¹² St. John's v. Clinton County, 111 Mich. 609; 70 N. W. 131.

plies to implied contracts as well as to express ones.¹³ It does not apply, however, to quasi-contract as distinguished from genuine implied contracts. Thus it does not apply to the return of money paid for illegal tax certificates which under the ordinance in force was never the property of the city.¹⁴

§1013. Construction of statutory powers.

Power given by statute, either expressly or impliedly, carries with it power to make contracts necessary and proper to carry such power into execution.¹ Thus power to provide for supplying water and lighting includes power to make contracts for that purpose.² Power to provide a water supply confers power to erect a plant to supply water.³ Power to abate nuisances includes power to contract for the removal of garbage to a place without the city limits.⁴ Power to build a sewer includes power to make a contract therefor.⁵ Power to keep streets in order includes power to release a railroad company from its liability to keep up a bridge. The city may agree to maintain such bridge itself.⁶ So power to grant franchises "upon such terms and conditions as council may prescribe" includes power to take a bond to insure the prompt installment and completion of the plant.⁷ So power to contract includes power to impose reasonable restrictions.⁸ Power to construct waterworks in-

¹³ *Hedges v. Dixon County*, 150 U. S. 182; *Windsor v. Des Moines*, 110 Ia. 175; 81 N. W. 476; *Board, etc., of D County v. Gillett*, 9 Okla. 593; 60 Pac. 277.

¹⁴ *Phelps v. Tacoma*, 15 Wash. 367; 46 Pac. 400.

¹ *French v. Paving Co.*, 181 U. S. 324; *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358; *Board, etc., of Perry County v. Gardner*, 155 Ind. 165; 57 N. E. 908; *Reed v. Anoka*, 85 Minn. 294; 88 N. W. 981; *Salem v. Anson*, 40 Or. 339; 91 Am. St. Rep. 485; 56 L. R. A. 169; 67 Pac. 190; *Reuting v. Titusville*, 175 Pa. St. 512; 34 Atl. 916; *Tiede v.*

Schneidt, 105 Wis. 470; 81 N. W. 826.

² *Reed v. Anoka*, 85 Minn. 294; 88 N. W. 981.

³ *Fawcett v. Mt. Airy*, 134 N. C. 125; 45 S. E. 1029.

⁴ *Kelley v. Broadwell (Neb.)*, 92 N. W. 643.

⁵ *Jones v. Holzapfel*, 11 Okla. 405; 68 Pac. 511.

⁶ *Hicks v. Ry.*, — Va. —; 45 S. E. 888.

⁷ *Salem v. Anson*, 40 Or. 339; 91 Am. St. Rep. 485; 56 L. R. A. 169; 67 Pac. 190.

⁸ *Hamilton v. Gambell*, 31 Or. 328; 48 Pac. 433.

cludes power to repay to private persons the amount spent by them in constructing pipes to connect with the city waterworks.⁹

A grant of a specified power does not confer analogous powers not granted. Power to erect cisterns for fire purposes does not confer power to erect a system of general waterworks,¹⁰ and power to construct waterworks does not confer power to engage in a general plumbing business.¹¹ Under the power to tax, a public corporation cannot contract to pay, for discovering unassessed and untaxed personalty, one-half the taxes thus added.¹² So power to rent market stalls does not include power to hire an auctioneer.¹³ Power to maintain roads is not power to employ an inspector,¹⁴ and power to sell bonds does not include power to compromise a claim for breach of a void executory agreement to sell bonds.¹⁵ A county cannot contract for medical services to cure a pauper who is an habitual drunkard,¹⁶ and a board of public works can employ a pipe-man only by contract at will.¹⁷

§1014. Examples of valid contracts.

Since the power of a public corporation to bind itself by contract depends upon the nature and extent of the powers conferred upon it by statute, no general absolute rules can be laid down as to the contractual powers which are necessarily possessed by every public corporation.¹ A slight difference in the

⁹ *State v. St. Louis*, 169 Mo. 31; 68 S. W. 900.

¹⁰ *Savidge v. Spring Lake*, 112 Mich. 91; 70 N. W. 425.

¹¹ *Keen v. Waycross*, 101 Ga. 588; 29 S. E. 42.

¹² *Grannis v. Blue Earth Co.*, 81 Minn. 55; 83 N. W. 495. An individual taxpayer may sue to annul an illegal contract for collecting back taxes. *Burness v. Multnomah County*, 37 Or. 460; 60 Pac. 1005.

¹³ *Norfolk v. Pollard*, 94 Va. 279; 26 S. E. 832.

¹⁴ *Turner v. Fulton County*, 109 Ga. 633; 34 S. E. 1024.

¹⁵ *Ft. Edward v. Fish*, 156 N. Y. 363; 50 N. E. 973; affirming 86 Hun (N. Y.) 548.

¹⁶ *Putney Bros. Co. v. Milwaukee Co.*, 108 Wis. 554; 84 N. W. 822.

¹⁷ *Frankfort v. Brawner*, 100 Ky. 166, 172; 37 S. W. 950; rehearing denied, 38 S. W. 497.

¹ "Upon the general subject of the liability of a municipal corporation, the authorities are a tangled web of contradictions and it is difficult to assert any proposition with respect to the same for which adjudications on both sides may not be cited." *Argenti v. San Fran-*

wording of two statutes may lead to material differences in the power of making contracts possessed by the corporations acting respectively under such statutes. All that can be done is to give typical illustrations of the contractual powers usually possessed by public corporations. A public corporation usually has power to construct and maintain streets, and hence may contract for the construction and repair² and lighting³ of its streets; for sidewalks⁴ and shade trees.⁵ It may contract for a water supply,⁶ and an underground railway.⁷

Under a power to provide a system of sewers a public corporation may buy a right of way for a sewer;⁸ may contract for disposing of sewage outside of the city limits;⁹ and has power to contract with a rendering establishment situated outside the city.¹⁰

cisco, 16 Cal. 255, 283; quoted in *Cincinnati v. Cameron*, 33 O. S. 336, 374.

² *French v. Paving Co.*, 181 U. S. 324; affirming *Barber, etc., Co. v. French*, 158 Mo. 534; 54 L. R. A. 492; 58 S. W. 934; *Reuting v. Titusville*, 175 Pa. St. 512; 34 Atl. 916. The contract for construction may provide that the contractor shall repair the street as far as necessary by reason of poor work or defective material in consideration of the original assessment. *City of Kansas City v. Hanson*, 60 Kan. 833; 58 Pac. 474; citing *Cole v. People*, 161 Ill. 16; 43 N. E. 607; *Allen v. Davenport*, 107 Ia. 90; 77 N. W. 532; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543; 38 S. W. 458; *Robertson v. Omaha*, 55 Neb. 718; 44 L. R. A. 534; 76 N. W. 412; *Wilson v. Trenton*, 60 N. J. L. 394; 38 Atl. 635.

³ *Seitzinger v. Tamaqua*, 187 Pa. St. 539; 41 Atl. 454.

⁴ *Jones v. City of Camden*, 44 S. C. 319; 51 Am. St. Rep. 819; 23 S. E. 141.

⁵ *Heller v. Garden City*, 58 Kan. 263; 48 Pac. 841.

⁶ *Cincinnati ex rel. v. Cincinnati*, 11 Ohio C. C. 309; 1 Ohio C. D. 372. A county may contract for a water supply for an unincorporated town. *Agua Pura Co. v. Las Vegas*, 10 N. M. 6; 60 Pac. 208.

⁷ *Sun, etc., Association v. The Mayor, etc., of New York*, 152 N. Y. 257; 37 L. R. A. 788; 46 N. E. 499 (by special statute).

⁸ *Coit v. Grand Rapids*, 115 Mich. 493; 73 N. W. 811. (Even if the price to be paid is said to be an exemption of the land through which the right of way runs from the sewer assessment; for though a contract to exempt from assessment was void, the real purpose of the contract was to pay a sum equal to the assessment for the right of way, which was lawful.) Citing *Turner v. Cruzen*, 70 Ia. 202; 30 N. W. 483.

⁹ *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358.

¹⁰ *Tiede v. Schneidt*, 105 Wis. 470; 81 N. W. 826.

Power to buy land includes power to create a debt and to issue non-negotiable but not negotiable bonds.¹¹ A city may agree to buy a lot for a public library to obtain a donation therefor.¹²

A city may acquire a building for public purposes and dispose by lease of any part thereof not immediately necessary for public use.¹³ So a city may erect a lighting plant, and furnish private light as well as public, if it is a suitable method of operating.¹⁴ A city and county owning a building in common as city hall and court house may make a joint contract for lighting it.¹⁵

A municipal corporation has power to compromise claims in dispute between it and other parties, such as it could have originally incurred.¹⁶ A city having power to place the cost of improvements on the general duplicate, or to make special assessments, may compromise with abutting property owners if the special fund proves insufficient.¹⁷

As a power specifically given carries with it power to make contracts necessary to carry such given power into effect, power to construct a lighting plant includes power to buy an engine

¹¹ *Witter v. Board, etc.*, 112 Ia. 380; 83 N. W. 1041; *Richmond, etc., Co. v. West Point*, 94 Va. 668; 27 S. E. 460; (citing *The Mayor, etc., of Nashville v. Ray*, 19 Wall. (U. S.) 468; *Ketchum v. Buffalo*, 14 N. Y. 356).

¹² *Attorney General v. Nashua*, 67 N. H. 478; 32 Atl. 852.

¹³ *Curtis v. Portsmouth*, 67 N. H. 506; 39 Atl. 439 (citing *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *French v. Quincy*, 3 All. (Mass.) 9); *Jones v. Camden*, 44 S. C. 319; 51 Am. St. Rep. 819; 23 S. E. 141.

¹⁴ *Jacksonville, etc., Co. v. Jacksonville*, 36 Fla. 229; 51 Am. St. Rep. 24; 30 L. R. A. 540; 18 So. 677; *Mitchell v. Negaunee*, 113

Mich. 359; 67 Am. St. Rep. 468; 38 L. R. A. 157; 71 N. W. 646; compare *Biddle v. Riverton*, 58 N. J. L. 289; 33 Atl. 279.

¹⁵ *State v. McCardy*, 62 Minn. 509; 64 N. W. 1133.

¹⁶ *Oakland v. Water-Front Co.*, 118 Cal. 160; 50 Pac. 277; *People v. Board, etc., of San Francisco, etc.*, 27 Cal. 655; *Agnew v. Brall*, 124 Ill. 312; 16 N. E. 230; *Grimes v. Hamilton Co.*, 37 Ia. 290; *Mills Co. v. R. R. Co.*, 47 Ia. 66; *State v. Martin*, 27 Neb. 441; 43 N. W. 244; *City of San Antonio v. Ry. Co.*, 22 Tex. Civ. App. 148; 54 S. W. 281; *Sheafe v. Seattle*, 18 Wash. 298; 51 Pac. 385.

¹⁷ *Sheafe v. Seattle*, 18 Wash. 298; 51 Pac. 385.

therefor,¹⁸ and to contract for labor and material.¹⁹ Power to erect poles and lights includes power to contract therefor.²⁰ A vote for free turnpikes is a vote to incur expenses necessary thereto,²¹ and power to build a court house is power to furnish it.²² Power to provide for "health and welfare" includes power to contract with a waterworks company for a supply of water to extinguish fires,²³ but not to operate a dispensary.²⁴

A county may make a contract to investigate the books of the county auditor and treasurer,²⁵ and may give a bond for money borrowed to support the families of soldiers during the Rebellion.²⁶ Under power to "construct and maintain waterworks" it cannot sell without legislative enactment.²⁷ A public corporation cannot bind itself by contract not to exercise its governmental functions. It cannot contract to exempt from taxation.²⁸

§1015. Employment of attorney.

Where there is statutory provision therefor a public corporation may retain a special counsel.¹ This has been recognized as an implied power where the interests of the corporation were

¹⁸ *Arbuckle-Ryan Co. v. Grand Ledge*, 122 Mich. 491; 81 N. W. 358.

¹⁹ *Rockebrandt v. Madison*, 9 Ind. App. 227; 53 Am. St. Rep. 348; 36 N. E. 444.

²⁰ *Oakley v. Atlantic City*, 63 N. J. L. 127; 44 Atl. 651. Power to levy a special tax for lighting does not limit a general power to light. *Townsend, etc., Co. v. Port Townsend*, 19 Wash. 407; 53 Pac. 551.

²¹ *Whaley v. Commonwealth*, 110 Ky. 154; 61 S. W. 35.

²² *Alabama, etc., Co. v. Reed*, 124 Ala. 253; 82 Am. St. Rep. 166; 27 So. 19.

²³ *Webb City, etc., Co. v. Webb City*, 78 Mo. App. 422.

²⁴ *Leesburg v. Putnam*, 103 Ga.

110; 68 Am. St. Rep. 80; 29 S. E. 602.

²⁵ *Board, etc., of Perry County v. Gardner*, 155 Ind. 165; 57 N. E. 908.

²⁶ *Commissioners, etc., of Barstow County v. Conyers*, 108 Ga. 559; 34 S. E. 351.

²⁷ *Huron Waterworks Co. v. Huron*, 7 S. D. 9; 58 Am. St. Rep. 817; 30 L. R. A. 848; 62 N. W. 975. Compare *Baily v. Philadelphia*, 184 Pa. St. 594; 63 Am. St. Rep. 812; 39 L. R. A. 837; 39 Atl. 494, where it was held to have power to lease water-works.

²⁸ *City of Tampa v. Kaunitz*, 39 Fla. 683; 63 Am. St. Rep. 202; 23 So. 416.

¹ *Appel v. State*, 9 Wyom. 187; 61 Pac. 1015.

affected in another state;² or where the services of an attorney were needed suddenly, as to obtain an injunction.³ Where a public official is designated by statute as the attorney for a public corporation it cannot employ another attorney. Thus a county cannot employ special counsel in a suit of which the attorney-general is put in charge by statute;⁴ and cannot be held to pay attorney fees for suit on the bond of a defaulting county trustee, to the district attorney-general, his partner and the county attorney, where the members of the county court knew of the rendition of services, but did not know that the services were rendered in a private capacity.⁵ So where bonds are issued under an unconstitutional statute the board thus created cannot bind the city by employing an attorney to defend actions growing out of the act.⁶

§1016. Contracts to be performed during long period.

Unless specifically restrained by statute a public corporation may make a contract which by its terms is to last for a long period of time. Contracts for water and lighting are the common examples of contracts of this sort.¹ The time must, however, be reasonable.² Thus a five-year lighting contract terminable at three months' notice,³ a contract for water supply to last twenty-five years,⁴ or ten years,⁵ or for lighting to last ten years,⁶ or five years,⁷ a contract for furnishing gas for

² *Memphis v. Adams*, 9 Heisk. (Tenn.) 518; 24 Am. Rep. 331.

³ *Louisville v. Murphy*, 86 Ky. 53; 5 S. W. 194.

⁴ *Storey v. Murphy*, 9 N. D. 115; 81 N. W. 23.

⁵ *McHenderson v. Anderson Co.*, 105 Tenn. 591; 59 S. W. 1016.

⁶ *City of Findlay v. Pendleton*, 62 O. S. 80; 56 N. E. 649.

¹ *Denver v. Hubbard*, 17 Colo. App. 346; 68 Pac. 993; *Maine Water Co. v. Waterville*, 93 Me. 586; 49 L. R. A. 294; 45 Atl. 830; *Seitzinger v. Tamaqua*, 187 Pa. St. 539; 41 Atl. 454.

² *McBean v. Fresno*, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358.

³ *Hartford v. Light Co.*, 65 Conn. 324; 32 Atl. 925.

⁴ *Walla Walla v. Water Co.*, 172 U. S. 1.

⁵ Though the contract is such as to tie up the general revenue for the water fund. *Monroe Water Co. v. Heath*, 115 Mich. 277; 73 N. W. 234.

⁶ *Reid v. Trowbridge*, 78 Miss. 542; 29 So. 167.

⁷ *Black v. Chester*, 175 Pa. St. 101; 34 Atl. 354.

twenty-five years,⁸ a contract for water for twenty years,⁹ or for thirty years,¹⁰ have in view of the nature of the contracts been held not unreasonable. Such contracts bind successive officers,¹¹ but they must go into full effect during the term of the officers who enter into them.¹² Unless in good faith for a reasonable time and for the public interest a contract extending beyond the term of the officials making it is void.¹³

A contract for the erection and maintenance of a bridge "for all future time"¹⁴ has been held unreasonable. If the time for which a contract may be made is fixed by statute, no contract in excess of such time can be made.¹⁵ A city whose corporate existence is to end by statutory merger in a larger municipality cannot make a contract to last beyond its own existence.¹⁶ So a ten-year contract made by the officials of a town included within the limits of "Greater New York," made fourteen days before the charter of "Greater New York" was to go into effect, was held void as a mere scheme to encumber the new municipality.¹⁷ The authorities are divided on the question of the effect of a contract by which the public corporation attempts to bind itself for a longer time than allowed by law. Some courts hold it good up to the limit for which the corporation might have

⁸ Vincennes v. Light Co., 132 Ind. 114; 16 L. R. A. 485; 31 N. E. 573.

⁹ City of Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416; Light, etc., Co. v. Jackson, 73 Miss. 598; 19 So. 771.

¹⁰ Little Falls, etc., Co. v. Little Falls, 102 Fed. 663.

¹¹ Detroit v. Ry., 184 U. S. 368; Pike's Peak Power Co. v. Colorado Springs, 105 Fed. 1; 44 C. C. A. 333; Illinois, etc., Bank v. Arkansas City, 76 Fed. 271; 34 L. R. A. 518; McBean v. Fresno, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358; Liggett v. Kiowa County, 6 Colo. App. 269; 46 Pac. 475; City of Valparaiso v. Gardner, 97 Ind. 1; 49 Am. Rep.

416; Indianapolis v. Coke Co., 66 Ind. 396; Grant v. Davenport, 36 Ia. 396; Smith v. Dedham, 144 Mass. 177; 10 N. E. 782; Weston v. Syracuse, 17 N. Y. 110.

¹² Kerlin Bros. Co. v. Toledo, 20 Ohio C. C. 603; 11 Ohio C. D. 56.

¹³ Board, etc., of Franklin County v. Ranck, 9 Ohio C. C. 301.

¹⁴ State v. Ry. Co., 80 Minn. 108; 50 L. R. A. 656; 83 N. W. 32.

¹⁵ Gaslight, etc., Co. v. New Albany, 156 Ind. 406; 59 N. E. 176; (City of) Wellston v. Morgan, 59 O. S. 147; 52 N. E. 127.

¹⁶ Hendrickson v. New York, 160 N. Y. 144; 54 N. E. 680.

¹⁷ Hendrickson v. New York, 160 N. Y. 144; 54 N. E. 680.

bound itself.¹⁸ Thus a contract for twenty years, to be renewed for twenty more if the city did not buy, is good for the first twenty where the city can bind itself for only twenty years.¹⁹ Such a contract has been said to be good as far as performed.²⁰

Other authorities hold such a contract totally void.²¹

Power to contract for a water supply for thirty years is not power to make a fixed and unalterable rate.²² Under a provision of the constitution forbidding legislative appropriations for more than two years a state officer cannot bind the state for contracts extending beyond that period.²³

§1017. Power to borrow money.

The numerical weight of authority holds that municipal corporations have implied power to borrow money when necessary for the purpose of their creation.¹ A minority strong in logic if not in numbers holds that a public corporation has no power to borrow except such as is given to it by the legislature, either expressly or by necessary implication, from express powers.² Power to borrow is often conferred by statute.³ Public corporations other than municipal, such as counties or township, are far more limited in their powers of borrowing than municipal corporations.⁴

¹⁸ *Defiance Water Co. v. Defiance*, 90 Fed. 753.

¹⁹ *Neosho, etc., Co. v. Neosho*, 136 Mo. 498; 38 S. W. 89.

²⁰ *Dawson v. Waterworks Co.*, 106 Ga. 696; 32 S. E. 907.

²¹ *Gaslight, etc., Co. v. New Albany*, 156 Ind. 406; 59 N. E. 176; *Kirkwood v. Highlands Co.*, 94 Mo. App. 637; 68 S. W. 761; (*City of*) *Wellston v. Morgan*, 59 O. S. 147; 52 N. E. 127; *Defiance v. Council of Defiance*, 23 Ohio C. C. 96.

²² *Danville v. Water Co.*, 178 Ill. 299; 69 Am. St. Rep. 304; 53 N. E. 118.

²³ *State v. Medbery*, 7 O. S. 522.

¹ *Richmond v. McGirr*, 78 Ind. 192; *Austin v. Colony*, 51 Ia. 102;

49 N. W. 1051; *State v. Babcock*, 22 Neb. 614; 35 N. W. 941; *Bank v. Chillicothe*, 7 Ohio, Part II., 31; *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721; *Clark v. Janesville*, 10 Wis. 136.

² *Allen v. La Fayette*, 89 Ala. 641; 9 L. R. A. 497; 8 So. 30; *Coquard v. Oquawka*, 192 Ill. 355; 61 N. E. 660; *Wells v. Salina*, 119 N. Y. 280; 7 L. R. A. 759; 23 N. E. 870.

³ *Heinl v. Terre Haute*, 161 Ind. 44; 66 N. E. 450; *Corliss v. Highland Park*, — Mich. —; 93 N. W. 254; affirmed on rehearing, 93 N. W. 610.

⁴ *Brown v. Board*, 108 Ky. 783; 57 S. W. 612.

§1018. Power to issue negotiable instruments.

Closely connected with the foregoing question is that of the implied power of a public corporation to issue negotiable instruments as evidences of a lawful debt. There is a divergence of authority as to whether an implied power to issue negotiable instruments exists if power to do so is not given by statute. Some authorities hold that this power is implied,¹ others that it exists only when expressly given by the legislature.² Where this view is entertained power to improve a street, raising the money therefor by a special assessment, is not power to issue bonds.³ A city incorporated after the passage of a statute authorizing cities then incorporated to issue bonds cannot issue them.⁴ Even an express power to borrow does not include power to issue negotiable bonds.⁵ Under power to borrow for municipal purposes a city may issue bonds to retire the floating

¹ *Carter County v. Sinton*, 120 U. S. 517; *Holmes v. Shreveport*, 31 Fed. 113; *Commonwealth v. Williamstown*, 156 Mass. 70; 30 N. E. 472; *Hubbard v. Sadler*, 104 N. Y. 223; 10 N. E. 426; *Smathers v. Madison County*, 125 N. C. 480; 34 S. E. 554; *Murry v. Fay*, 2 Wash. 352; 26 Pac. 533.

² *Barnett v. Denison*, 145 U. S. 135 (citing *Claiborne County v. Brooks*, 111 U. S. 400; *Kelley v. Milan*, 127 U. S. 139). To the same effect are *Brenham v. Bank*, 144 U. S. 173; *Hopper v. Covington*, 8 Fed. 777; *Dudley v. Lake County*, 80 Fed. 672; *Coffin v. Indianapolis*, 59 Fed. 221; *Watson v. Huron*, 97 Fed. 449; 38 C. C. A. 264; *Coquard v. Oquawka*, 192 Ill. 355; 61 N. E. 660; *Neugass v. New Orleans*, 42 La. Ann. 163; 21 Am. St. Rep. 368; 7 So. 565; *Brinkworth v. Grable*, 45 Neb. 647; 63 N. W. 952; *State v. Newark*, 54 N. J. L. 624; 23

Atl. 129; *Johnson City v. R. R.*, 100 Tenn. 138; 44 S. W. 670; *Richardson v. Marshall County*, 100 Tenn. 346; 45 S. W. 440; *Waxahachie v. Brown*, 67 Tex. 519; 4 S. W. 207; *Thornburgh v. Tyler*, 16 Tex. Civ. App. 439; 43 S. W. 1054.

³ *Redondo Beach v. Cate*, 136 Cal. 146; 68 Pac. 586.

⁴ *Oquawka v. Graves*, 82 Fed. 568; 27 C. C. A. 327.

⁵ *Brenham v. Bank*, 144 U. S. 173; *Merrill v. Monticello*, 138 U. S. 673; *German Ins. Co. v. Manning*, 95 Fed. 597; *Lehman v. San Diego*, 27 C. C. A. 668; 83 Fed. 669; *Ashuelot National Bank v. School District*, 56 Fed. 197; *Dodge v. Memphis*, 51 Fed. 165; *Heins v. Lincoln*, 102 Ia. 69; 71 N. W. 189 (criticising *Sioux City v. Weare*, 59 Ia. 95; 12 N. W. 786). *Contra*, *Commonwealth v. Williamstown*, 156 Mass. 70; 30 N. E. 472.

debt,⁶ or to refund prior bonds.⁷ In opposition to this view it has been held that power to issue bonds does not include power to issue new negotiable bonds to take up the old bonds.⁸ A statute which violates a mandatory provision of the constitution cannot authorize an issue of bonds,⁹ nor can the legislature make bonds payable elsewhere than at the city treasury.¹⁰ If a negotiable instrument is issued by a corporation having authority to issue only non-negotiable instruments it is void.¹¹ According to the divergence of views already expressed some authorities treat municipal bonds as non-negotiable,¹² while others treat both the bonds¹³ and the coupons thereon¹⁴ as negotiable. A statute giving authority to issue municipal bonds for certain purposes only excludes power to issue bonds for any other purpose.¹⁵ If power to issue bonds exists, they may be issued where no prior debt exists, as where they are issued to buy waterworks.¹⁶

§1019. Statutory restriction on power to borrow.

Statutory provisions as to the power of a public corporation to borrow money and the methods by which it may borrow are

⁶ *Morris v. Taylor*, 31 Or. 62; 49 Pac. 660 (citing *Quincy v. Warfield*, 25 Ill. 317; 79 Am. Dec. 330; *Gallena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557; *Solon v. Bank*, 114 N. Y. 122; 21 N. E. 168; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278; *Rogan v. Watertown*, 30 Wis. 259).

⁷ *Pierre v. Dunscumb*, 106 Fed. 611; 45 C. C. A. 499.

⁸ *Coquard v. Oquawka*, 192 Ill. 355; 61 N. E. 660.

⁹ *Lake County v. Graham*, 130 U. S. 674; *Wilkes Co. v. Call*, 123 N. C. 308; 44 L. R. A. 252; 31 S. E. 481.

¹⁰ *Los Angeles v. Teed*, 112 Cal. 319; 44 Pac. 580.

¹¹ *Dodge v. Memphis*, 51 Fed. 165.

¹² *Goodwin v. East Hartford*, 70 Conn. 18; 38 Atl. 876; *State ex rel.*

Slingerland v. Newark, 54 N. J. L. 62; 23 Atl. 129.

¹³ *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Humboldt Township v. Long*, 92 U. S. 642; *Roberts v. Bolles*, 101 U. S. 119; *Wilson County v. Bank*, 103 U. S. 770; *Ottawa v. Bank*, 105 U. S. 342; *Ackley School District v. Hall*, 113 U. S. 135; *Klamath Falls v. Sachs*, 35 Or. 325; 76 Am. St. Rep. 501; 57 Pac. 329.

¹⁴ *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Walnut v. Wade*, 103 U. S. 683; *Stewart v. Lansing*, 104 U. S. 505; *Thompson v. Perrine*, 106 U. S. 589.

¹⁵ *Uncas National Bank v. Superior*, 115 Wis. 340; 91 N. W. 1004.

¹⁶ *State v. Topeka*, — Kan. —; 74 Pac. 647.

at present in most states very full and ample.¹ As has been indicated in the preceding section, much of the discussion as to the implied power of a public corporation to borrow turns on the effect of the statutes on that subject.² Bonds issued after a repeal of the law under which they were issued,³ or under an unconstitutional law,⁴ are void. A law allowing a specified township to issue bonds is not of general nature and hence is constitutional, even if not uniform, under a constitutional provision requiring laws of a general nature to be uniform.⁵ A statute authorizing a town to vote bonds to aid a railroad, without formally amending its charter,⁶ or special authority to borrow without formally amending a general statute limiting such power,⁷ confers such authority. A limited power of borrowing excludes implied power.⁸ Statutes on the subject of issuing bonds should be construed together if possible as *in pari materia* even if passed at different times.⁹ If statutes passed at different times cannot be reconciled, the later controls. Thus a general law may be superseded by a charter.¹⁰ So a grant of general power to borrow money and issue bonds for municipal purposes is not restricted by a prior grant for special purposes.¹¹

¹ *Ellinwood v. Reedsburg*, 91 Wis. 131; 64 N. W. 885.

² *Commonwealth v. Williamstown*, 156 Mass. 70; 30 N. E. 472.

³ *Lehman v. San Diego*, 73 Fed. 105.

⁴ *Slocomb v. Fayetteville*, 125 N. C. 362; 34 S. E. 436.

⁵ *Battleboro Savings Bank v. Hardy Township*, 98 Fed. 524 (citing *Cass v. Dillon*, 2 O. S. 607; *State v. Judges*, 21 O. S. 1; *State v. Covington*, 29 O. S. 102; *McGill v. State*, 34 O. S. 228; *State v. Hoffman*, 35 O. S. 435; *State v. Commissioners*, 35 O. S. 458; *State v. Board*, 38 O. S. 3; *State v. Powers*, 38 O. S. 54; *Hart v. Murray*, 48 O. S. 605; 29 N. E. 576; *State v. Kendle*, 52 O. S. 346; 39 N. E. 947; *Ex parte Falk*, 42 O. S. 638; *State v. Winch*, 45 O. S. 663; 18 N. E. 380; *State*

v. Ellet, 47 O. S. 90; 21 Am. St. Rep. 772; 23 N. E. 931; *Commissioners v. Rosche*, 50 O. S. 103; 40 Am. St. Rep. 653; 19 L. R. A. 584; 33 N. E. 408; *Loeb v. Trustees*, 91 Fed. 37. *Disapproving Hixson v. Burson*, 54 O. S. 470; 43 N. E. 1000; *State v. Davis*, 55 O. S. 15; 44 N. E. 511).

⁶ *Glenn v. Wray*, 126 N. C. 730; 36 S. E. 167.

⁷ *Peabody v. Waterworks*, 20 R. I. 176; 37 Atl. 807.

⁸ *Hughson v. Crane*, 115 Cal. 404; 47 Pac. 120. *Contra*, *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557.

⁹ *Roberts v. Taft*, 109 Fed. 825; 48 C. C. A. 681.

¹⁰ *McHugh v. San Francisco*, 132 Cal. 381; 64 Pac. 570.

¹¹ *Pierre v. Dunscomb*, 106 Fed. 611; 45 C. C. A. 499.

Power to incur indebtedness for municipal improvements is not limited by a grant of power in another section of the statute to make specific kinds of improvements.¹² Clerical errors and grammatical inaccuracies are to be disregarded if the meaning of the statute is clear. Thus a statute authorizing bonds if "two thirds of the qualified electors voting an assent" means if two thirds of the qualified electors voting, assent.¹³ Restrictions as to requiring bond in case the cost of constructing a street is assessed upon abutting property owners have no application to contracts for constructing a sidewalk.¹⁴ Power to issue bonds with interest coupons payable at a given place is not power to issue bonds with interest coupons payable elsewhere.¹⁵ Power to refund "bonded indebtedness actually existing" is power to include unpaid interest coupons in the face of the new bonds.¹⁶

§1020. Construction of statutory provisions.

Power to refund a debt includes power to issue negotiable bonds therefor,¹ though in such case the corporation cannot issue bonds in excess of such debt.² Power to issue "bonds" is power to issue negotiable bonds;³ power to "donate money or other securities" is power to issue bonds;⁴ and power to "borrow money and for that purpose to issue bonds" includes power to refund.⁵ Power to issue interest bearing bonds includes power

¹² *Hammond v. San Leandro*, 135 Cal. 450; 67 Pac. 692.

¹³ *Fritz v. San Francisco*, 132 Cal. 373; 64 Pac. 566.

¹⁴ *Tennessee Paving-Brick Co. v. Barker* (Ky.), 59 S. W. 755.

¹⁵ *Middleton v. St. Augustine*, 42 Fla. 287; 89 Am. St. Rep. 227; 29 So. 421.

¹⁶ *Kelly v. Cole*, 63 Kan. 385; 65 Pac. 672.

¹ *Rathbone v. Hopper*, 57 Kan. 240; 34 L. R. A. 674; 45 Pac. 610.

² *Louisville, etc., v. Zimmerman*, 101 Ky. 432; 41 S. W. 428.

³ *Austin v. Naile*, 85 Tex. 520; 22

S. W. 668; rehearing denied, 22 S. W. 960; reversing 21 S. W. 375; *Klamath v. Sachs*, 35 Or. 325; 76 Am. St. Rep. 501; 57 Pac. 329 (other provisions of the statute showed that negotiable bonds were contemplated).

⁴ *Lund v. Chippewa County*, 93 Wis. 640; 34 L. R. A. 131; 67 N. W. 927.

⁵ *Huron v. Bank*, 86 Fed. 272; 30 C. C. A. 38; 49 L. R. A. 534 (citing *Quincy v. Warfield*, 25 Ill. 317; 79 Am. Dec. 330; *Galena v. Corwith*, 48 Ill. 423; 95 Am. Dec. 557; *Morris v. Taylor*, 31 Or. 62; 49 Pac.

to attach interest coupons,⁶ and power to sell bonds and pay proceeds includes power to deliver bonds.⁷ Power to issue bonds is generally held to include power to make them payable in gold.⁸ Power to issue bonds must be strictly followed. Thus a vote to issue bonds to two persons, on their erecting a mill, does not authorize issuing bonds to a partnership consisting of them and others,⁹ and if the amount of each bond is fixed, the bonds are invalid if in larger amounts though aggregating the same.¹⁰ However, where bonds were to run ten years, they are valid if payable more than ten years from their date but within ten years from their issue.¹¹ If bonds are issued by authority of law they are not made invalid because their proceeds are misapplied.¹² A city cannot issue bonds for a greater sum than that borrowed by selling them below par, which must include interest due,¹³ and officials selling state bonds below par are liable, even if the bonds would not sell at par.¹⁴ So a city cannot sell at the face value, paying large commissions.¹⁵ So a city cannot add enough to the amount . . .

660; *Rogan v. Watertown*, 30 Wis. 259).

⁶ *Atchison Board, etc., v. De Kay*, 148 U. S. 591.

⁷ *Clifton Forge v. Electric Co.*, 92 Va. 289; 23 S. E. 288.

⁸ *Woodruff v. Mississippi*, 162 U. S. 291 (reversing *Woodruff v. State*, 66 Miss. 298; 6 So. 235); *Moore v. Walla Walla*, 60 Fed. 961; *Judson v. Bessemer*, 87 Ala. 240; 4 L. R. A. 742; 6 So. 267; *Skinner v. Santa Rosa*, 107 Cal. 464; 29 L. R. A. 512; 40 Pac. 742; *Murphy v. San Luis Obispo*, 119 Cal. 624; 39 L. R. A. 444; 51 Pac. 1085; affirming in banc 48 Pac. 974; *Heilbron v. Cuthbert*, 96 Ga. 312; 23 S. E. 206; *Farson v. Louisville, etc.*, 97 Ky. 119; 30 S. W. 17; *Winston v. Fort Worth (Tex.)*, 47 S. W. 710; *Packwood v. Kittitas County*, 15 Wash. 88; 55 Am. St. Rep. 875; 33 L. R. A. 673; 45 Pac. 640; *Kenyon v.*

Spokane, 17 Wash. 57; 48 Pac. 783. *Contra*, *Burnett v. Maloney*, 97 Tenn. 697; 34 L. R. A. 541; 37 S. W. 689.

⁹ *George v. Cleveland*, 53 Neb. 716; 74 N. W. 266.

¹⁰ *Livingston v. School District*, 9 S. D. 345; 69 N. W. 15.

¹¹ *Syracuse Township v. Rollins*, 104 Fed. 958; 44 C. C. A. 277.

¹² *Gladstone v. Throop*, 71 Fed. 341; 18 C. C. A. 61; *Jones v. City of Camden*, 44 S. C. 319; 51 Am. St. Rep. 819; 23 S. E. 141; *Clifton Forge v. Electric Co.*, 92 Va. 289; 23 S. E. 288; *Clifton Forge v. Bank*, 92 Va. 283; 23 S. E. 284.

¹³ *Ft. Edward v. Fish*, 156 N. Y. 363; 50 N. E. 973; affirming 86 Hun (N. Y.) 548.

¹⁴ *State v. Buchanan (Tenn. Ch. App.)*, 52 S. W. 480.

¹⁵ *Whelen's Appeal*, 108 Pa. St. 162; 1 Atl. 88; *Hunt v. Fawcett*, 8

of its warrants to compensate for the discount at which they must be sold.¹⁶ Power to settle claims includes power to issue warrants for amounts due;¹⁷ and power to retire warrants includes power to issue them, even if there will be no money to pay them with for over a year.¹⁸ Power to borrow for running expenses is not power to borrow for erecting a court house.¹⁹ Under a statute which requires all the interest and part of the principal of an issue of bonds to be paid annually, an issue of bonds the principal of which is payable one hundred dollars a year for nineteen years, and thirty-three thousand one hundred dollars at the twentieth year, is valid.²⁰ A power to make a contract for water and to levy a tax of a certain amount therefor does not restrict the contract price to the amount of the tax.²¹

§1021. Statutory prohibition against incurring debt.

The extravagance of American municipalities has led to various attempts on the part of legislatures to prevent or restrict future indebtedness. Contracts in violation of such statutes are invalid.¹ A statute restraining the power of cities to incur debts, in the exact language of the constitution is abrogated by a subsequent enlargement of power to incur debts given by a later constitutional amendment.² Various methods of restraint have been tried. Some of the more common types are discussed in the following sections. There is this inherent

Wash. 396; 36 Pac. 318. However, it has been held that a city may pay ten per cent of the face value to a broker for lithographing and selling their bonds. *State v. Land Co.*, 75 Minn. 456; *sub nom.*, *In re Taxes*, etc., 78 N. W. 115.

¹⁶ *Municipal Security Co. v. Barker County*, 33 Or. 338; 54 Pac. 174.

¹⁷ *City of New Orleans v. Warner*, 180 U. S. 199; affirming 101 Fed. 1005; 41 C. C. A. 676.

¹⁸ *City of Little Rock v. United*

States, 103 Fed. 418; 43 C. C. A. 261.

¹⁹ *Lewis v. Lofley*, 92 Ga. 804; 19 S. E. 57 (a county).

²⁰ *Kemp v. Hazelhurst*, 80 Miss. 443; 31 So. 908.

²¹ *Ft. Madison v. Water Co.*, 114 Fed. 292; 52 C. C. A. 204; affirming 110 Fed. 901; *Marion Water Co. v. Marion*, 121 Ia. 306; 96 N. W. 883.

¹ *Shinn v. Board of Education*, 39 W. Va. 497; 20 S. E. 604.

² *Bray v. Florence*, 62 S. C. 57; 39 S. E. 810.

difficulty underlying them all. Local government without the exercise of discretion, is an impossibility; yet the existence of discretion generally involves the power to abuse it as well as to exercise it. The problem for the legislature to solve is to obtain the maximum of discretionary power with the minimum of abuse.

§1022. Necessity of appropriation.

One group of statutes intended to prevent municipalities from incurring indebtedness, seeks to restrict expenditure to income. Different statutes of this group seek to attain this result in different ways. Some of these statutes forbid a contract unless an appropriation has been made by the proper authorities available for payment on such contract.¹ A contract entered into when no such appropriation has been made is unenforceable,² and no recovery can be had for property or services furnished thereunder.³ Thus a contract to complete a building made when an appropriation for part of its cost only has been made is invalid, although the city had agreed to make a subsequent appropriation to complete such building.⁴ So no recovery can be had in excess of the appropriation made.⁵ A general appropriation for the expense of building a bridge is sufficient to make valid a contract with an adjoining land owner whereby the city agrees to pay damages, and allow him to use a vault built by the city under the street, in consideration of his allowing the city to swing its bridge over his land.⁶ A general appropriation for constructing a street intended to cover future

¹ *Hilliard v. Bunker*, 68 Ark. 340; 58 S. W. 362; *Wiegel v. Pulaski County*, 61 Ark. 74; 32 S. W. 116; *Indianapolis v. Wann*, 144 Ind. 175; 31 L. R. A. 743; 42 N. E. 901; *Kelley v. Broadwell* (Neb.), 92 N. W. 643; *Clark v. Portsmouth*, 68 N. H. 263; 44 Atl. 388; *Engstad v. Dinne*, 8 N. D. 1; 76 N. W. 292.

² *Hurley v. Trenton*, 67 N. J. L. 350; 51 Atl. 1109; affirming 66 N. J. L. 538; 49 Atl. 518; *Roberts*

v. Fargo, 10 N. D. 230; 86 N. W. 726.

³ *Board of Water Commissioners v. Commissioners*, 126 Mich. 459; 85 N. W. 1132; *Roberts v. Fargo*, 10 N. D. 230; 86 N. W. 726.

⁴ *Johnston v. Philadelphia*, 113 Fed. 40.

⁵ *Hurley v. Trenton*, 67 N. J. L. 350; 51 Atl. 1109; affirming 66 N. J. L. 538; 49 Atl. 518.

⁶ *Chicago v. Milling Co.*, 196 Ill.

repairs is sufficient to make valid a contract therefor.⁷ If an appropriation lapses at the end of a fiscal year it cannot validate subsequent contracts unless re-appropriated.⁸ Such a statute is superseded by a subsequent grant of power to incur indebtedness for specified purposes, from which grant restrictions are omitted.⁹

§1023. Necessity of levying tax to meet obligation.

Other statutes provide that, either in all cases or where the debt has reached a certain amount, no contract is valid unless a means is provided by taxation for paying principal and interest.¹ It is generally necessary to impose such a tax as will keep the interest down and form a sinking fund which will discharge the principal within the time specified by law. Where such provision is found in the constitution the statute authorizing the debt need not fix the tax rate, but may leave it to county officers,² and it is complied with by a tax to begin at a considerable time in the future.³ There must be a specific levy for the sinking fund, a general levy being insufficient.⁴ Such provision applies to a contract of compromise of a prior claim.⁵ If the contract price exceeds the amount to be raised by such tax, the excess over the amount raised by taxation cannot be recovered.⁶ Such statutes apply only to interest-bearing con-

580; 63 N. E. 1043; affirming 97 Ill. App. 651.

⁷ Louisville v. Gosnell (Ky.), 61 S. W. 476.

⁸ Neumeyer v. Krakel, 110 Ky. 624; 62 S. W. 518.

⁹ Belding, etc., Co. v. Belding, 128 Mich. 79; 87 N. W. 113.

¹ Brazoria Co. v. Bridge Co., 80 Fed. 10; 25 C. C. A. 306; John Hancock, etc., Co. v. Huron, 80 Fed. 652; affirmed, 100 Fed. 1001; 40 C. C. A. 683; Wilkins v. Waynesboro, 116 Ga. 359; 42 S. E. 767; Epping v. Columbus, 117 Ga. 263; 43 S. E. 803; Dawson v. Waterworks Co., 102 Ga. 594; 29 S. E.

755; Howard v. Smith, 91 Tex. 8; 38 S. W. 15; Mineralized Rubber Co. v. Cleburne, 22 Tex. Civ. App. 621; 56 S. W. 220.

² Mitchell County v. Bank, 91 Tex. 361; 43 S. W. 880; reversing 15 Tex. Civ. App. 172; 39 S. W. 628.

³ City of Boise City v. Trust Co., 7 Ida. 342; 63 Pac. 107 (tax to begin in 1909).

⁴ Wade v. Travis County, 72 Fed. 985.

⁵ Austin v. McCall, 95 Tex. 565; 68 S. W. 791; reversing (Tex. Civ. App.) 67 S. W. 192.

⁶ Gray v. Bourgeois, 107 La. 671; 32 So. 42.

tracts extending over a term of years, and not to contracts to be paid out of the taxes of the current year.⁷ Such a provision does not apply to a long time contract for a water supply payable in installments.⁸

§1024. Liabilities forbidden in excess of current income.

Other statutes of this group forbid contracts incurring liability which cannot be paid out of taxes for that fiscal year.¹ Under a statute of this class the fact that interest on the debt incurred, and an amount to be paid into the sinking fund sufficient to discharge the debt ultimately are, when added together, within the annual income of the city, does not prevent a debt in excess of the income from being invalid.² Persons who work for the city must take notice of such provision,³ and debts contracted in violation thereof cannot be paid out of the next year's taxes.⁴ Such provisions cannot be evaded by buying goods on credit extending to the next fiscal year.⁵ In determining what the revenue is money lost by a bank failure must be included in the estimate of revenue.⁶ A liability incurred when there was sufficient money on hand to discharge it is not avoided because the fund is exhausted before the claim

⁷ *Herman v. Oconto*, 110 Wis. 660; 86 N. W. 681.

⁸ *Blanks v. Monroe*, 110 La. 944; 34 So. 921.

¹ *Weaver v. San Francisco*, 111 Cal. 319; 43 Pac. 972; *Bradford v. San Francisco*, 112 Cal. 537; 44 Pac. 912; *Montague v. English*, 119 Cal. 225; 51 Pac. 327; *Phillips v. Reed*, 107 Ia. 331; 76 N. W. 850; 77 N. W. 1031 (citing *Shaw v. Statler*, 74 Cal. 258; 15 Pac. 833; *Putnam v. Grand Rapids*, 58 Mich. 416; 25 N. W. 330; *State v. Martin*, 27 Neb. 441; 43 N. W. 244); *Grady v. Landram* (Ky.), 63 S. W. 284; *State v. St. Paul, Judge, etc.*, 107 La. 777; 32 So. 88; *Trump Mfg. Co. v. Buchanan*, 116 Mich. 113; 74

N. W. 466; *Greenville v. Laurent*, 75 Miss. 456; 23 So. 185. This restriction exists only by statute. *Mitchell v. Negaunee*, 113 Mich. 359; 67 Am. St. Rep. 468; 38 L. R. A. 157; 71 N. W. 646.

² *Richmond v. Powell*, 101 Ky. 7; 27 S. W. 1.

³ *Weaver v. San Francisco*, 111 Cal. 319; 43 Pac. 972.

⁴ *Montague v. English*, 119 Cal. 225; 51 Pac. 327.

⁵ *Trump Mfg. Co. v. Buchanan*, 116 Mich. 113; 74 N. W. 466; *Merchants' National Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828; 23 S. E. 681.

⁶ *Higgins v. San Diego*, 131 Cal. 294; 63 Pac. 470.

is presented,⁷ and a debt contracted against a special fund must be paid though prior debts not out of such fund cannot be paid.⁸ Where debts are invalid if they exceed the amount of taxes for that year less certain specified municipal expenditures for necessary purposes, it is error to deduct other items of expense than those fixed by statute from the year's taxes.⁹ The year for which such debts and revenues are to be estimated is *prima facie* a calendar year.¹⁰ If a fiscal year is intended the council may change the time of beginning thereof if they do not thereby make two fiscal years out of one.¹¹

§1025. Necessity of certificate showing sufficient funds.

Other statutes avoid contracts unless the proper officer, such as the auditor, certifies that there is a sufficient fund on hand unappropriated to discharge the liability.¹ Thus a contract employing an attorney is void unless such certificate is filed.² Such a statute applies only to so much of the cost of an improvement as is to be paid from general taxation and not to the part to be raised by assessment;³ and does not apply where the fund is to be raised by taxation thereafter,⁴ or out of the income of the property for the purchase of which the debt is incurred,⁵ or to bonds issued to refund prior valid debts.⁶

⁷ Montague v. English, 119 Cal. 225; 51 Pac. 327.

⁸ Meyer v. Widber, 126 Cal. 252; 58 Pac. 532.

⁹ Lebanon, etc., Co. v. Lebanon, 163 Mo. 246; 63 S. W. 809.

¹⁰ Garfield Township v. Dodsworth Book Co., 9 Kan. App. 752; 58 Pac. 565.

¹¹ First National Bank v. Keith, 183 Ill. 475; 56 N. E. 179.

¹ Jutte, etc., Co. v. Altoona, 94 Fed. 61; 36 C. C. A. 84; Higgins v. San Diego, 118 Cal. 524; 45 Pac. 824; modified on rehearing, 50 Pac. 670; City of Findlay v. Pendleton, 62 O. S. 80; 56 N. E. 649; Comstock v. Nelsonville, 61 O. S. 288; 56 N. E. 15.

² Findlay v. Pendleton, 62 O. S. 80; 56 N. E. 649.

³ Comstock v. Nelsonville, 61 O. S. 288; 56 N. E. 15.

⁴ Defiance Water Co. v. Defiance, 90 Fed. 753 (a contract for water supply).

⁵ Kerr v. Bellefontaine, 59 O. S. 446; 52 N. E. 1024 (a contract for gas works). A voucher not drawn on particular fund, where there are not enough funds to the credit of the account on which it should have been drawn, is properly refused. State v. Boyden, 18 Ohio C. C. 282; 10 Ohio C. D. 137.

⁶ Clapp v. Marice City, 111 Fed. 103; 49 C. C. A. 251.

§1026. Limitation on amount of indebtedness.

Statutes of a second group have for their purpose prohibiting debts of a public corporation in excess of a certain limit, which is either a fixed sum or a percentage on the valuation of the taxable property within the corporate limits. Contracts in excess of such limit are invalid,¹ and no recovery can be had on *quantum meruit*.² In some states, however, such a contract is voidable, but not void.³ A later statute will not be presumed to repeal the earlier statute though it does not in terms reenact it.⁴ A "general welfare" clause does not authorize the issue of bonds in excess of the amount specifically fixed by statute.⁵

Where such limitation is found in the state constitution the legislature cannot authorize a debt in excess thereof.⁶ So if it is created by the federal statute for the government of a territory the territorial legislature cannot authorize further indebtedness.⁷ A statute will be presumed to refer to the constitutional limitation though it does not repeat it expressly.⁸ A statute authorizing the issuing of railroad aid bonds "to any amount" will be construed as meaning to any amount within constitutional limits.⁹ Such a limitation, whether created by statute¹⁰ or by a constitutional provision,¹¹ does not invalidate

¹ *Litchfield v. Ballou*, 114 U. S. 190; *Rathbone v. Kiowa County*, 73 Fed. 395; *Sutro v. Rhodes*, 92 Cal. 117; 28 Pac. 98; *Laporte v. Game-well, etc., Co.*, 146 Ind. 466; 58 Am. St. Rep. 359; 35 L. R. A. 686; 45 N. E. 588; *Mosher v. School District*, 44 Ia. 122; *McPherson v. Foster*, 43 Ia. 48; 22 Am. Rep. 215; *Helena Waterworks Co. v. Helena*, 27 Mont. 205; 70 Pac. 513.

² *McGillivray v. School District*, 112 Wis. 354; 88 Am. St. Rep. 969; 58 L. R. A. 100; 88 N. W. 310.

³ *Sioux City, etc., Co. v. Trust Co.*, 173 U. S. 99.

⁴ *Beck v. St. Paul*, 87 Minn. 381; 92 N. W. 328.

⁵ *Grace v. Mayor, etc., of Hawk-insville*, 101 Ga. 553; 28 S. E. 1021.

⁶ *Doon Township v. Cummins*, 142 U. S. 366; *Hodges v. Crowley*, 186 Ill. 305; 57 N. E. 889; *Reynolds v. Waterville*, 92 Me. 292; 42 Atl. 553.

⁷ *Martin v. Territory*, 5 Okla. 188; 48 Pac. 106; *Spencer v. Gray*, 5 Okla. 216; 48 Pac. 110.

⁸ *Swanson v. Ottumwa*, 118 Ia. 161; 59 L. R. A. 620; 91 N. W. 1048.

⁹ *Germania Savings Bank v. Darlington*, 50 S. C. 337; 27 S. E. 846.

¹⁰ *City of Mitchell v. Smith*, 12 S. D. 241; 80 N. W. 1077.

¹¹ *Myers v. Jeffersonville*, 145 Ind. 431; 44 N. E. 452; *McCreight v.*

a pre-existing valid debt.¹² If the limit is not reached when the contract is made, an unlawful diversion of public funds,¹³ as a loss due to a bank failure,¹⁴ cannot make such contract invalid.

§1027. Claims subject to limitation.

The general view taken of such statutory provisions is that they apply to all forms of indebtedness, no matter how incurred or what is received therefor. Thus such limitation applies to debts incurred in the purchase of property,¹ even if such property is necessary for the management of the public corporation,² such as a water supply³ or electric lights.⁴ So where the limit of debt is exceeded a contract for 7,000 lamps "more or less" is invalid.⁵ These provisions apply to debts incurred in carrying out powers conferred on the municipality by statute.⁶ Thus where no debt can be created in excess of income there is no implied liability resting on a county for burying indigent dead after the limit of indebtedness has been reached, though

City of Camden, 49 S. C. 78; 26 S. E. 984.

¹² City of Kansas City v. Gas Co., 9 Kan. App. 325; 61 Pac. 317; Cass County v. Wilbarger County, 25 Tex. Civ. App. 52; 60 S. W. 988.

¹³ State Savings Bank v. Davis, 22 Wash. 406; 61 Pac. 43.

¹⁴ New York, etc., Co. v. Tacoma, 21 Wash. 303; 57 Pac. 810.

¹ Crogster v. Bayfield Co., 99 Wis. 1; 74 N. W. 635; 77 N. W. 167 (where bonds were issued for railroad stock).

² Chicago v. McDonald, 176 Ill. 404; 52 N. E. 982; Laporte v. Gamewell, etc., Co., 146 Ind. 466; 58 Am. St. Rep. 359; 35 L. R. A. 686; 45 N. E. 588; Windsor v. Des Moines, 110 Ia. 175; 80 Am. St. Rep. 280; 81 N. W. 476; Grand Island, etc., R. R. Co. v. Baker, 6 Wyom. 369; 71 Am. St. Rep. 926; 34 L. R. A. 835; 45 Pac. 494.

³ State v. Helena, 24 Mont. 521; 81 Am. St. Rep. 453; 55 L. R. A. 336; 63 Pac. 99.

⁴ Windsor v. Des Moines, 110 Ia. 175; 80 Am. St. Rep. 280; 81 N. W. 476 (even if the contract price was no greater than had been paid).

⁵ City of Chicago v. Galpin, 183 Ill. 399; 55 N. E. 731 (citing Lake County v. Rollins, 130 U. S. 662; Thompson-Houston Electric Co. v. Newton, 42 Fed. 723; City of Chicago v. McDonald, 176 Ill. 404; 52 N. E. 982; Beard v. Hopkinsville, 95 Ky. 239; 44 Am. St. Rep. 222; 23 L. R. A. 402; 24 S. W. 872; overruling City of East St. Louis v. Coke Co., 98 Ill. 415; 38 Am. Rep. 97; City of Carlyle v. Power Co., 140 Ill. 445; 29 N. E. 556).

⁶ Lake County v. Rollins, 130 U. S. 662.

omission of burial is a misdemeanor.⁷ Such limitation applies to obligations imposed by statute as well as to those created by express contract.⁸

According to the foregoing cases the fact that the debt in question is incurred in the necessary and legitimate exercise of the corporation does not make the case an exception to the plain provisions of the statute.⁹ The authorities are not unanimous upon this point, however. In some jurisdictions the provisions limiting indebtedness are held not to apply to certain forms of indebtedness which are required by mandatory constitutional provisions.¹⁰ Thus, even where the limit of indebtedness has been reached it has been held that a county is liable for the fees of jurors,¹¹ or for the expense of keeping its prisoners in the jail of another county¹² and that a city is liable on warrants issued for the salaries of its policemen, marshal and treasurer;¹³ or for expenses of printing ballots, quarantining, impounding stock and insuring city buildings.¹⁴ Even where there is a limitation of debts to a certain per cent of the assessed value a new county may borrow money for necessary running expenses before the first assessment.¹⁵

The limitation of the statute cannot be evaded by having the purchase assume the form of a lease, the rental to pay the purchase price,¹⁶ nor by deferring the payment of the purchase

⁷ *Pacific Undertakers v. Widber*, 113 Cal. 201; 45 Pac. 273.

⁸ *Grand Island, etc., R. R. Co. v. Baker*, 6 Wyom. 369; 71 Am. St. Rep. 926; 34 L. R. A. 835; 45 Pac. 494.

⁹ *Chicago v. McDonald*, 176 Ill. 404; 52 N. E. 982; *Prince v. Quincy*, 105 Ill. 138; 41 Am. Rep. 785; *Law v. People*, 87 Ill. 385; *Sackett v. New Albany*, 88 Ind. 473; 45 Am. Rep. 467.

¹⁰ *Rauch v. Chapman*, 16 Wash. 568; 58 Am. St. Rep. 52; 36 L. R. A. 407; 48 Pac. 253.

¹¹ *Rauch v. Chapman*, 16 Wash. 568; 58 Am. St. Rep. 52; 36 L. R. A. 407; 48 Pac. 253.

¹² *Potter v. Douglass County*, 87 Mo. 239.

¹³ *Hull v. Ames*, 26 Wash. 272; 66 Pac. 391.

¹⁴ *Gladwin v. Ames*, 30 Wash. 608; 71 Pac. 189.

¹⁵ *Hall, etc., Co. v. Board, etc., of Roger Mills County*, 8 Okla. 378; 58 Pac. 620; *Board, etc., of Roger Mills County v. Rowden*, 8 Okla. 406; 58 Pac. 624; *Same v. Sauer*, 8 Okla. 409; 58 Pac. 625.

¹⁶ *Hall v. Cedar Rapids*, 115 Ia. 199; 88 N. W. 448; *Earles v. Wells*, 94 Wis. 285; 59 Am. St. Rep. 886; 68 N. W. 964.

price,¹⁷ nor by dividing a debt into installments, each within the limit.¹⁸ So where the limit is reached a city cannot buy property encumbered with liens though it assumes no liability.¹⁹ So a mortgage on land purchased by a city was counted as a debt, the city taking subject thereto, though not promising to pay such debt; since without paying it, the city cannot keep the land.²⁰

A contract for rentals for hydrants is usually considered as creating a debt when each installment becomes due.²¹ If such contract does not exceed the limit when made, but exceeds the limit when due, it is invalid.²² A contract which gives an official power to order unlimited extras is invalid.²³

§1028. Claims not subject to limitation.

A constitutional or statutory limitation of indebtedness does not apply to contracts which do not create a personal liability against the public corporation. Thus such a limitation does not apply to a contract payable out of special assessments only;¹

¹⁷ *Culbertson v. Fulton*, 127 Ill. 30; 18 N. E. 781; *Windsor v. Des Moines*, 110 Ia. 175; 80 Am. St. Rep. 280; 81 N. W. 476; *Covington v. McKenna*, 99 Ky. 508; 36 S. W. 518; *Brown v. Corry*, 175 Pa. St. 528; 34 Atl. 854; *Spilman v. Parkersburg*, 35 W. Va. 605; 14 S. E. 279; *Earles v. Wells*, 94 Wis. 285; 59 Am. St. Rep. 886; 68 N. W. 964.

¹⁸ *Hoffman v. Gallatin County*, 18 Mont. 224; 44 Pac. 973; 18 Mont. 246; 44 Pac. 979; *Pepper v. Philadelphia*, 181 Pa. St. 566; 37 Atl. 579.

¹⁹ *Ironwood Waterworks Co. v. City of Ironwood*, 99 Mich. 454; 58 N. W. 371.

²⁰ *Browne v. Boston*, 179 Mass. 321; 60 N. E. 934. *Contra*, unpaid installments of the purchase price of a park which constitute a lien only are not counted as debts. *Kelly*

v. Minneapolis, 63 Minn. 125; 30 L. R. A. 281; 65 N. W. 115; *Burnham v. Milwaukee*, 98 Wis. 128; 73 N. W. 1018.

²¹ See § 1033.

²² *Keihl v. South Bend*, 76 Fed. 921; 22 C. C. A. 618; 36 L. R. A. 228.

²³ *N. P. Perrine, etc., Co. v. Pasadena*, 116 Cal. 6; 47 Pac. 777.

¹ *Denny v. Spokane*, 79 Fed. 719; 25 C. C. A. 164; *Jacksonville Ry. Co. v. Jacksonville*, 114 Ill. 562; 2 N. E. 478; *Quill v. Indianapolis*, 124 Ind. 292; 7 L. R. A. 681; 23 N. E. 788; *Ft. Dodge, etc., Co. v. Ft. Dodge*, 115 Ia. 568; 89 N. W. 7; *Clinton v. Walliker*, 98 Ia. 655; 68 N. W. 431; *Morrison v. Morey*, 146 Mo. 543; 48 S. W. 629; *Ladd v. Gambell*, 35 Or. 393; 59 Pac. 113; *Little v. Portland*, 26 Or. 235; 37 Pac. 911; *Smith v. Seattle*, 25 Wash. 300; 65 Pac. 612;

or out of a special tax;² or out of the gross receipts of the waterworks for the erection of which the debt is incurred.³ If the debt is one for which a tax could be laid, but no tax has been laid, it is invalid if in excess of the legal limit.⁴ A limitation by statute as to the amount to be paid for a court house does not apply to a donation by private citizens.⁵ A judgment on a claim is not a contract within the limitation, and if on a debt which exceeded the limit, this fact must be set up in such action and cannot be a matter of collateral attack on the judgment.⁶ Such limitation does not apply to a judgment in tort.⁷ If a certain form of indebtedness is by express statutory provision authorized in excess of the limit of ordinary indebtedness, such limitation is valid.⁸

§1029. Claims payable out of assessments.

If the parties who enter into a contract with a public corporation are required, either by statute or by the terms of their contract, to look solely to local assessments for their compensation, they cannot, in the absence of special circumstances, re-

Baker v. Seattle, 2 Wash. 576; 27 Pac. 462.

² City of New Orleans v. Warner, 175 U. S. 120; modifying 81 Fed. 645; 26 C. C. A. 508; People v. May, 9 Colo. 404; 12 Pac. 838; Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Swanson v. Ottumwa, 118 Ia. 161; 59 L. R. A. 620; 91 N. W. 1048. *Contra*, Ottumwa v. Water Supply Co., 119 Fed. 315; 59 L. R. A. 604, in which the Federal Court refused to take the same view of the liability of the city and the validity of the bond issue as that taken by the Supreme Court of the State in Swanson v. Ottumwa, 118 Ia. 161; 59 L. R. A. 620; 91 N. W. 1048.

³ Winston v. Spokane, 12 Wash.

524; 41 Pac. 888; Faulkner v. Seattle, 19 Wash. 320; 53 Pac. 365.

⁴ Laporte v. Gamewell, etc., Co., 146 Ind. 466; 58 Am. St. Rep. 359; 35 L. R. A. 686; 45 N. E. 588; Beard v. Hopkinsville, 95 Ky. 239; 44 Am. St. Rep. 222; 23 L. R. A. 402; 24 S. W. 872.

⁵ Way v. Fox, 109 Ia. 340; 80 N. W. 405.

⁶ Edmundson v. School District, 98 Ia. 639; 60 Am. St. Rep. 224; 67 N. W. 671. See Grand Island, etc., R. R. Co. v. Baker, 6 Wyom. 369; 71 Am. St. Rep. 926; 34 L. R. A. 835; 45 Pac. 494.

⁷ For injury sustained by defect in highway. McAleer v. Angell, 19 R. I. 688; 36 Atl. 588.

⁸ People v. Salt Lake City, 23 Utah 13; 64 Pac. 460.

cover on the contract against the corporation personally.¹ Even if the city contracts to collect such assessments and fails to take proper steps to do so, many authorities hold that the city does not incur any personal liability on the contract.² The remedy of the creditors is to compel the officers by mandamus to collect the assessment,³ or to sue in equity to compel the city to exercise its powers in making and collecting the assessments.⁴ Some courts hold that the city is liable for breach of its contract to collect such assessments,⁵ on the theory that it is charged as trustee with the duty of collecting and apply-

¹ *Vickrey v. Sioux City*, 115 Fed. 437; *Foster v. Alton*, 173 Ill. 587; 51 N. E. 76; affirming 74 Ill. App. 511; *Affeld v. Detroit*, 112 Mich. 560; 71 N. W. 151; *Huntington v. Force*, 152 Ind. 368; 53 N. E. 443; *Kansas City v. Ward*, 134 Mo. 172; 35 S. W. 600; *Wheeler v. Poplar Bluff*, 149 Mo. 36; 49 S. W. 1088; *Heller v. Milwaukee*, 96 Wis. 134; 70 N. W. 1111. The same principle applies where the debt incurred is payable exclusively out of a special tax. *Raton Waterworks Co. v. Raton*, 9 N. M. 70; 49 Pac. 898; reversed on another point, 174 U. S. 360.

² *Pontiac v. Paving Co.*, 94 Fed. 65; 36 C. C. A. 88; 48 L. R. A. 326 (rehearing denied, 96 Fed. 679); *Greencastle v. Allen*, 43 Ind. 347; *Goodrich v. Detroit*, 12 Mich. 279; *Soule v. Seattle*, 6 Wash. 315, 324; 33 Pac. 384 (rehearing denied, 33 Pac. 1080); *German, etc., Bank v. Spokane*, 17 Wash. 315; 38 L. R. A. 259; 47 Pac. 1103; 49 Pac. 542 (overruling *McEwan v. Spokane*, 16 Wash. 212; 47 Pac. 433); *Wilson v. Aberdeen*, 19 Wash. 89; 52 Pac. 524; *Rhode Island, etc., Co. v. Spokane*, 19 Wash. 616; 53 Pac. 1104;

Northwestern Lumber Co. v. Aberdeen, 20 Wash. 102; 54 Pac. 935; *Fletcher v. Oshkosh*, 18 Wis. 228. "The city is not required to collect the tax and pay it over to the contractor." *Thornton v. Clinton*, 148 Mo. 648; 50 S. W. 295.

³ *People v. Syracuse*, 144 N. Y. 63; 38 N. E. 1006 (though in New York such remedy is not exclusive); *Wilson v. Aberdeen*, 19 Wash. 89; 52 Pac. 524.

⁴ *Burlington Savings Bank v. Clinton*, 111 Fed. 439; *Farson v. Sioux City*, 106 Fed. 278.

⁵ *Clayburgh v. Chicago*, 25 Ill. 535; 79 Am. Dec. 346; *Foster v. Alton*, 173 Ill. 587; 51 N. E. 76; affirming 74 Ill. App. 511; *Weston v. Syracuse*, 158 N. Y. 274; 70 Am. St. Rep. 472; 43 L. R. A. 678; 53 N. E. 12; reversing 82 Hun (N. Y.) 67; *Reilly v. Albany*, 112 N. Y. 30; 19 N. E. 508; *Commercial National Bank v. Portland*, 24 Or. 188; 41 Am. St. Rep. 854; 33 Pac. 532. "It could not be supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government over which he had no control, to place

ing the assessments.⁶ If the special assessment is collected by the city, and the funds arising therefrom are then embezzled by a city official in whose custody they are, the city becomes liable for warrants drawn on such fund, though it was not liable originally.⁷ The liability of the city in case the assessment proves to be unenforceable is a question on which there is a conflict of authority. In some jurisdictions the city is liable if by reason of its own lack of compliance with the law the assessments fail, even if it is not primarily liable,⁸ and even if the limit of the city's indebtedness has been exceeded.⁹ So if the city has no authority to make the improvement at the expense of the abutting property, the contractor is allowed to recover from the city even if he has agreed that he will be entitled in no event to recover from the city.¹⁰ In other jurisdictions a different view obtains. If the special assessment is invalid, because the ordinance levying it is irregular, it has been held that the contractor has no remedy and cannot recover.¹¹

If, however, the contract is one on which the corporation is primarily liable, a partial or total failure of the assessments does not discharge the liability of the corporation.¹²

§1030. Refunding bonds.

Bonds issued after the limit has been exceeded, for the pur-

in the hands of the city the funds necessary to enable it to pay its obligations." *Reilly v. Albany*, 112 N. Y. 30, 42; 19 N. E. 508.

⁶ *Vickery v. Sioux City*, 104 Fed. 164.

⁷ *Potter v. New Whatcom*, 20 Wash. 589; 72 Am. St. Rep. 135; 56 Pac. 394.

⁸ *Gable v. Altoona*, 200 Pa. St. 15; 49 Atl. 367; *Addyston, etc., Co. v. Corry*, 197 Pa. St. 41; 80 Am. St. Rep. 812; 46 Atl. 1035.

⁹ *Ft. Dodge, etc., Co. v. Ft. Dodge*, 115 Ia. 568; 89 N. W. 7.

¹⁰ *Louisville v. Bitzer*, — Ky. —; 61 L. R. A. 434; 73 S. W. 1115.

¹¹ (*Village of*) *Park Ridge v. Robinson*, 198 Ill. 571; 92 Am. St. Rep. 276; 65 N. E. 104.

¹² *Burlington Savings Bank v. Clinton*, 106 Fed. 269; *State v. Commissioners*, 37 O. S. 526; *Lewis v. Taylor*, 18 Ohio C. C. 443; 10 Ohio C. D. 205; *Addyston, etc., Co. v. Corry*, 197 Pa. St. 41; 80 Am. St. Rep. 812; 46 Atl. 1035; *Belton v. Stirling* (Tex. Civ. App.), 50 S. W. 1027.

pose of taking up pre-existing valid bonds,¹ or warrants,² or a valid indebtedness,³ or a valid judgment,⁴ are valid, even if the bonds are to be sold and their proceeds used to take up valid bonds, and for a short time they increased the debt beyond the limit.⁵ In any event the new bonds must be so dated that double interest is not paid by the city for any period of time.⁶ There is a conflict of authority on this question, however; and some courts hold that the new bonds thus issued are invalid since there is no assurance that the money received from the sale of the new bonds will be applied to discharge the earlier issue.⁷ The correct procedure is said to be to place the new bonds in the hands of a trustee for delivery when the old bonds

¹ *Fairfield v. School District*, 116 Fed. 838; *Lyon Co. v. Bank*, 100 Fed. 337; 40 C. C. A. 391 (affirming 90 Fed. 523); *Keene, etc., Bank v. Lyon Co.*, 97 Fed. 159; *Huron v. Bank*, 86 Fed. 272; 30 C. C. A. 38; 49 L. R. A. 534; *Lake County v. Standley*, 24 Colo. 1; 49 Pac. 23; *Powell v. Madison*, 107 Ind. 106; 8 N. E. 31; *Heins v. Lincoln*, 102 Ia. 69; 71 N. W. 189; *Palmer v. Helena*, 19 Mont. 61; 47 Pac. 209; *Hyde v. Ewert*, — S. D. —; 91 N. W. 474; *National, etc., Ins. Co. v. Mead*, 13 S. D. 342; 83 N. W. 335; affirming on rehearing 13 S. D. 37; 82 N. W. 78.

² *Hotchkiss v. Marion*, 12 Mont. 218; 29 Pac. 821; *Morris v. Taylor*, 31 Or. 62; 49 Pac. 660.

³ *Independent School District v. Rew*, 111 Fed. 1; 55 L. R. A. 364; 49 C. C. A. 198; *Board, etc., of Lake County v. Bank*, 108 Fed. 505; 47 C. C. A. 464; *Board, etc., of Lake County v. Platt*, 79 Fed. 567; 25 C. C. A. 87; *Los Angeles v. Teed*, 112 Cal. 319; 44 Pac. 580; *McCreight v. City of Camden*, 49 S. C. 78; 26 S. E. 984; *Hyde v. Ewert*, — S. D. —; 91 N. W. 474; *West-*

ern, etc., Co. v. Lane, 7 S. D. 599; 65 N. W. 17.

⁴ *Board, etc., of Lake County v. Platt*, 79 Fed. 567; 25 C. C. A. 87; *Board, etc., of Pratt County v. Society, etc.*, 90 Fed. 233; 32 C. C. A. 596; *Jamison v. School District*, 90 Fed. 387. But such bonds are invalid if the judgment has been bonded already. *District of Rock Rapids v. Society, etc.*, 98 Ia. 581; 67 N. W. 370.

⁵ *Huron v. Bank*, 86 Fed. 272; 49 L. R. A. 534; 30 C. C. A. 38; *Los Angeles v. Teed*, 112 Cal. 319; 44 Pac. 580; *Powell v. Madison*, 107 Ind. 106; 8 N. E. 31; *Hotchkiss v. Marion*, 12 Mont. 218; 29 Pac. 821; *Palmer v. Helena*, 19 Mont. 61; 47 Pac. 209; *Poughkeepsie v. Quintard*, 136 N. Y. 275; 32 N. E. 764; *Miller v. School District*, 5 Wyom. 217; 39 Pac. 879.

⁶ *Louisville v. Zimmerman*, 101 Ky. 432; 41 S. W. 428.

⁷ *Doon Township v. Cummins*, 142 U. S. 366; *Heins v. Lincoln*, 102 Ia. 69; 71 N. W. 189; *Birkholz v. Dinnie*, 6 N. D. 511; 72 N. W. 931; *State v. McGraw*, 12 Wash. 541; 41 Pac. 893.

were delivered up and cancelled,⁸ or to exchange the new bonds for the old.⁹ So if the valuation of property has shrunk so that earlier bonds, valid when issued, are in excess of the per cent of the valuation allowed by law, refunding bonds issued to take up such earlier bonds are valid.¹⁰ If the bonds issued in excess of the limit are used in part to refund valid debts, they are valid up to such amount.¹¹ Refunding bonds are invalid if in excess of the limit of such bonds fixed by statute.¹² If the pre-existing bonds are invalid as in excess of the limit of indebtedness the refunding bonds are invalid.¹³ Refunding bonds if issued to the proper parties may be made payable to bearer.¹⁴ Warrants issued for a prior valid debt are not invalid though issued after the limit of indebtedness is exceeded.¹⁵

§1031. Method of valuing property.

The value of property as fixed by the assessing bodies and not its real value must be used to determine whether the limit is exceeded.¹ This has been held to be the last assessed value before the bonds are issued and not before they are voted,² though another theory is that it is "the last assessment preceding the incurring of the indebtedness" and not "the last preceding the completion of the work."³ If the value fixed by

⁸ *Heins v. Lincoln*, 102 Ia. 69; 71 N. W. 189.

⁹ "There was a legal method—the method of exchange—by which they could have issued the bonds without increasing the debt a mill." *Lyon County v. Bank*, 100 Fed. 337, 339.

¹⁰ *Ewert v. Mallery*, — S. D. —; 91 N. W. 479.

¹¹ *Aetna Life Ins. Co. v. Lyon County*, 82 Fed. 929; same case, 95 Fed. 325.

¹² *Guckenberger v. Dexter*, 17 Ohio C. C. 115; affirming 5 Ohio N. P. 429.

¹³ *Holliday v. Hildebrandt*, 97 Ia. 177; 66 N. W. 89.

¹⁴ *West Plains Township v. Sage*, 69 Fed. 943; 16 C. C. A. 553.

¹⁵ *United States v. Capdevielle*, 118 Fed. 809; 55 C. C. A. 421.

¹ *City Water Supply Co. v. Ottumwa*, 120 Fed. 309; *City of Chicago v. Fishburn*, 189 Ill. 367; 59 N. E. 791.

² *Corning v. Meade County*, 102 Fed. 57; 42 C. C. A. 151; *Board of Lake County v. Sutliff*, 97 Fed. 270, 281; 38 C. C. A. 167; *Rathbone v. Board, etc., of Kiowa County*, 83 Fed. 125, 132; 27 C. C. A. 477.

³ *Croyster v. Bayfield County*, 99 Wis. 1; 74 N. W. 635; 74 N. W. 167; overruling *State v. Tomahawk*, 96 Wis. 73; 71 N. W. 86.

local assessors is subsequently modified by lawful authority the assessed value ultimately fixed controls.⁴ Under some statutes even a *bona fide* holder is bound to take notice of the assessment lists,⁵ under others he is justified in relying on the clerk's abstract of assessments without going back to the books of the precinct assessors and boards of equalization.⁶

§1032. Method of ascertaining debt.

The method of ascertaining indebtedness in such cases is important. The principal and unpaid interest due on all outstanding debts on the day that the amount of the new debt is fixed must be ascertained.¹ Interest to become due thereafter must not be counted.² Warrants payable out of funds on hand,³ or out of taxes levied and unappropriated,⁴ even if anticipating a levy already made but not collected,⁵ are not to be counted among the debts to determine if the limit is exceeded. If cash on hand is to be deducted from the amount of indebtedness outstanding warrants must be first deducted from the amount of cash on hand.⁶ Even taxes due from former years but not collected have been deducted from debts,⁷ and it has been held proper to deduct the sinking fund from

⁴ Chicago, etc., Ry. v Wilber, 63 Neb. 624; 88 N. W. 660.

⁵ Holliday v. Hilderbrandt, 97 Ia. 177; 66 N. W. 89.

⁶ Valley County v. McLean, 79 Fed. 728; affirming 74 Fed. 389.

¹ Epping v. Columbus, 117 Ga. 263; 43 S. E. 803.

² Ashland v. Culbertson, 103 Ky. 161; 44 S. W. 441.

³ State v. Tomahawk, 96 Wis. 73; 71 N. W. 86.

⁴ (City of) Cedar Rapids v. Bechtel, 110 Ia. 196; 81 N. W. 468; Adams v. Waterville, 95 Me. 242; 49 Atl. 1042; Spangler v. Leitheiser, 182 Pa. St. 277; 37 Atl. 832; Shannon v. Huron, 9 S. D. 356; 69 N. W. 598; Rogan v. Sherman, 20 R. I. 388; 39 Atl. 568; Kenyon v. Spok-

ane, 17 Wash. 57; 48 Pac. 783. But in State v. Tomahawk, 96 Wis. 73; 71 N. W. 86, it seemed to be held that only warrants against cash on hand were to be counted.

⁵ Darling v. Taylor, 7 N. D. 538; 75 N. W. 766 (citing Grant v. Davenport, 36 Ia. 396; Laurence Co. v. Meade County, 10 S. D. 175; 72 N. W. 405; Shannon v. Huron, 9 S. D. 356; 69 N. W. 598; *In re State Warrants*, 6 S. D. 518; 62 N. W. 101; Spilman v. Parkersburg, 35 W. Va. 605; 14 S. E. 279; disapproving Prince v. Quincy, 105 Ill. 138; 44 Am. Rep. 785).

⁶ Balch v. Beach, 119 Wis. 77; 95 N. W. 132.

⁷ State v. Hopkins, 14 Wash. 59, 66; 44 Pac. 134, 550.

debts.⁸ Taxes uncertain in amount, as licenses for the sale of liquor or taxes on the earnings of a street-railway cannot be deducted from the gross debts.⁹ Taxes which have become a lien but are not yet collectible cannot be counted as an asset.¹⁰ Taxes not yet placed in the hands of the proper officers for collection cannot be deducted.¹¹ Cash on hand is to be deducted from the gross amount of indebtedness.¹² Money borrowed for a specific purpose cannot be counted as an asset of the city, though in the treasury, and though no contract for its expenditure has been made.¹³ There is some conflict on these points, however. It has been held improper to deduct cash on hand,¹⁴ or uncollected taxes,¹⁵ or claims against others.¹⁶ If taxes are not to be deducted, current expenses payable out of the taxes cannot be counted as debts.¹⁷ In determining whether the limit of indebtedness has been reached, invalid claims which are not debts, such as invalid bonds,¹⁸ and illegal warrants,¹⁹ cannot be counted as a part of the indebtedness, even if voluntarily paid.²⁰ Debts of other public corporations cannot be included though such debts may be ultimately paid in whole or in part by taxes imposed upon the property in the public corporation whose debt is in question.

⁸ *Kelly v. Minneapolis*, 63 Minn. 125; 30 L. R. A. 281; 65 N. W. 115.

⁹ *Rice v. Milwaukee*, 100 Wis. 516; 76 N. W. 341.

¹⁰ *Herman v. Oconto*, 110 Wis. 660; 86 N. W. 681.

¹¹ *Balch v. Beach*, 119 Wis. 77; 95 N. W. 132.

¹² *Johnson v. Pawnee County*, 7 Okla. 686; 56 Pac. 701; *Crogster v. Bayfield County*, 99 Wis. 1; 74 N. W. 635; 77 N. W. 167.

¹³ *Herman v. Oconto*, 110 Wis. 660; 86 N. W. 681.

¹⁴ *City Water Supply Co. v. Ottumwa*, 120 Fed. 309; *Chicago v. McDonald*, 176 Ill. 404; 52 N. E. 982.

¹⁵ *Chicago v. McDonald*, 176 Ill.

404; 52 N. E. 982; *Municipal Security Co. v. Baker County*, 33 Or. 338; 54 Pac. 174.

¹⁶ *Jordan v. Andrus*, 27 Mont. 22; 69 Pac. 118.

¹⁷ *O'Bryan v. Owensboro*, — Ky. —; 68 S. W. 858; rehearing denied, 69 S. W. 800; *Redding v. Esplen Borough*, 207 Pa. St. 248; 56 Atl. 431.

¹⁸ *Ashuelot National Bank v. Lyon County*, 81 Fed. 127; *German Ins. Co. v. Manning*, 95 Fed. 597; *State v. Hopkins*, 14 Wash. 59, 66; 44 Pac. 134, 559.

¹⁹ *Keene, etc., Bank v. Lyon County*, 97 Fed. 159.

²⁰ *Lyon County v. Bank*, 87 Fed. 137; 30 C. C. A. 582; affirming 81 Fed. 127.

Thus the debt of a school district co-terminous with a city cannot be counted as city debt,²¹ nor can the debt of a water district be so counted;²² nor the proportionate share of the county debt payable by the city;²³ nor the proportionate share of the state debt.²⁴ Nor are bonds to be paid by a tax on a township which is to be collected and paid over by the county, debts of the county.²⁵ A debt payable solely out of special assessments, not creating a personal liability against the city is not to be counted.²⁶ If a debt is incurred for which the city is primarily liable, it must be counted in determining whether the statutory limit is exceeded, even if the city is to be reimbursed out of local assessments,²⁷ or in some other manner, as in case of bonds to be paid out of the proceeds of the waterworks.²⁸ If a bond is a personal liability against the corporation, it must be counted though provision is made for a tax to pay such bond.²⁹ The legislature may provide specifically that a certain debt is not to be counted in determining the limit of indebtedness.³⁰ If a special provision is made by statute for issuing bonds in excess of the amount usually permitted, as where they are issued for some specific purpose, as for furnishing water,³¹ or where they are issued in a specific manner, as by vote of the electors,³² bonds issued under such special provisions are not to be counted in determining whether the usual limit of in-

²¹ *Heinl v. Terre Haute*, 161 Ind. 44; 66 N. E. 450; *Hyde v. Ewert*, — S. D. —; 91 N. W. 474.

²² *Kennebec Water District v. Waterville*, 96 Me. 234; 52 Atl. 774.

²³ *Todd v. Laurens*, 48 S. C. 395; 26 S. E. 682.

²⁴ *Lancaster School District v. Robinson-Humphrey Co.*, 64 S. C. 545; 42 S. E. 998.

²⁵ *Board, etc., of Monroe Co. v. Harrell*, 147 Ind. 500; 46 N. E. 124.

²⁶ *Davis v. Des Moines*, 71 Ia. 500; 32 N. W. 470.

²⁷ *Burlington Savings Bank v. Clinton*, 111 Fed. 439; *Allen v. Dav-*

enport, 107 Ia. 90; 77 N. W. 532; *Stehmeyer v. Charleston*, 53 S. C. 259; 31 S. E. 322; *Fowler v. Superior*, 85 Wis. 411; 54 N. W. 800.

²⁸ *Joliet v. Alexander*, 194 Ill. 457; 62 N. E. 861.

²⁹ *Ottumwa v. Water Supply Co.*, 119 Fed. 315; 59 L. R. A. 604.

³⁰ *Prince v. Crocker*, 166 Mass. 347; 32 L. R. A. 610; 44 N. E. 446.

³¹ *Los Angeles v. Hance*, 137 Cal. 490; 70 Pac. 475; *Wells v. Sioux Falls*, — S. D. —; 94 N. W. 425.

³² *State v. Blake*, 26 Wash. 237; 66 Pac. 396; *Hazeltine v. Blake*, 26 Wash. 231; 66 Pac. 394.

debtedness has been exceeded. Since the special issue could be made, though the ordinary indebtedness of the city had then reached the statutory limit, it follows that if the special issue is made before the ordinary indebtedness has reached such limit, it should not prevent the ordinary indebtedness from reaching such limit thereafter.³³ Bonds issued under a special statute for erecting a county insane asylum are not to be included to determine whether debt exceeds the limit.³⁴ An unliquidated claim for damages for breach of contract by a contractor cannot be subtracted from the amount due on the contract in estimating debts.³⁵

§1033. Amounts to become due under installment contracts.

A contract lasting for a considerable time calling for the performance of services to the corporation and payment therefor in installments as such services are rendered is, by the weight of authority, a liability of the corporation only for so much as is earned and due and not for future unearned installments, in determining the debts of the corporation.¹ Contracts for a

³³ Keller v. Scranton, 202 Pa. St. 586; 52 Atl. 26; State v. Blake, 26 Wash. 237; 66 Pac. 396; Hazel-tine v. Blake, 26 Wash. 231; 66 Pac. 394.

³⁴ Kyes v. St. Croix Co., 108 Wis. 136; 83 N. W. 637.

³⁵ Herman v. Oconto, 110 Wis. 660; 86 N. W. 681.

¹ Walla Walla v. Water Co., 172 U. S. 1; affirming 60 Fed. 957; Centerville v. Guaranty Co., 118 Fed. 332; 55 C. C. A. 348; Fidelity, etc., Co. v. Water Co., 113 Fed. 560; Anoka, etc., Co. v. Anoka, 109 Fed. 580; Cunningham v. Cleveland, 98 Fed. 657; 39 C. C. A. 211; Kiehl v. South Bend, 76 Fed. 921; 36 L. R. A. 228; Budd v. Budd, 59 Fed. 735; McBean v. Fresno, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358; Smilie v. Fresno Co., 112 Cal. 311; 44 Pac. 556; Higgins

v. San Diego, 118 Cal. 524; 45 Pac. 824; modified on rehearing 50 Pac. 670; People v. Pacheco, 27 Cal. 175; Koppikus v. State Capitol Commissioners, 16 Cal. 248; State v. McCauley, 15 Cal. 429; Denver v. Hubbard, 17 Colo. App. 346; 68 Pac. 993; Carlyle v. Carlyle Water & Power Co., 140 Ill. 445; 29 N. E. 556; East St. Louis v. Coke Co., 98 Ill. 415; 38 Am. Rep. 97; La Porte v. Gamewell, etc., Co., 146 Ind. 466; 58 Am. St. Rep. 359; 35 L. R. A. 686; 45 N. E. 588; City of South Bend v. Reynolds, 155 Ind. 70; 49 L. R. A. 795; 57 N. E. 706; Seward v. Liberty, 142 Ind. 551; 42 N. E. 39; Foland v. Frank-ton, 142 Ind. 546; 41 N. E. 1031; Crowder v. Sullivan, 128 Ind. 486; 13 L. R. A. 647; 28 N. E. 94; Val-paraiso v. Gardner, 97 Ind. 1; 49 Am. Rep. 416; Dively v. Cedar

supply of light and water are the most common examples of this sort. Where this view is taken, the financial condition of the city when any given installment becomes due determines the validity of the contract as to that installment.²

Other authorities hold that all the sums which may be payable under such contract in the future must be added to determine whether the limit is exceeded.³ All the installments to become due under such a contract have been counted as a present debt under a provision forbidding incurring a debt without provision for paying the same.⁴ In many cases it has not been necessary to decide whether installments payable when services are rendered should be added in determining the existing amount of indebtedness. If the limit of indebtedness has already been reached such contract creates a debt for at least the first installment and if no tax is levied to pay such installment the contract is void.⁵ A similar result follows if the

Falls, 27 Ia. 227; *Grant v. Davenport*, 36 Ia. 396; *Creston Waterworks Co. v. Creston*, 101 Ia. 687; 70 N. W. 739; *New Orleans, etc., Co. v. New Orleans*, 42 La. Ann. 188; 7 So. 559; *Smith v. Dedham*, 144 Mass. 177; 10 N. E. 782; *Ludington, etc., Co. v. Ludington*, 119 Mich. 480; 78 N. W. 558; *Lamar Water, etc., Co. v. Lamar*, 140 Mo. 145; 39 S. W. 768; *Lamar, etc., Co. v. Lamar*, 128 Mo. 188; 32 L. R. A. 157; 31 S. W. 756; 26 S. W. 1025; *Saleno v. Neosho*, 127 Mo. 627; 48 Am. St. Rep. 653; 27 L. R. A. 769; 30 S. W. 190; *Weston v. Syracuse*, 17 N. Y. 110; *Territory v. Oklahoma*, 2 Okla. 158; 37 Pac. 1094; *Wade v. Oakmont Borough*, 165 Pa. St. 479; 30 Atl. 959; *Seitzinger v. Tamaqua*, 187 Pa. St. 539; 41 Atl. 454; *Stedman v. Berlin*, 97 Wis. 505; 73 N. W. 57.

² *Keihl v. South Bend*, 76 Fed. 921; 36 L. R. A. 228.

³ *City of Dawson v. Waterworks Co.*, 106 Ga. 696; 32 S. E. 907;

overruling in part *Spann v. Webster Co.*, 64 Ga. 498; *Cabaniss v. Hill*, 74 Ga. 845; *Kuchli v. Electric Co.*, 58 Minn. 418; 49 Am. St. Rep., 523; 59 N. W. 1088; *State v. Helena*, 24 Mont. 521; 81 Am. St. Rep. 453; 55 L. R. A. 336; 63 Pac. 99; *Niles Waterworks v. Niles*, 59 Mich. 311; 26 N. W. 525; *State v. City of Bayonne*, 55 N. J. L. 241; 26 Atl. 81; *Salem Water Co. v. Salem*, 5 Or. 29; *Erie's Appeal*, 91 Pa. St. 398; *Duncan v. Charleston*, 60 S. C. 532; 39 S. E. 265.

⁴ *Dawson v. Waterworks Co.*, 102 Ga. 594; 29 S. E. 755; *State v. Bayonne*, 55 N. J. L. 241; 26 Atl. 81.

⁵ *Chicago v. McDonald*, 176 Ill. 404; 52 N. E. 982; (holding remarks in *East St. Louis Co. v. Coke Co.*, 98 Ill. 415; 38 Am. Rep. 97; and *Carlyle v. Power Co.*, 140 Ill. 445; 29 N. E. 556; obiter as in those cases the limit was not reached when the debt was incurred); *Beard v. Hopkinsville*, 95 Ky. 239; 44 Am. St. Rep. 222; 23 L. R. A. 402;

liability exceeds the appropriation.⁶ Even if the income from the property thus brought,⁷ or from taxes which the city means to levy,⁸ will probably exceed the amount of the annual installments the contract is invalid if it imposes a liability on the city. In other cases a somewhat different view of such a contract is taken. It is held void if it is not shown that the annual revenues from the property will pay for the installments.⁹ If the contract is really one of purchase of a plant outright, the price to be paid under the guise of annual rentals, the total cost must be counted as a debt existing when the contract is made, and if the limit of indebtedness is then exceeded, such contract is invalid.¹⁰ If the annual installments are to be paid out of the receipts from the property bought and no liability attaches to the city, such contract is valid even if the limit of indebtedness is exceeded.¹¹

Other authorities have held that no appropriation in advance for future installments was necessary where a contract could be based only on an appropriation.¹² It is sufficient if an appropriation be made each year to cover the installment accruing in that year.¹³ Under such a statute a five-year contract for lighting was held invalid where there was no appropriation for more than two months.¹⁴ So where the statute requires the certificate of the proper officer that there are sufficient funds

24 S. W. 872; *State v. Atlantic City*, 49 N. J. L. 558; 9 Atl. 759.

⁶ *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665; 15 Atl. 10.

⁷ *Beard v. Hopkinsville*, 95 Ky. 239; 44 Am. St. Rep. 222; 23 L. R. A. 402; 24 S. W. 872; *State ex rel. Read v. Atlantic City*, 49 N. J. L. 558; 9 Atl. 759.

⁸ *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. 249.

⁹ *Eric's Appeal*, 91 Pa. St. 398.

¹⁰ *Baltimore, etc., Ry. v. People*, 200 Ill. 541; 66 N. E. 148; *Spilman v. Parkersburg*, 35 W. Va. 605; 14 S. E. 279; (the electric-light plant to be sold to the city for one dollar when the rentals were paid); *Earles*

v. Wells, 94 Wis. 285; 59 Am. St. Rep. 886; 68 N. W. 964; (the waterworks to become the property of the city when the rentals are paid); (distinguishing *Crowder v. Sullivan*, 128 Ind. 486; 13 L. R. A. 647; 28 N. E. 94; *Smith v. Dedham*, 144 Mass. 177; as true installment contracts).

¹¹ *Valparaiso v. Gardner*, 97 Ind. 1; 49 Am. Rep. 416.

¹² *Lincoln Land Co. v. Grant*, 57 Neb. 70; 77 N. W. 349.

¹³ *Denver v. Hubbard*, 17 Colo. App. 346; 68 Pac. 993.

¹⁴ *Indianapolis v. Wann*, 144 Ind. 175; 31 L. R. A. 743; 42 N. E. 901.

in the treasury, such certificate need not be made for future installments.¹⁵ An ordinance fixing the rate of hydrant rentals is not a contract, does not create a debt, and hence is valid even if the limit is reached.¹⁶

§1034. Validity of debt which causes excess over limit.

When bonds are issued for a debt which, when added to the pre-existing valid debts, exceeds the limit, some authorities hold that the bonds are invalid *in toto*,¹ while others hold that they are good for such amount as added to pre-existing debts equals the legal limit of indebtedness,² and if the bonds are issued simultaneously the deficiency is to be pro rated among the bonds,³ while if issued in different series at different times those first issued are good up to the legal limit.⁴ Other debts which cause the limit to be exceeded are valid up to the limit.⁵ So a contract for the erection of a schoolhouse, which incurs the debt which exceeds the statutory limit, can be enforced up to the limit.⁶

§1035. Popular vote on incurring debt.

Many statutes require a popular vote as a pre-requisite to incurring certain kinds of debts,¹ as to exceed the limit of

¹⁵ *Defiance v. Defiance*, 23 Ohio C. C. 96.

¹⁶ *Danville v. Water Co.*, 180 Ill. 235; 54 N. E. 224; s. c., 178 Ill. 299; 53 N. E. 118.

¹ *Hedges v. Dixon Co.*, 150 U. S. 182; *Massachusetts, etc., Co. v. Cane Creek Tp.*, 45 Fed. 336; *Crogster v. Bayfield Co.*, 99 Wis. 1; 74 N. W. 635; 77 N. W. 167.

² *Columbus v. Woonsocket Institution*, 114 Fed. 162; 52 C. C. A. 118; *Everett v. Independent School District*, 109 Fed. 697; *Rathbone v. Board, etc., of Kiowa Co.*, 83 Fed. 125; 27 C. C. A. 477; *Culbertson v. Fulton*, 127 Ill. 30; 18 N. E. 781; *Winamac School Town v. Hess*, 151

Ind. 229; 50 N. E. 81; *Turner v. Woodson Co.*, 27 Kan. 314.

³ *Columbus v. Woonsocket Institution*, 114 Fed. 162; 52 C. C. A. 118; *Francis v. Howard Co.*, 50 Fed. 44; *Nolan Co. v. State*, 83 Tex. 182; 17 S. W. 823.

⁴ *Citizens' Bank v. Terrell*, 78 Tex. 450; 14 S. W. 1003.

⁵ *Chicago v. McDonald*, 176 Ill. 404; 52 N. E. 982; *Webb City, etc., Co. v. Carterville*, 153 Mo. 128; 54 S. W. 557.

⁶ *McGillivray v. School District*, 112 Wis. 354; 88 Am. St. Rep. 969; 58 L. R. A. 100; 88 N. W. 310.

¹ *State v. Kansas City*, 60 Kan. 518; 57 Pac. 118; *Farr v. Grand*

indebtedness.² An election is necessary only when required by statute.³ Thus, if an election is necessary for the validity of an issue of bonds amounting to one hundred thousand dollars or over, the council may issue a less amount for a proper purpose without an election, although the total bonded indebtedness exceeds such limit.⁴ Where the statute requires a vote on purchases over \$500, such provision cannot be evaded by giving several warrants for the purchase each less than \$500.⁵

Such provisions usually apply only to the creation of new debts and not to the refunding of old ones,⁶ but if the rate of interest is increased an election is necessary for refunding.⁷ A contract by which a viaduct is to be erected without any expense to the city, but the city assumes the damages to abutting property incurs debts within the meaning of a constitutional provision requiring an election.⁸ If an election on the question of issuing aid bonds is held before the adoption of a constitutional provision forbidding such issue and the bonds are issued afterwards they are invalid.⁹ The bonds must be restricted to the

Rapids, 112 Mich. 99; 70 N. W. 411; Appleton Waterworks Co. v. Appleton, 116 Wis. 363; 93 N. W. 262. Issuing bonds, Belknap v. Louisville, 99 Ky. 474; 59 Am. St. Rep. 478; 34 L. R. A. 256; 36 S. W. 1118; Roye v. Columbia, 192 Pa. St. 146; 43 Atl. 597. Constructing sewers, Kennedy v. Belmar, 61 N. J. L. 20; 38 Atl. 756. Constructing roads, Theis v. Board, etc., of Washita Co., 9 Okl. 643; 60 Pac. 505. Contract for school house, Grady v. Pruitt, 111 Ky. 100; 63 S. W. 283. Contract for waterworks, Painter v. Norfolk, 62 Neb. 330; 87 N. W. 31; Defiance v. Defiance, 23 Ohio C. C. 96; Duncan v. Charleston, 60 S. C. 532; 39 S. E. 265. Contract for water supply, Harrodsburg v. Water Co. (Ky.), 64 S. W. 658.

² Christie v. Duluth, 82 Minn. 202; 84 N. W. 754; State v. Pull-

man, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265.

³ Board, etc., of Seward Co. v. Ins. Co., 90 Fed. 222; 32 C. C. A. 585; Klamath Falls v. Sachs, 35 Or. 325; 76 Am. St. Rep. 501; 57 Pac. 329.

⁴ Le Tourneau v. Duluth, 85 Minn. 219; 88 N. W. 529.

⁵ Fire Extinguisher Mfg. Co. v. Perry, 8 Okl. 429; 58 Pac. 635.

⁶ Geer v. Ouray Co., 97 Fed. 435; 38 C. C. A. 250; Lexington v. Bank, 75 Miss. 1; 22 So. 291; McCreight v. City of Camden, 49 S. C. 78; 26 S. E. 984.

⁷ Broadfoot v. Fayetteville, 128 N. C. 529; 39 S. E. 20.

⁸ Keller v. Scranton, 200 Pa. St. 130; 86 Am. St. Rep. 708; 49 Atl. 781.

⁹ Stebbins v. Perry Co., 167 Ill. 567; 47 N. E. 1048; reversing 66 Ill. App. 427. (The prior election

purpose for which the special tax is voted.¹⁰ A vote to buy land and build market does not give power to build on land already owned.¹¹ The statute may limit the time within which the validity of a bond election may be attacked.¹²

§1036. Form of resolution.

The question to be voted on is usually submitted by ordinance or resolution. The resolution or ordinance must show the purpose for which the debt is to be incurred.¹ Describing the debt to be bonded as "outstanding indebtedness other than municipal bonds" is not sufficient.² The amount of the debt must be given,³ but if the rate of interest is given it is not necessary to compute it.⁴ In some jurisdictions the proposition submitted must specify the exact amount to be issued, and not merely the maximum amount for which authority is wished;⁵ in others it is sufficient to state the maximum amount.⁶

§1037. Formalities of election.—Voting on several propositions.

The formalities necessary to a valid election depend so entirely on the details of local statutes that no general statement of them is practicable. In the absence of statute, more than one proposition may be submitted at one election if the electors are given a fair chance to vote on each issue separately. A vote may be taken at the same time on two separate bond issues,¹ or two propositions for incurring indebtedness,² but

was in this case not authorized by law.)

¹⁰ Callaghan v. Alexandria, 52 La. Ann. 1013; 27 So. 540.

¹¹ Tukey v. Omaha, 54 Neb. 370; 69 Am. St. Rep. 711; 74 N. W. 613.

¹² Gray v. Bourgeois, 107 La. 671; 32 So. 42.

¹ *In re* Statehouse Bonds, 19 R. I. 393; 33 Atl. 870.

² Coffin v. Richards, 6 Ida 741, 744; 59 Pac. 562.

³ Dawson v. Waterworks Co., 106 Ga. 696; 32 S. E. 907.

⁴ Ponder v. Forsyth, 96 Ga. 572; 23 S. E. 498.

⁵ State *ex rel.* Schultze v. Manchester Township, 61 N. J. L. 513; 40 Atl. 589.

⁶ Chicago, etc., Ry. v. Wilber, 63 Neb. 624; 88 N. W. 660.

¹ Maybin v. Biloxi, 77 Miss. 673; 28 So. 566.

² Wetzell v. Paducah, 117 Fed. 647.

the electors must have a chance to vote on each separately.³

§1038. Notice of election.

Notice is necessary only if required by statute.¹ Notice of the indebtedness to be voted on is often necessary by statute. An election is void if legal notice is not given substantially in the form and manner required by statute.² But where the statute requires bond by the commissioners, before any act done, and the election must be held before such bond, it is valid if held before.³ The notice must advise the electors of the proposition to be voted on.⁴ Technical accuracy in the notice is not necessary if it conveys in a reasonably clear manner the information necessary.⁵ Substantial compliance with the statutory requirements of notice is sufficient.⁶ If ten days' notice is required, thirty days' notice is sufficient.⁷ If five weeks' notice is required, notice once a week for five weeks is sufficient even if the first notice was given only thirty-two days before the election.⁸ If the law requires fifteen days' notice, it is sufficient if notices are given nineteen, twelve, and five days respectively before the election.⁹ Omission to state the hours of the election on the question of the bond issue does not invalidate the notice where this omission may be supplied from the regular election notices.¹⁰ If notice of the election is given as required by statute, omissions

³ *City of Denver v. Hayes*, 28 Colo. 110; 63 Pac. 311; *Cain v. Smith*, 117 Ga. 902; 44 S. E. 3.

¹ *Asheville v. Webb*, 134 N. C. 72; 46 S. E. 19.

² *Demaree v. Johnson*, 150 Ind. 419, 424; 49 N. E. 1062; rehearing denied, judgment modified, 50 N. E. 376. Or in New Jersey if held in less than twenty days after the resolution becomes effective. *State ex rel. Mittag v. Park Ridge*, 61 N. J. L. 151; 38 Atl. 750.

³ *Village v. Champlain v. McCrea*, 165 N. Y. 264; 59 N. E. 83.

⁴ *Wilkins v. Waynesboro*, 116 Ga.

359; 42 S. E. 767; *Smith v. Dublin*, 113 Ga. 833; 39 S. E. 327.

⁵ *Packwood v. Kittitas Co.*, 15 Wash. 88; 55 Am. St. Rep. 875; 33 L. R. A. 673; 45 Pac. 640.

⁶ *Sommercamp v. Kelly*, — Ida. —; 71 Pac. 147.

⁷ *Hesseltine v. Wilbur*, 29 Wash. 407; 69 Pac. 1094.

⁸ *State v. Weston*, — Neb. —; 93 N. W. 728.

⁹ *State v. Allen*, — Mo. —; 77 S. W. 868.

¹⁰ *Packwood v. Kittitas Co.*, 15 Wash. 88; 55 Am. St. Rep. 875; 33 L. R. A. 673; 45 Pac. 640.

to comply with the provisions of the resolution of the council calling such election may be waived by the council.¹¹

§1039. Number of votes necessary.

The number of votes which must be cast for the proposition for indebtedness in order to carry it depends on statute and is usually either a majority or two thirds. Where a general statute provided that a majority should be sufficient, and the charter of a railroad provided that counties through which it passed might aid it on a two-thirds vote, it was held that a county through which it did not pass might aid it by a majority vote.¹ The question most frequently arising in this connection is of what votes this majority or two thirds consists. It usually means a majority of those voting, not of those authorized to vote.² If other questions are voted on at the same election as the question of indebtedness, some statutes are construed to require a majority of all votes cast at such election,³ others to require only a majority on two thirds of the votes cast on the question of the bond issue.⁴ Where the statute required the assent of "two thirds of the voters thereof, voting at an election to be held for that purpose," it was held to require only two thirds of those voting on the bond question and not two thirds of all voting at that election.⁵ The statute may require two-thirds of those authorized to vote. The

¹¹ *Hamilton v. Detroit*, 83 Minn. 119; 85 N. W. 933.

¹ *Carpenter v. Greene County*, 130 Ala. 613; 29 So. 194.

² *State v. Ruhe*, 24 Nev. 251; 52 Pac. 274.

³ *Stebbins v. Grand Rapids*, 108 Mich. 693; 66 N. W. 594; *Bryan v. City of Lincoln et al.*, 50 Neb. 620; 35 L. R. A. 752; 70 N. W. 252; *State ex rel. v. Cornell*, 54 Neb. 72; 74 N. W. 432.

⁴ *Carroll Co. v. Smith*, 111 U. S. 556; *Cass Co. v. Johnston*, 95 U. S. 360; *Armour, etc., Co. v. Finney Co.*, 41 Fed. 321; *Howland v. San*

Joaquin Co., 109 Cal. 152; 41 Pac. 864; *Holcomb v. Davis*, 56 Ill. 413; *Marion County v. Winkley*, 29 Kan. 36; *Smith v. Proctor*, 130 N. Y. 319; 14 L. R. A. 403; 29 N. E. 312; *Metcalfe v. Seattle*, 1 Wash. 297; 25 Pac. 1010.

⁵ *Montgomery County v. Trimble*, 104 Ky. 629; 42 L. R. A. 738; 47 S. W. 773; overruling *Belknap v. Louisville*, 99 Ky. 474; 59 Am. St. Rep. 478; 34 L. R. A. 256; 36 S. W. 1118; *McGoodwin v. Franklin (Ky.)*, 38 S. W. 481; *Owensboro v. Baker (Ky.)*, 37 S. W. 1129.

number authorized is to be determined by the registration lists, if there are such lists; and if not by the votes at the last election, if greater in number than those cast at the bond election,⁶ but if the number cast at the bond election is greater, that number will control.⁷

§1040. Method of holding election.

Statutes usually provide with considerable detail the method of holding the election. Registration of voters at such election may be required.¹ In such case *bona fide* holders are not bound to go back of the registration books, but may rely on the certificate of the registrar as to the legality of the registration.² Canvassing of the returns by the county board is not necessary if the statute does not require it.³ The vote may be recanvassed if the election laws allow it and the bonds have not been delivered.⁴ Slight irregularities in the form of the ballot not tending to mislead the voters do not invalidate the election. Thus where some ballots were for "electric light contract and tax levy" and others for "electric light contract,"⁵ or where the ballots were marked "For taxation. Yes —. Against taxation. No —," the voter to mark in the blank,⁶ the election was held valid. The ordinary election laws apply.⁷ Irregularity in holding an election in one ward only does not necessarily invalidate the election.⁸

§1041. Petition of voters.

Under other statutes there must be a petition signed by a majority of the qualified voters to authorize certain contracts.¹

⁶ Wilkins v. Waynesboro, 116 Ga. 359; 42 S. E. 767.

⁷ McKnight v. Senoia, 115 Ga. 915; 42 S. E. 256.

¹ Pacific Improvement Co. v. Clarksdale, 74 Fed. 528; 20 C. C. A. 635.

² Claybrook v. Rockingham Co., 117 N. C. 456; 23 S. E. 360; same case, 114 N. C. 453; 19 S. E. 593.

³ Brown v. Ingalls Township, 86 Fed. 261; 30 C. C. A. 27.

⁴ Louisville v. Park Commissioners, 112 Ky. 409; 65 S. W. 860.

⁵ Lebanon, etc., Co. v. Lebanon, 163 Mo. 246; 63 S. W. 809.

⁶ Bras v. McConnell, 114 Ia. 401; 87 N. W. 290.

⁷ Hammond v. San Leandro, 135 Cal. 450; 67 Pac. 692; (as to the time of closing the polls).

⁸ Lebanon, etc., Co. v. Lebanon, 163 Mo. 246; 63 S. W. 809.

¹ *Ex rel.* McWhirter v. Newberry,

If so many withdraw their consent before action is taken that less than the requisite number is left, authority to make such contract is lacking.² A petition that the municipality let contracts and that three thousand dollars will be necessary therefor and will benefit the town is sufficient to indicate the wish of the petitioners that the municipality borrow such sum.³ If the petition must be signed by freeholders the name of one owning no property in such municipality and living on his wife's property therein is not sufficient.⁴

§1042. Examples of ultra vires contracts in general.

A public corporation has no implied authority to make contracts which are not necessary to carry out the governmental purposes for which it was formed. Thus power to buy land for its use and benefit is not power to buy for investment;¹ nor for making a gift thereof,² nor can a county bind itself by a warranty in its deed,³ nor convey realty without an express grant of power.⁴ A public corporation cannot under general power contract that it will abstain from exercising powers necessary in conducting local government.⁵ It cannot contract away its police power,⁶ or its power to tax.⁷ A city cannot bind itself for all future time; as to maintain a bridge,⁸ or a well in a public street,⁹ nor can a city covenant to keep a whole

47 S. C. 418; *sub nom.* State *ex rel.* McWhirter v. Evans, 25 S. E. 216.

² Biddle v. Riverton, 58 N. J. L. 289; 33 Atl. 279.

³ Hubbell v. Custer City, 15 S. D. 55; 87 N. W. 520.

⁴ Hamilton v. Detroit, 85 Minn. 83; 88 N. W. 419.

¹ Hunnicutt v. Atlanta, 104 Ga. 1; 30 S. E. 500.

² Markley v. Mineral City, 58 O. S. 430; 65 Am. St. Rep. 776; 51 N. E. 28.

³ Harrison v. Palo Alto Co., 104 Ia. 383; 73 N. W. 872; (citing Findla v. San Francisco, 13 Cal. 534).

⁴ Jefferson County v. Grafton, 74 Miss. 435; 60 Am. St. Rep. 516; 36 L. R. A. 798; 21 So. 247.

⁵ McBean v. Fresno, 112 Cal. 159; 53 Am. St. Rep. 191; 31 L. R. A. 794; 44 Pac. 358; Flynn v. Water Co., 74 Minn. 180; 77 N. W. 38; 78 N. W. 106.

⁶ Pittsburg, etc., Ry. Co. v. Hood, 94 Fed. 618; 36 C. C. A. 423.

⁷ Altgelt v. San Antonio, 81 Tex. 436; 13 L. R. A. 383; 17 S. W. 75.

⁸ State v. Ry., 80 Minn. 108; 50 L. R. A. 656; 83 N. W. 32.

⁹ Snyder v. Mt. Pulaski, 176 Ill. 397; 44 L. R. A. 407; 52 N. E. 62.

street open,¹⁰ nor guarantee against all damage from the backing up of a sewer.¹¹ A contract whereby a railroad agrees to pay to the city all damages due to abutting property owners for vacating a street is unenforceable.¹² So a contract entered into by a city for paving as a street a strip of ground in which the city has no right of way is *ultra vires*.¹³ Under general power to dispose of its property it cannot lease its waterworks.¹⁴ While a city may grant a franchise, and such contract is valid and binding on the city,¹⁵ it has no power, in the absence of express statutory grant, to contract for an exclusive franchise.¹⁶ General language does not imply power to grant exclusive privileges.¹⁷ Thus an exclusive grant of the right to furnish water for a term of years is invalid.¹⁸ So a public corporation cannot contract for a monopoly of gas.¹⁹ A public corporation cannot by contract assume liabilities imposed by law upon other public bodies and not upon itself. Thus a city cannot offer a reward for conviction for a state offense,²⁰ or issue bonds for a county jail.²¹ County bonds for road purposes cannot be issued where a city within the county is not subject to the road tax,²² nor for a state institution.²³

¹⁰ Penley v. Auburn, 85 Me. 278; 21 L. R. A. 657; 27 Atl. 158.

¹¹ Nashville v. Sutherland, 92 Tenn. 335; 36 Am. St. Rep. 88; 19 L. R. A. 619; 21 S. W. 674.

¹² New Haven v. R. R., 62 Conn. 252; 18 L. R. A. 256; 25 Atl. 316.

¹³ Sang v. Duluth, 58 Minn. 81; 59 N. W. 878.

¹⁴ Ogden City v. Irrigation Co., 16 Utah 440; 41 L. R. A. 305; 52 Pac. 697; citing Huron Waterworks Co. v. Huron, 7 S. D. 9; 58 Am. St. Rep. 817; 30 L. R. A. 848; 62 N. W. 975.

¹⁵ People v. Telephone Co., 192 Ill. 307; 85 Am. St. Rep. 338; 61 N. E. 428; Baxter Springs v. Power Co., 64 Kan. 591; 68 Pac. 63.

¹⁶ Syracuse Water Co. v. Syracuse, 116 N. Y. 167; 5 L. R. A. 546; 22 N. E. 381; Thrift v. Elizabeth

City, 122 N. C. 31; 44 L. R. A. 427; 30 S. E. 349; Altgelt v. San Antonio, 81 Tex. 436; 13 L. R. A. 383; 17 S. W. 75.

¹⁷ Detroit, etc., Ry. Co. v. Detroit, 110 Mich. 384; 64 Am. St. Rep. 350; 35 L. R. A. 859; 68 N. W. 304; affirmed 171 U. S. 48.

¹⁸ Altgelt v. San Antonio, 81 Tex. 436; 13 L. R. A. 383; 17 S. W. 75.

¹⁹ Parfitt v. Ferguson, 159 N. Y. 111; 53 N. E. 707.

²⁰ Winchester v. Redmond, 93 Va. 711; 57 Am. St. Rep. 822; 25 S. E. 1001.

²¹ Myers v. Jeffersonville, 145 Ind. 431; 44 N. E. 452.

²² Devine v. Board, etc., of Sacramento Co., 121 Cal. 670; 54 Pac. 262.

²³ Oberlin v. Wasson, 52 O. S. 610; 44 N. E. 1143.

§1043. Contracts for speculation.

A public corporation cannot by contract assume liabilities of private corporations or individuals, even to induce such action on their part as will benefit the individuals who comprise the public body. Such aid cannot be given indirectly by agreeing to pay a given rental for a waterworks if the lessor builds a railroad.¹ However, power to build its own road is not subject to the objection that it is aiding a railroad.² A public corporation cannot buy land to donate to a manufacturing plant,³ nor issue bonds for such purpose,⁴ nor pledge itself to aid an association,⁵ nor contract to secure a right of way for a railroad,⁶ nor contract to pay stenographer's fees in an action to which the city is not a party and from which no liability could arise,⁷ nor erect a building on the land of another,⁸ nor contract to build a bridge outside its own limits, not for the benefit of its own citizens but to draw trade.⁹ A city cannot agree to extend a lighting contract if the contractor will erect a plant to produce electric power for operating machinery for individuals, as this is not contracting for the benefit of the municipality.¹⁰ A public corporation cannot contract for obtaining the location of the state capital,¹¹ or the county-seat.¹² A city cannot em-

¹ *Higgins v. San Diego*, 118 Cal. 524, 537; 45 Pac. 824; modified on rehearing, 50 Pac. 670.

² *Sun, etc., Association v. Mayor, etc., of New York*, 152 N. Y. 257; 37 L. R. A. 788; 46 N. E. 499; (citing *Walker v. Cincinnati*, 21 O. S. 14; 8 Am. Rep. 24; *Taylor v. Ross Co.*, 23 O. S. 22; *Wyscaver v. Atkinson*, 37 O. S. 80; *Counterman v. Dublin Township*, 38 O. S. 515).

³ *Markley v. Mineral City*, 58 O. S. 430; 65 Am. St. Rep. 776; 51 N. E. 28.

⁴ *Adams v. Nemeyer*, 54 O. S. 614; 46 N. E. 1154.

⁵ *Park v. Modern Woodmen*, 181 Ill. 214; 54 N. E. 932.

⁶ *Covington, etc., Ry. v. Athens*, 85 Ga. 367; 11 S. E. 663.

⁷ *City of Chicago v. Williams*, 182 Ill. 135; 55 N. E. 123; reversing 80 Ill. App. 33.

⁸ *State ex rel. Knight v. Cape May*, 61 N. J. L. 149; 38 Atl. 752.

⁹ *Manning v. Devil's Lake*. — N. D. —; 99 N. W. 51.

¹⁰ *Mealey v. Hagerstown*, 92 Md. 741; 48 Atl. 746.

¹¹ *John Hancock, etc., Co. v. Huron*, 80 Fed. 652; (bonds issued for such expenses, as for printing matter to be used in securing to the location of the state capital in that city; *Shannon v. Huron*, 9 S. D. 356; 69 N. W. 598.

¹² *Schneck v. Jeffersonville*, 152 Ind. 204; 52 N. E. 212.

ploy an attorney to appear before the Secretary of the Interior to try to induce him to locate a railroad through its limits.¹³ A public corporation cannot contract for the expenses of a committee to represent the city at the convention of American municipalities,¹⁴ nor for the expenses of members of a council committee to visit cities on municipal matters,¹⁵ or for placing a stone from the county in the state's building at the World's Fair,¹⁶ or for the entertainment of invited guests at an encampment of the Grand Army of the Republic,¹⁷ or at an exposition.¹⁸

§1044. Loan of credit.

Credit cannot be loaned directly or indirectly without express authority.¹ Thus a contract for issuing interest-bearing warrants to the contractor on the execution of the contract to enable him to raise money to carry out the contract, the contractor to repay the interest at the final settlement is invalid.² A contract of guaranty, entered into by a municipal corporation is ordinarily *ultra vires*.³ Power to erect a lighting plant is not implied power to guarantee bonds of an electric light company.⁴ However, giving its notes to pay assessments in a mutual insurance company of which it is a member is not a gratuity or

¹³ Field v. Shawnee, 7 Okla. 73; 54 Pac. 318.

¹⁴ Waters v. Bonvouloir, 172 Mass. 286; 52 N. E. 500.

¹⁵ James v. Seattle, 22 Wash. 654; 79 Am. St. Rep. 957; 62 Pac. 84.

¹⁶ Hayes v. Douglass Co., 92 Wis. 429; 53 Am. St. Rep. 926; 31 L. R. A. 213; 65 N. W. 482. *Contra*, a county may contract for exhibiting its products at a state centennial outside the county limits. State v. Cornell, 53 Neb. 556; 68 Am. St. Rep. 629; 74 N. W. 59; Shelby Co. v. Exposition Co., 96 Tenn. 653; 33 L. R. A. 717; 36 S. W. 694.

¹⁷ Stem v. Cincinnati, 6 Ohio N. P. 15; (citing Tash v. Adams, 10 Cush. (Mass.) 252; Hood v. Lynn,

1 Allen (Mass.) 103; Claflin v. Hopinton, 4 Gray (Mass.) 502; Hodges v. Buffalo, 2 Denio (N. Y.) 110). See Daggett v. Colgan, 92 Cal. 53; 27 Am. St. Rep. 95; 14 L. R. A. 474; 28 Pac. 51.

¹⁸ Moore v. Hoffman, 2 Cinn. Sup. Ct. 453.

¹ Scott v. La Porte, — Ind. —; 68 N. E. 278.

² Moran v. Thompson, 20 Wash. 525; 56 Pac. 29.

³ Nashville v. Sutherland Co., 92 Tenn. 335; 36 Am. St. Rep. 88; 19 L. R. A. 619; 21 S. W. 674.

⁴ Lynchburg, etc., Co. v. Dameron, 95 Va. 545; 28 S. E. 951; citing Blake v. Mayor, etc., of Macon, 53 Ga. 172.

a loan of credit.⁵ Under some state constitutions, it is held that the legislature cannot authorize a loan of credit,⁶ or a gift to a private enterprise.⁷ In other states this power may be given expressly by statute.⁸ Issuing bonds in payment of a valid stock subscription has been held not to be a loan of credit;⁹ and giving bonds for local improvements, the bonds to be paid out of the assessments is not objectionable as a loan of credit.¹⁰

§1045. Form necessary in contracts of public corporations.

Under many statutes contracts of public corporations must be made in accordance with certain specified formalities. Under some statutes they must be in writing,¹ in which case oral contracts are invalid,² and oral modifications of written contracts are invalid.³ Under such statute the acceptance of a bid is not a contract as no contract exists until reduced to writing and executed.⁴ A statute which provides that no contract shall bind the city unless in writing and by order of the council is exclusive, and the requirements of a valid contract are not added to by another section requiring contracts to be countersigned by the finance committee, numbered and registered.⁵ If a written contract is entered into it is valid, although the statute requires it to be executed in duplicate.⁶ Under other

⁵ French v. Milville, 67 N. J. L. 349; 51 Atl. 1109; memorandum opinion affirming 66 N. J. L. 392; 49 Atl. 465.

⁶ Coleman v. Broad River Township, 50 S. C. 321; 27 S. E. 774.

⁷ Sutherland-Innes Co. v. Evart, 86 Fed. 597; 30 C. C. A. 305.

⁸ Neale v. Wood Co., 43 W. Va., 90; 27 S. E. 370.

⁹ Johnson City v. R. R. Co., 100 Tenn. 138; 44 S. W. 670; distinguishing Colburn v. R. R., 94 Tenn. 43; 28 S. W. 298; as a loan of credit as well as a stock subscription.

¹⁰ Redmon v. Chacey, 7 N. D. 231; 73 N. W. 1081.

¹ Times Publishing Co. v. Weatherby, 139 Cal. 618; 73 Pac. 465;

Frick v. Los Angeles, 115 Cal. 512; 47 Pac. 250; Logansport v. Blake-more, 17 Ind. 318; Starkey v. Minneapolis, 19 Minn. 203; Aurora Water Co. v. Aurora, 129 Mo. 540; 31 S. W. 946; Savage v. Springfield, 83 Mo. App. 323; Arnott v. Spokane, 6 Wash. 442; 33 Pac. 1063.

² Smart v. Philadelphia, 205 Pa. St. 329; 54 Atl. 1025.

³ McManus v. Philadelphia, 201 Pa. St. 619; 51 Atl. 320.

⁴ Mann v. Rochester, 29 Ind. App. 12; 63 N. E. 874.

⁵ Goodyear Rubber Co. v. Eureka, 135 Cal. 613; 67 Pac. 1043.

⁶ Saleno v. Neosho, 127 Mo. 627; 48 Am. St. Rep. 653; 27 L. R. A. 769; 30 S. W. 190.

statutes such contracts must be entered upon the public records, in which case a verbal contract employing a quarantine guard is invalid.⁷ But where the statute requires a public contract to be recorded after it is entered into, omission so to record it, not being the fault of the contractor does not invalidate it.⁸ So if a mandatory statute requires an ordinance, a contract cannot be made by resolution;⁹ though otherwise it may be made by resolution,¹⁰ or on motion.¹¹ If the statute requires the ye and nay vote of the council to be taken and entered on the record on the passage of a resolution to accept a bid for bonds, an acceptance of such a bid without such formality is invalid.¹² Where the statute requires the purpose for which a bond is issued to appear on its face, it is sufficient if they purport to be "refunding bonds," to "extend the time of payment" of certain debts.¹³ Where the statute requires the superintendent of streets to fix the date of beginning work within fifteen days from the date of the contract, it is not necessary that the exact date be fixed, if a time within the limit is indicated;¹⁴ and the date may be fixed in the contract.¹⁵

§1046. Advertisement of public contracts.

Statutes often require advertisement for bids in public contracts exceeding a certain amount and of certain classes. Contracts of these classes entered into without complying with

⁷ Marion Co. v. Woulard, 77 Miss. 343; 27 So. 619.

⁸ Diggins v. Hartshorne, 108 Cal. 154; 41 Pac. 283.

⁹ Noel v. San Antonio, 11 Tex. Civ. App. 580; 33 S. W. 263.

¹⁰ Illinois, etc., Bank v. Arkansas City, 76 Fed. 271; 22 C. C. A. 171; 34 L. R. A. 518; City of Alma v. Bank, 60 Fed. 203; Elyria, etc., Co. v. Elyria, 57 O. S. 374; 49 N. E. 335. (But one resolution cannot provide for the issuing and sale of bonds to buy waterworks and erect new ones.)

¹¹ Illinois, etc., Bank v. Arkansas

City, 76 Fed. 271; 22 C. C. A. 171; 34 L. R. A. 518; Wrought Iron Bridge Co. v. Arkansas City, 59 Kan. 259; 52 Pac. 869.

¹² Coffin v. Portland, 43 Fed. 411.

¹³ Village of Kent v. Dana, 100 Fed. 56; 40 C. C. A. 281. But in Keehn v. Wooster, 13 Ohio C. C. 270, it was held insufficient to recite that it was issued to refund legal debts.

¹⁴ Williams v. Bergin, 127 Cal. 578; 60 Pac. 164; reversing on rehearing 57 Pac. 1072.

¹⁵ Ramish v. Hartwell, 126 Cal. 443; 58 Pac. 920.

these formalities are unenforceable.¹ Advertisement for bids is not necessary unless the statute requires it.² A statute requiring advertisement for one class of public contracts, as for work on buildings or streets does not include other classes of contracts, as for electric lighting.³ If the law does not require advertisement but the body empowered to act requires it, the same body may waive any defect or irregularity in advertisement.⁴ If the notice required by law is fairly given irregularly in giving it does not make a contract thereunder void.⁵ Thus if the clerk, instead of the council, fixed the time for which the notice was to be given, and the council let the contract under such notice,⁶ or if the council, as required by law, designated the paper in which the advertisement should be given, but ordered a "re-advertisement" without expressly stating that it was to be in the same paper,⁷ or if advertisement is made in the name of the wrong department,⁸ or if it does not state when bids would be opened and where there is a uniform and known custom to open bids at the end of the time fixed for receiving them,⁹ such notice is sufficient. If the statute requires a notice thirty days before the contract is let, a notice given twenty-nine days before the bids are opened, but more than thirty days before the contract is let, is sufficient.¹⁰ Contracts made pursuant to such advertisement are valid. But notice must

¹ Brooks v. Satterlee, 49 Cal. 289; Bowditch v. Superintendent, etc., of Boston, 168 Mass. 239; 46 N. E. 1026; Town of Clarksdale v. Broadus, 77 Miss. 667; 28 So. 954; Barber, etc., Co. v. Hezel, 155 Mo. 391; 48 L. R. A. 285; 56 S. W. 449; Fairbanks v. North Bend, — Neb. —; 94 N. W. 537; Cincinnati v. Guckenberger, 60 O. S. 353; 54 N. E. 376; State v. Butler Co. 10 Ohio C. D. 118; Duryee v. Friars, 18 Wash. 55; 50 Pac. 583; (even when bonds are to be exchanged for warrants).

² Crowder v. Sullivan, 128 Ind. 486; 13 L. R. A. 647; 28 N. E. 94; Gillette, etc., Co. v. Board, etc.,

of Aitkin Co., 69 Minn. 297; 72 N. W. 123.

³ Reid v. Trowbridge, 78 Miss. 542; 29 So. 167.

⁴ Augusta v. McKibben (Ky.), 60 S. W. 291.

⁵ Belser v. Allman, 134 Cal. 399; 66 Pac. 492.

⁶ Belser v. Allman, 134 Cal. 399; 66 Pac. 492.

⁷ Ellis v. Witmer, 134 Cal. 249; 66 Pac. 301.

⁸ Potts v. Philadelphia, 195 Pa. St. 619; 46 Atl. 195.

⁹ Cass Farm Co. v. Detroit, 124 Mich. 433; 83 N. W. 108.

¹⁰ Newport News v. Potter, 122 Fed. 321; 58 C. C. A. 483.

be given substantially as required by law. Advertisement in a paper not authorized by law is ineffectual.¹¹ So if advertisement is to be given unless the mayor dispenses with it, his approval after a contract is let without advertisement does not make such contract valid.¹² A re-advertisement is equivalent to a rejection of bids and avoids a contract under the first advertisement.¹³ After a contract is let a change in details may be made in some jurisdictions without re-advertising,¹⁴ at least if the extra expenditure does not exceed the sum for the expenditure of which the statute requires advertising.¹⁵ It has been held that a requirement for advertising for bids does not apply to a contract to complete a contract abandoned by the original contractor.¹⁶

§1047. Specifications.

Statutes often require plans and specifications of the work to be done to be prepared before contracts are let therefor. The object of this is usually to enable competing contractors to know exactly what they are to bid on.¹ Specifications must therefore be reasonably clear and free from ambiguity.² Under such statutes a statement of the location and capacity of a garbage crematory is insufficient, as without plans it is impossible to say who is the lowest bidder.³ So a notice for bids for collecting garbage, the bidders to submit their own plans as to the method of disposing of it is insufficient.⁴ So it is insufficient where the plans but not the location of a court house are sub-

¹¹ *California, etc., Co. v. Moran*, 128 Cal. 373; 60 Pac. 969.

¹² *Warren v. Boston*, 181 Mass. 6; 62 N. E. 951.

¹³ *Johnson v. Rock Hill*, 57 S. C. 371; 35 S. E. 568.

¹⁴ *Commissioners v. Heating Co.*, 128 Ind. 240; 12 L. R. A. 502; 27 N. E. 612.

¹⁵ *Brady v. Mayor, etc., of New York*, 112 N. Y. 480; 2 L. R. A. 751; 20 N. E. 390.

¹⁶ *Newport News v. Potter*, 122 Fed. 321; 58 C. C. A. 483.

¹ *Ertle v. Leary*, 114 Cal. 238; 46 Pac. 1; *Andrews v. Ada Co.*, 7 Ida. 453; 63 Pac. 592; *Wells v. Burnham*, 20 Wis. 112; *Kneeland v. Furlong*, 20 Wis. 437.

² *Piedmont Paving Co. v. Allmar*, 136 Cal. 88; 68 Pac. 493.

³ *Ricketson v. Milwaukee*, 105 Wis. 591; 47 L. R. A. 685; 81 N. W. 864.

⁴ *Packard v. Hayes*, 94 Md. 233; 51 Atl. 32.

mitted to the judges.⁵ A contract is invalid where the proposals are less advantageous to the city than the specifications.⁶

§1048. Letting public contract to lowest bidder.

A public contract need not be let to the "lowest" bidder unless the statute requires it.¹ The statutes often require the contract to be let, after advertising, to the "lowest," "the lowest and best," or "the lowest responsible" bidder.² A contract let without complying with this requirement is unenforceable.³ Since the purpose of such provisions is to secure to the public corporation the full benefit of free competition, a change cannot be made in a bid after the time set for receiving bids,⁴ even if only one person has submitted bids.⁵ A contract is void if provisions favorable to the contractor are added after the bids are in, differing from the specifications on which such bids are made.⁶ Such provisions do not prevent a city from constructing public works under the direction of its own engineers and officers.⁷

These provisions are for the benefit of the public. The lowest bidder cannot sue at law for profits which he would have made had his bid been accepted.⁸ The lowest bidder may enjoin the

⁵ Mahon v. Luzerne Co., 197 Pa. St. 1; 46 Atl. 894.

⁶ State *ex rel.* Moreland v. Passaic, 63 N. J. L. 208; 42 Atl. 1058.

¹ Pacific Bridge Co. v. Clackamas County, 45 Fed. 217; Riehl v. San Jose, 101 Cal. 442; 35 Pac. 1013; Hartford v. Light Co., 65 Conn. 324; 32 Atl. 925; Mayo v. Hampden, 141 Mass. 74; 6 N. E. 757; Kundinger v. Saginaw, — Mich. —; 93 N. W. 914; State v. Lincoln County, 35 Neb. 346; 53 N. W. 147; State v. Dixon County, 24 Neb. 106; 37 N. W. 936; Oakley v. Atlantic City, 63 N. J. L. 127; 44 Atl. 651. It was said to be the duty of the public corporation to let the contract to the lowest bidder unless by statutory authority in State v. Cornell, 52 Neb. 25; 71 N. W. 961.

² Mueller v. Eau Claire Co., 108 Wis. 304; 84 N. W. 430.

³ Fox v. New Orleans, 12 La. Ann. 154; 68 Am. Dec. 766. So where bonds are sold at private sale without giving a chance to bid. Roberts v. Taft, 116 Fed. 228; Roberts v. Taft, 109 Fed. 825; 48 C. C. A. 681.

⁴ Fairbanks v. North Bend, — Neb. —; 94 N. W. 537.

⁵ Le Tourneau v. Hugo, 90 Minn. 420; 97 N. W. 115.

⁶ Diamond v. Mankato, 89 Minn. 48; 61 L. R. A. 448; 93 N. W. 91.

⁷ Home, etc., Co. v. Roanoke, 91 Vt. 52; 27 L. R. A. 551; 20 S. E. 895.

⁸ Talbot Paving Co. v. Detroit, 109 Mich. 657; 63 Am. St. Rep. 604; 67 N. W. 979.

council from accepting a higher bid.⁹ Property owners who are obliged to pay more for an improvement than they otherwise would have been obliged to pay, may recover against a city which has voluntarily released the lowest bidder, whose bid has been accepted, and accepted the bid of a higher bidder, for the difference between the two bids.¹⁰ If bids have been advertised for on two different specifications, intended as alternative for the same work, a provision requiring the letting of the contract to the lowest bidder does not bind the city to select that specification on which the lowest bid is given.¹¹

§1049. Exercise of discretion by public officers.

Where the statute requires the contract to be let to "the lowest and best" bidder, a discretion is vested in the officials who let the contract to determine who is the "best."¹ Such statutes are intended "for the benefit and protection of the public rather than that of the bidders and . . . they confer no absolute right" upon a bidder,² which discretion cannot be controlled by mandamus.³ If the right to reject all bids is reserved, the lowest reliable bidder cannot force the board to let the contract to him though the statute requires the contract

⁹ *Times Printing Co. v. Seattle*, 25 Wash. 149; 64 Pac. 940.

¹⁰ *Barfield v. Louisville (Ky.)*, 64 S. W. 959; modifying on rehearing, *Kimberger v. Bitzer*, 111 Ky. 429; 63 S. W. 964; s. c. also cited as *Barfield v. Gleason*.

¹¹ *Trapp v. Newport*, — Ky. —; 74 S. W. 1109; *Trowbridge v. Hudson*, 24 Ohio C. C. 76.

¹ *Kelly v. Chicago*, 62 Ill. 279; *Mayo v. Hampden Co.*, 141 Mass. 74; 6 N. E. 757; *State v. McGrath*, 91 Mo. 386; *Hoole v. Kinkead*, 16 Nev. 217; *State ex rel. Van Reipen, Mayor, etc., of Jersey City*, 58 N. J. L. 262; 33 Atl. 740; *East River, etc., Co. v. Donnelly*, 93 N. Y. 557; *Copper v. Hermann*, 6 Ohio N. P.

452; *Interstate, etc., Co. v. Philadelphia*, 164 Pa. St. 477; 30 Atl. 383; *Douglass v. Commonwealth*, 108 Pa. St. 559; *Reuting v. Titusville*, 175 Pa. St. 512; 34 Atl. 916; *Times Publishing Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865; 37 Pac. 695.

² *State v. Rickards*, 16 Mont. 145, 156; 50 Am. St. Rep. 476; 28 L. R. A. 298; 40 Pac. 210.

³ *State v. Rickards*, 16 Mont. 145; 50 Am. St. Rep. 476; 28 L. R. A. 298; 40 Pac. 210; *State v. Hermann*, 63 O. S. 440; 59 N. E. 104. *Contra*, a gross abuse of discretion will be controlled by mandamus. *Inge v. Board of Public Works*, 135 Ala. 187; 93 Am. St. Rep. 20; 33 So. 678.

to be let to the lowest bidder, if reliable.⁴ When bids are offered for heating apparatus, each for a different patent, the board may select the most suitable and is not confined to the lowest.⁵ It is presumed that the board did its duty in awarding bids.⁶ The word "responsible" includes ability to perform the contract in a satisfactory manner, and such bidder is not necessarily the lowest.⁷ The skill and integrity of the bidder are to be considered as well as the amount of the bid.⁸ So where the contract is to be let to the lowest responsible bidder who can do satisfactory work, this need not be the lowest bidder,⁹ but is the lowest responsible bidder offering the best terms,¹⁰ and the lowest bidder cannot enforce the letting of the contracts to himself.¹¹

Under such a statute extra work on a contract may be let to the original contractor, though not the lowest bidder.¹²

§1050. Requirements restricting competition.—Monopolies.

Where bids must be let to the lowest responsible bidder the city may, if public interest requires it, specify articles covered by patents so that competition is practically impossible.¹ The

⁴ Colorado Paving Co. v. Murphy, 78 Fed. 28; 23 C. C. A. 631; 37 L. R. A. 630; Peckham v. Watsonville, 138 Cal. 242; 71 Pac. 169; Kelly v. Chicago, 62 Ill. 279.

⁵ State v. Board, etc., of Toledo, 14 Ohio C. C. 15; 7 Ohio C. D. 338.

⁶ Neff v. Sand Co., 108 Ky. 457; 55 S. W. 697; 56 S. W. 723.

⁷ People v. Kent, 160 Ill. 655; 43 N. E. 760; Reuting v. Titusville, 175 Pa. St. 512; 34 Atl. 916.

⁸ Inge v. Mobile, 135 Ala. 187; 33 So. 678.

⁹ Scheffbauer v. Kearney, 57 N. J. L. 588; 31 Atl. 454.

¹⁰ State *ex rel.* Van Reipen, Mayor, etc., of Jersey City, 58 N. J. L. 262; 33 Atl. 740.

¹¹ State *ex rel.* McGovern v. Trenton, 60 N. J. L. 402; 38 Atl. 636.

¹² State *ex rel.* Moreland v. Passaic, 63 N. J. L. 208; 42 Atl. 1058.

¹ Holmes v. Detroit, 120 Mich. 226; 77 Am. St. Rep. 587; 45 L. R. A. 121; 79 N. W. 200; Attorney General v. Detroit, 26 Mich. 263; Hobart v. Detroit, 17 Mich. 246; 97 Am. Dec. 185 (Nicholson block paving); Verdin v. St. Louis, 131 Mo. 26; 33 S. W. 480; 36 S. W. 52; Barber, etc., Co. v. Hunt, 100 Mo. 22; 18 Am. St. Rep. 530; 8 L. R. A. 110; 13 S. W. 98; Harlem Gaslight Co. v. Mayor, etc., of New York, 33 N. Y. 309; Baird v. New York, 96 N. Y. 567 (a patent water meter); *In re* Dugro, 50 N. Y. 513 (Nicholson block paving); Silsby Mfg. Co. v. Allentown, 153 Pa. St. 319; 26 Atl. 646; Kilvington v. Superior, 83 Wis. 222; 18 L. R. A. 45; 53 N. W. 487 (patent crematory).

view of the Wisconsin courts originally was that such contracts were in violation of the statute.² Special statutes were passed thereupon to make such contracts valid and these statutes were upheld.³ Some states hold such contracts invalid.⁴ Some jurisdictions hold that specifications of natural material of which one vendor has a monopoly are valid;⁵ others that they are invalid.⁶ If the article is manufactured but not patented, specifications designating the manufacturer have been held invalid if other manufacturers produced as suitable an article.⁷ In jurisdictions where the product of a designated factory cannot be specified there is a conflict of authority as to whether specifications can call for articles equal to a specified article.⁸ So in jurisdictions where patented articles may be specified, there is a conflict of authority as to whether bids should be advertised for as in other cases.⁹

§1051. Restricting competition in labor.

Provisions which restrict free competition of labor violate the spirit of the statute requiring bids to be let to the lowest bidder. A resolution of a municipality to exclude from com-

²Dean v. Charlton, 23 Wis. 590; 99 Am. Dec. 205 (contracts for Nicholson block paving).

³Dean v. Borchsenius, 30 Wis. 236; Mills v. Chareltan, 29 Wis. 400; 9 Am. Rep. 578.

⁴Nicolson Pavement Co. v. Painter, 35 Cal. 699; Fineran v. Paving Co., — Ky. —; 76 S. W. 415. (Bituminous macadam); Burgess v. Jefferson, 21 La. Ann. 143 (Nicolson pavement).

⁵Field v. Paving Co., 117 Fed. 925; Verdin v. St. Louis, 131 Mo. 26; 33 S. W. 480; 36 S. W. 52.

⁶Fishburn v. Chicago, 171 Ill. 338; 63 Am. St. Rep. 336; 39 L. R. A. 482; 49 N. E. 532. (Asphaltum was required from Pitch Lake, Island of Trinidad.)

⁷Smith v. Improvement Co., 161 N. Y. 484; 55 N. E. 1077. (Specifications for "vitrified paving brick manufactured by" a specified manufacturer.)

⁸That they can. Mulrein v. Kalloch, 61 Cal. 522. That they cannot. Tucker v. Newark, 19 Ohio C. C. 1; 10 Ohio C. D. 437.

⁹That bids should be advertised for. Worthington v. Boston, 41 Fed. 23; Newark v. Bonnell, 57 N. J. L. 424; 51 Am. St. Rep. 609; 31 Atl. 408; Ricketson v. Milwaukee, 105 Wis. 591; 47 L. R. A. 685; 81 N. W. 864. That advertising in such cases is "not only a farcical but also a hazardous proceeding." See Baird v. Mayor, etc., of New York, 96 N. Y. 567, 587.

petition all persons except those of a specified class is void.¹ A provision that no alien or convict labor is to be employed,² or that only citizen labor shall be used and that eight hours shall constitute a day's work,³ invalidates a contract if increasing or tending to increase the contract price. So a city cannot require a union label upon all printing done for it where competitive bidding is necessary,⁴ or that only union labor shall be used on public works.⁵ The result has been reached in some cases, however, that as such provision is invalid, it is to be regarded as simply void, and as it is presumed that all bidders ignored it, the contract is valid.⁶ Under some statutes provisions not unfavorable to the public may be inserted in the contract, though not in the specifications. Thus a contract has been held valid which contains a provision that no Chinamen shall be employed on the work, and that eight hours shall constitute a day's labor,⁷ or that no person who was not a citizen of the United States should be employed on the work in question,⁸ or that only citizens of the United States should be employed and that eight hours should constitute a day's work,⁹ where it is not shown that such provisions were known in advance, or considered in making bids; and therefore they did not increase the amount of such bids. Under statutes which require contracts to be let to the lowest bidder the proposals for bids cannot fix the price to be paid for labor,¹⁰ nor provide that all rock used

¹ *Paterson Chronicle Co. v. Paterson*, 66 N. J. L. 129; 48 Atl. 589.

² *Inge v. Board of Public Works*, 135 Ala. 187; 93 Am. St. Rep. 20; 33 So. 678.

³ *Glover v. People*, 201 Ill. 545; 66 N. E. 820 (attack on validity of assessment).

⁴ *City of Atlanta v. Stein*, 111 Ga. 789; 51 L. R. A. 335; 36 S. E. 932; *Holden v. Alton*, 179 Ill. 318; 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194; 69 Am. St. Rep. 222; 42 L. R. A. 718; 52 N. E. 314; *Marshall & Bruce Co. v. Nashville*, — Tenn. —; 71 S. W. 815. See also § 440.

⁵ *Fiske v. People*, 188 Ill. 206; 52 L. R. A. 291; 58 N. E. 985.

⁶ *Marshall & Bruce Co. v. Nashville*, — Tenn. —; 71 S. W. 815.

⁷ *Hellman v. Shoulters*, 114 Cal. 141; 44 Pac. 915; affirmed in banc, 114 Cal. 136; 45 Pac. 1057.

⁸ *Hamilton v. People*, 194 Ill. 133; 62 N. E. 533.

⁹ *De Wolf v. People*, 202 Ill. 73; 66 N. E. 868; (attack on assessment); *Wells v. Raymond*, 201 Ill. 435; 66 N. E. 210 (objection by property owner).

¹⁰ *Frame v. Felix*, 167 Pa. St. 47; 27 L. R. A. 802; 31 Atl. 375.

must be dressed in the state,¹¹ as such provisions restrict bidding. A provision agreeing to comply with an unconstitutional labor law has been held not to invalidate the contract if it does not increase the cost.¹²

§1052. Requiring repair of streets.

Under authority to construct streets it is generally held that a city cannot require the contractor to agree to keep the streets in repair for a certain period of time.¹ Several reasons exist for this rule. It prevents letting the contract for constructing the street alone to the highest bidder; it involves a fixed liability for making future repairs which may never be made, and it throws the costs of repairs upon the fund or the persons who have to pay the cost of the street, usually the abutting property owners, whereas by statute such repairs usually are payable out of the fund raised by general taxation. These reasons may be reduced to one, namely, that the power to contract for constructing a street is not power to contract for constructing and repairing it. So a contract that "all loss or damage arising from the nature of the work to be done under the specifications shall be sustained by the contractor" is void.² The contract may require the contractor to repair all defective work, even if the street is paid for by assessments, as this merely provides a mode of performing the contract to construct the street.³ So it has been held that a contract to keep the street in repair for a fixed period is in the nature of a guaranty of the work done, and not a contract for repairs within the

¹¹ *St. Louis, etc., Co. v. Von Versen*, 81 Mo. App. 519.

¹² *People v. Featherstonhaugh*, 172 N. Y. 112; 60 L. R. A. 768; 64 N. E. 802.

¹ *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 226; 80 Am. St. Rep. 124; 52 L. R. A. 264; 62 Pac. 394; *Brown v. Jenks*, 98 Cal. 10; 32 Pac. 701; *Fehler v. Gosnell*, 99 Ky. 380; 35 S. W. 1125; *Portland*

v. Paving Co., 33 Or. 307; 72 Am. St. Rep. 713; 44 L. R. A. 527; 52 Pac. 28; *McAllister v. Tacoma*, 9 Wash. 272; 37 Pac. 447, 658; *Boyd v. Milwaukee*, 92 Wis. 456; 66 N. W. 603.

² *Blochman v. Spreckels*, 135 Cal. 662; 57 L. R. A. 213; 67 Pac. 1061.

³ *Allen v. Portland*, 35 Or. 420; 58 Pac. 509.

meaning of the statute that requires such contracts to be let to the lowest bidder.⁴ On this theory a guaranty of paving for five⁵ or for eight⁶ years has been held valid. In New Jersey such contracts are held valid, the abutting property owners, however, having a right to have their assessments reduced to a reasonable price for the street itself.⁷ A provision that the contractor shall assume all risk of damage to others arising from the work has been held invalid.⁸

§1053. Effect of *ultra vires* contracts.—Executory contracts.

The effect and consequences of an *ultra vires* contract must next be considered. We must first consider the contract which is invalid only because it is *ultra vires* — that is, while beyond the power of the corporation it is not forbidden by statute, and does not violate any rules of public policy applicable to natural persons. The effect of such contract depends upon the extent of the performance thereof. The contract presented for consideration in any given case may be (1) executory on both sides; (2) performed on one side either by (a) the corporation or (b) the adversary party, or (3) performed completely on each side. As far as the contract is executory and the public corporation has received nothing of value thereunder, an *ultra vires* contract is of no effect. Either party may repudiate it without liability for its breach.¹ Thus an executory contract

⁴ *Kansas City v. Hanson*, 60 Kan. 833; 58 Pac. 474; *Barber, etc., Co. v. Hezel*, 155 Mo. 391; 48 L. R. A. 285; 56 S. W. 449 (giving a history of the litigation in Missouri on this point); *Barber, etc., Co. v. Ullman*, 137 Mo. 543; 38 S. W. 458; and see *Seaboard National Bank v. Woesten*, 147 Mo. 467; 48 L. R. A. 279; 48 S. W. 939; *St. Louis, etc., Co. v. Frost*, 90 Mo. App. 677. Such provision is, of course, valid if under express statutory authority. *La Veine v. Kansas City*, 67 Kan. 239; 72 Pac. 774.

⁵ *Barber Asphalt Paving Co. v. Goar*, — Ky. —; 73 S. W. 1106; *McGlynn v. Toledo*, 12 Ohio C. D. 15.

⁶ *People v. Featherstonhaugh*, 172 N. Y. 112; 60 L. R. A. 768; 64 N. E. 802.

⁷ *Wilson v. Trenton*, 61 N. J. L. 599; 68 Am. St. Rep. 714; 44 L. R. A. 540; 40 Atl. 575.

⁸ *Inge v. Board of Public Works*, 135 Ala. 187; 93 Am. St. Rep. 20; 33 So. 678.

¹ *McKee v. Greensburg*, 160 Ind. 378; 66 N. E. 1009; *Swift v. Fal-*

to keep a certain watercourse open,² or to keep a road fenced, in return for a right of way,³ or to exempt certain realty from taxation,⁴ is void. Payment of a debt barred by the statute of limitations is held to be *ultra vires*. Mandamus will therefore be refused where the treasurer declines to pay a warrant drawn for such debt.⁵

§1054. Performance by public corporation.

If the public corporation has performed the contract on its side, the adversary party cannot retain the benefits and plead *ultra vires*. The objection that the contract was originally *ultra vires* has been eliminated by performance.¹ Thus a city may collect a loan of its funds and enforce a mortgage given therefor, though the loan is *ultra vires*.² So a city may enforce payment under an *ultra vires* contract for hiring out prisoners in its workhouse.³ This view is not entertained in all jurisdictions, however. The view is entertained by some courts that performance by the corporation does not make the contract itself enforceable, the right of the corporation being only to recover what it has parted with under such contract. Thus it has been held that if a city loans its funds to a private corporation, it cannot enforce a bond given therefor.⁴ Thus

mouth, 167 Mass. 115; 45 N. E. 184; Spaulding v. Peabody, 153 Mass. 129; 26 N. E. 421; Mead v. Acton, 139 Mass. 341; 1 N. E. 413; Greenough v. Wakefield, 127 Mass. 275; Halstead v. Mayor, etc., of New York, 3 N. Y. 430; Philadelphia v. Flanigen, 47 Pa. St. 21; Alleghany Co. v. Parrish, 93 Va. 615; 25 S. E. 882.

² Swift v. Falmouth, 167 Mass. 115; 45 N. E. 184.

³ Meek v. Meade Co., 12 S. D. 162; 80 N. W. 182.

⁴ McTwiggan v. Hunter, 19 R. I. 265; 29 L. R. A. 526; 33 Atl. 5.

⁵ Trowbridge v. Schmidt, — Miss. —; 34 So. 84.

¹ Middleton v. State, 120 Ind.

166; 22 N. E. 123; Deering v. Peterson, 75 Minn. 118; 77 N. W. 568; St. Louis v. Davidson, 102 Mo. 149; 22 Am. St. Rep. 764; 14 S. W. 825; Mayor, etc., of Hoboken, v. Harrison, 30 N. J. L. 73; Buffalo v. Balcom, 134 N. Y. 532; 32 N. E. 7; Mayor, etc., of New York, v. Sonneborn, 113 N. Y. 423; 21 N. E. 121; Hendersonville v. Price, 96 N. C. 423; 2 S. E. 155.

² City of Fergus Falls v. Hotel Co., 80 Minn. 165; 81 Am. St. Rep. 249; 50 L. R. A. 170; 83 N. W. 54.

³ St. Louis v. Davidson, 102 Mo. 149; 22 Am. St. Rep. 764; 14 S. W. 825.

⁴ City Council v. Plank Road Co., 31 Ala. 76.

where as part of an *ultra vires* contract the corporation takes a bond to secure performance, it has been held that it cannot maintain an action on such bond.⁵ The remedy of the corporation is to avoid the contract and recover whatever it has parted with thereunder.⁶

§1055. Performance by adversary party.—Liability on contract.

Performance by the adversary party usually gives something of value to the corporation as the result of such performance, but it leaves the *ultra vires* part of the contract executory. Accordingly even if the corporation has received something of value under the contract, it is not thereby estopped from alleging its lack of capacity in order to avoid liability.¹ Thus if a contract is made in excess of the statutory limitation without the assent of three-fifths of the voters² performance by the adversary party does not estop the municipality from alleging *ultra vires*. A covenant by a city in consideration of a conveyance to it of a strip of land, whereby it agrees to leave a street open for its whole width, is *ultra vires* and void.³

§1056. Performance by adversary party.—Liability in quasi-contract.

If performance by the adversary party gives something of value to the public corporation, suitable for the purposes for which it was formed, it is, according to the weight of authority, bound to pay a reasonable compensation therefor.¹ Thus where

⁵ *Kansas City v. O'Connor*, 82 Mo. App. 655; *Portland v. Paving Co.*, 33 Or. 307; 72 Am. St. Rep. 713; 44 L. R. A. 527; 52 Pac. 28.

⁶ *Kansas City v. O'Connor*, 82 Mo. App. 655.

¹ *Mealey v. Mayor, etc., Hagerstown*, 92 Md. 741; 48 Atl. 746; *Thomas v. Port Huron*, 27 Mich. 320; *State v. Pullman*, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265; *Balch v. Beach*, 119 Wis. 77; 95 N. W. 132.

² *State v. Pullman*, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265 (contract to buy a water-works).

³ *Penley v. Auburn*, 85 Me. 278; 21 L. R. A. 657; 27 Atl. 158.

¹ *Chapman v. Douglas Co.*, 107 U. S. 348; *Parkersburg v. Brown*, 106 U. S. 487; *City of Louisiana v. Wood*, 102 U. S. 294; *Pimental v. San Francisco*, 21 Cal. 351; *Argenti v. San Francisco*, 16 Cal. 256; *National Tube Works Co. v. Cham-*

the corporation receives money,² as by the sale of void bonds,³ and it is used for a lawful purpose,⁴ or it borrows money without authority, and uses it for a lawful purpose, as for improving streets,⁵ or in buying a schoolhouse,⁶ or where a corporation receives a water supply,⁷ or public lights,⁸ it must make compensation therefor. So where a bond is invalid, because for a time shorter than the statutes provide, the lender may recover on debt.⁹ So if property is transferred to a public corporation under an *ultra vires* contract¹⁰ and the corporation voluntarily retains the property it must make compensation therefor. So if a city receives certain of its own bonds cancelled and given up under an *ultra vires* contract for refunding it must either return such bonds and recognize them as valid, or else account for whatever it has received under such contract.¹¹ So if *ultra vires* bonds are issued for work done in laying a sidewalk,¹²

berlain, 5 Dak. 54; 37 N. W. 761; Chicago v. McKechney, 205 Ill. 372; 68 N. E. 954; affirming, 91 Ill. App. 442; Schipper v. Aurora, 121 Ind. 154; 6 L. R. A. 318; 22 N. E. 878; Turner v. Cruzen, 70 Ia. 202; 30 N. W. 483; Brown v. Atchison, 39 Kan. 37; 7 Am. St. Rep. 515; 17 Pac. 465; Grand Island Gas Co. v. West, 24 Neb. 852; 45 N. W. 242; Ward v. Forest Grove, 20 Or. 355; 25 Pac. 1020; Livingston v. School District, 11 S. D. 150; 76 N. W. 301; Schneider v. Menasha, — Wis. —; 95 N. W. 94; Paul v. Kenosha, 22 Wis. 266; 94 Am. Dec. 598.

² Bangor Savings Bank v. Stillwater, 49 Fed. 721; Allen v. La Fayette, 89 Ala. 641; 9 L. R. A. 497; 8 So. 30.

³ Geer v. School District, 111 Fed. 682; 49 C. C. A. 539; Paul v. Kenosha, 22 Wis. 266; 94 Am. Dec. 598.

⁴ Thomson v. Elton, 109 Wis. 589; 85 N. W. 425.

⁵ Bangor Savings Bank v. Stillwater, 49 Fed. 721.

⁶ Allen v. La Fayette, 89 Ala. 641; 9 L. R. A. 497; 8 So. 30.

⁷ Higgins v. San Diego, 131 Cal. 294; 63 Pac. 470; Higgins v. San Diego, 118 Cal. 524, 537; 45 Pac. 824; modified on rehearing, 50 Pac. 670; Nicholasville Water Co. v. Nicholasville (Ky.), 38 S. W. 430; denying rehearing in 36 S. W. 549.

⁸ City of Kansas City v. Gas Co., 9 Kan. App. 325; 61 Pac. 317; Wellston v. Morgan, 59 O. S. 147; 52 N. E. 127. So a city must pay for private water pipe taken for the city's system and kept if it cannot restore it. Cleveland v. Denison, 16 Ohio C. C. 541.

⁹ People's Bank v. School District, 3 N. D. 496; 28 L. R. A. 642; 57 N. W. 787.

¹⁰ Chapman v. Douglas County, 107 U. S. 348; Parkersburg v. Brown, 106 U. S. 487.

¹¹ Brown v. Atchison, 39 Kan. 37; 7 Am. St. Rep. 515; 17 Pac. 465.

¹² Hitchcock v. Galveston, 96 U. S. 341.

or if *ultra vires* warrants are issued in payment for street curbing and paving,¹³ reasonable compensation must be made for such labor. A purchaser of invalid bonds from the original holder is allowed in some jurisdictions to recover on *quantum meruit* as assignee of such claim,¹⁴ in others not.¹⁵ One who buys void warrants can recover the amount originally paid in to the city only on showing that such funds were devoted to proper purposes.¹⁶ A public corporation may be liable in *quantum meruit* for work and labor furnished under a void contract, the benefits of which were received by the city.¹⁷ Thus if a city makes an *ultra vires* lease of land by the terms of which the lessee is to fill in on each side of a stone gutter which the city is to construct, which will prevent the soil from washing away, and the city does not construct such gutter, and therefore the lessee cannot use the realty for the purpose intended, the city is at least liable for the work done by him in making such fill.¹⁸ If the benefits under the contract have been received not by the municipality but by individuals or some local body, the corporation is not liable for what the adversary party has parted with under an *ultra vires* contract. A public corporation is not liable for local improvement made pursuant to unauthorized contracts.¹⁹ So a city is not liable in assumpsit for money received by it from the sale of bonds issued to aid a railroad, which money was expended in constructing a railroad depot and tracks within the city limits.²⁰ Some courts have suggested a theory which is in some respects at least inconsistent with the views heretofore expressed. It is suggested as a proper test that if the contract is within the scope of cor-

¹³ Johnson v. Alderson, 33 W. Va. 473; 10 S. E. 815.

¹⁴ Geer v. School District, 111 Fed. 682; 49 C. C. A. 539.

¹⁵ Coquard v. Oquawka, 192 Ill. 355; 61 N. E. 660.

¹⁶ Watson v. Huron, 97 Fed. 449; 38 C. C. A. 264.

¹⁷ Chicago v. McKechney, 205 Ill. 372; 68 N. E. 954; affirming, 91 Ill. App. 442.

¹⁸ Schipper v. Aurora, 121 Ind. 154; 6 L. R. A. 318; 22 N. E. 878.

¹⁹ Willis v. Wyandotte Co., 86 Fed. 872; 30 C. C. A. 445; Wrought Iron Bridge Co. v. Hendricks Co., 19 Ind. App. 672; 48 N. E. 1050.

²⁰ Travelers' Ins. Co. v. Johnson City, 99 Fed. 663; 49 L. R. A. 123; 40 C. C. A. 58.

porate power and the power is merely exercised irregularly so as to make the contract itself unenforceable, recovery should be allowed on *quantum meruit*.²¹ On the other hand, if the contract is entirely without the powers of the corporation, there is no liability for work done thereunder even in *quantum meruit*.²²

§1057. Performance by both parties.

If an *ultra vires* contract is performed completely by both parties, no objection can thereafter be raised on the ground of its original invalidity. So a statute authorizing a county to recover money paid without authority of law does not apply where the county has received the benefits, the other party acting in good faith.¹

§1058. Effect of divisible or indivisible contract.

If the contract is divisible in its nature and part only is *ultra vires*, the valid part of the contract is enforceable.¹ Thus a contract with a water company is enforceable as to payment for water and hydrant rentals, though *ultra vires* as granting

²¹ Recovery for constructing and furnishing a schoolhouse. *Union, etc., Furniture Co. v. School District*, 50 Kan. 727; 20 L. R. A. 136; 32 Pac. 368; *School District v. Sullivan*, 48 Kan. 624; 29 Pac. 1141; *Sullivan v. School District*, 39 Kan. 347; 18 Pac. 287. Recovery for constructing street. *Ryan v. Coldwater*, 46 Kan. 242; 26 Pac. 675; *Sleeper v. Bullen*, 6 Kan. 300.

²² *Newport v. Ry.*, 58 Ark. 270; 24 S. W. 427; *Perry v. Superior City*, 26 Wis. 64. Employment as attorney. *Hampton v. Logan County*, 4 Ida. 646; 43 Pac. 324. Construction of bridge. *Salt Creek Township v. King, etc., Mfg. Co.*, 51 Kan. 520; 33 Pac. 303. Construction of road. *Hovey v. Wy-*

andotte County, 56 Kan. 577; 44 Pac. 17; *Pleasant View Township v. Shawgo*, 54 Kan. 742; 39 Pac. 704. Guaranty that sewer will not flood property. *Nashville v. Sutherland*, 92 Tenn. 335; 36 Am. St. Rep. 88; 19 L. R. A. 619; 21 S. W. 674.

¹ *Sacramento Co. v. Pacific Co.*, 127 Cal. 217; 59 Pac. 568, 825. (The railroad rebuilt roadway on its bridge and turned it over to the county.)

¹ *Kimball v. Cedar Rapids*, 100 Fed. 802; *City of Greenville v. Waterworks Co.*, 125 Ala. 625; 27 So. 764; *Valparaiso v. Water Co.*, 30 Ind. App. 316; 65 N. E. 1063; *Coit v. Grand Rapids*, 115 Mich. 493; 73 N. W. 811.

an exclusive privilege.² So where a city has reached its limit of indebtedness, a contract for the construction of a street, the city to pay the cost of paving intersections and to assess the cost of the rest of the street on the abutting property is invalid as to the former clause, but valid as to the latter.³ If the contract is indivisible and part of it is *ultra vires*, no part of it can be enforced.⁴ Thus an indivisible contract for settling a valid judgment and purchasing a water and light plant is unenforceable as to the first provision if the latter is *ultra vires*.⁵ The contract cannot be so modified by the courts as to make it valid if it is indivisible. A contract for fire-alarm telegraph system which was void as in excess of the limit of indebtedness cannot be changed so as to give the contractor a franchise to maintain it, where part of the apparatus was furnished by the city.⁶

§1059. Contracts in violation of statutory provisions.

If a contract is entered into by a public corporation in violation of some specific statute, the effect of such contract depends on the intent of the legislature in enacting such statute. If the proceedings are irregular but not in violation of a mandatory statute, recovery may be had on the contract after performance thereof,¹ or on *quantum meruit*.² Thus where a

² Monroe Waterworks Co. v. Monroe, 110 Wis. 11; 85 N. W. 685.

³ Ft. Dodge, etc., Co. v. Ft. Dodge, 115 Ia. 568; 89 N. W. 7.

⁴ Kansas City v. O'Connor, 82 Mo. App. 655.

⁵ Austin v. McCall, 95 Tex. 565; 67 S. W. 192; 68 S. W. 791.

⁶ Gamewell, etc., Co. v. Laporte, 102 Fed. 417; 42 C. C. A. 405.

¹ Chapman v. Douglas County, 107 U. S. 348; Argenti v. San Francisco, 16 Cal. 255; National Tube Works v. Chamberlain, 5 Dak. 54; 37 N. W. 761; Sanitary District v. Mfg. Co., 179 Ill. 167;

53 N. E. 627; Mound City v. Snoddy, 53 Kan. 126; 35 Pac. 1112; State v. Moore, 46 Neb. 590; 50 Am. St. Rep. 626; 65 N. W. 193; State v. Long Branch, 59 N. J. L. 371; 35 Atl. 1070; Portland, etc., Co. v. Portland, 18 Or. 21; 6 L. R. A. 290; 22 Pac. 536 (notice defective).

² City of Ellsworth v. Rossiter, 46 Kan. 237; 26 Pac. 674; Carey v. East Saginaw, 79 Mich. 73; 44 N. W. 168; Lincoln Land Co. v. Grant, 57 Neb. 70; 77 N. W. 349; Kramrath v. Albany, 127 N. Y. 575; 28 N. E. 400.

contract was held void because the title of the ordinance whereby it was formed did not show its true purpose, the city was liable for rental for fifteen hydrants used by it.³ On the other hand, if the contract is in violation of a mandatory statute, and is contrary to public policy, no recovery can be had either on the contract or on *quantum meruit*.⁴ The title to property delivered under an irregular bid passes to the public corporation, and such corporation cannot rescind and agree to treat the property as delivered under a second and valid bid.⁵

§1060. Illustrations of particular statutes.

Different statutes of the same general class differ in their phraseology. Courts differ, further, in their views of the intent of the legislature in enacting such statutes. There is accordingly a hopeless diversity of opinion as to the effect of similar statutes upon contracts entered into in violation thereof. Statutes which forbid public corporations to incur indebtedness in excess of certain limits apply in their spirit and terms to liabilities for reasonable compensation as well as to express contracts. Since they are intended to compel municipalities to do business on a cash basis, no recovery can be had for

³ Lincoln Land Co. v. Grant, 57 Neb. 70; 77 N. W. 349; distinguishing, Tullock v. Webster Co., 46 Neb. 211; 64 N. W. 705.

⁴ Litchfield v. Ballou, 114 U. S. 190; State Trust Co. v. Duluth, 104 Fed. 632; Gamewell Fire Alarm Telegraph Co. v. Laporte, 102 Fed. 417; Morton v. Nevada City, 41 Fed. 582; City Improvement Co. v. Broderick, 125 Cal. 139; 57 Pac. 776; Zottman v. San Francisco, 20 Cal. 96; 81 Am. Dec. 96; Moss v. Sugar Ridge Township, 161 Ind. 417; 67 N. E. 460; Ryce v. Osage, 88 Ia. 558; 55 N. W. 532; Niles Waterworks v. Niles, 59 Mich. 311; 26 N. W. 525; McBrien v. Grand Rapids, 56 Mich. 95; 22

N. W. 206; Maupin v. Franklin County, 67 Mo. 327; Atlantic City Water Works Co. v. Read, 50 N. J. L. 665; 15 Atl. 10; McDonald v. New York, 68 N. Y. 23; 23 Am. Rep. 144; Goose River Bank v. School Township, 1 N. D. 26; 26 Am. St. Rep. 605; 44 N. W. 1002; Capital Bank v. School District, 1 N. D. 479; 48 N. W. 363; Springfield Milling Co. v. Lane County, 5 Or. 265; Bryan v. Page, 51 Tex. 532; 32 Am. Rep. 637; McGillivray v. Joint School District, 112 Wis. 354; 88 Am. St. Rep. 969; 58 L. R. A. 100; 88 N. W. 310.

⁵ Office, etc., Co. v. Washoe County, 24 Nev. 359; 55 Pac. 222.

reasonable compensation for property or services furnished to the corporation.¹ If the statute absolutely forbids incurring any indebtedness, no liability exists if property is bought on credit, even for a reasonable compensation therefor.² So if by statute the dispenser is authorized to buy and sell liquors for cash only, the city is not liable for the value of liquor sold to it on credit.³ This rule has been applied even where the liquor has been sold and the city retains the proceeds thereof.⁴ So where the city cannot contract obligations in excess of its annual income except by popular vote, it is not liable for a reasonable compensation for hydrant rentals, if in excess of such income.⁵ This does not prevent recovery for property retained by the corporation in cases where it can be surrendered to the party furnishing it. Where an installment contract is held to be invalid if all the payments to be made added together will, when added to the other debts of the public corporation, exceed the limit of indebtedness, but no one installment will cause such excess, such a contract has been held good from year to year until renounced by either party.⁶ If the statute or constitution requires that a provision for a tax must be made to meet the liability imposed by the contract, a contract entered into in disregard of such provision is a nullity. No recovery can be had for a reasonable compensa-

¹ *Litchfield v. Ballou*, 114 U. S. 190; *Prince v. Quincy*, 128 Ill. 443; 21 N. E. 768; *Chicago v. McDonald*, 176 Ill. 404; 52 N. E. 982; *State v. Helena*, 24 Mont. 521; 81 Am. St. Rep. 453; 51 L. R. A. 336; 63 Pac. 99; *Keller v. Scranton*, 200 Pa. St. 130; 86 Am. St. Rep. 708; 49 Atl. 781; *State v. Pullman*, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265; *Balch v. Beach*, 119 Wis. 77; 95 N. W. 132; *Merchants' National Bank v. Spates*, 41 W. Va. 27; 56 Am. St. Rep. 828; 23 S. E. 681.

² *Bluthenthal v. Headland*, 132 Ala. 249; 90 Am. St. Rep. 904; 31 So. 87; *Mosher v. School District*, 44 Ia. 122; *Fox v. New Orleans*, 12

La. Ann. 154; 68 Am. Dec. 766; *Niles Water Works v. Niles*, 59 Mich. 311; 26 N. W. 525; *Detroit v. Robinson*, 38 Mich. 108; *Detroit v. Paving Co.*, 36 Mich. 335; *Earles v. Wells*, 94 Wis. 285; 59 Am. St. Rep. 885; 68 N. W. 964.

³ *Bluthenthal v. Headland*, 132 Ala. 249; 90 Am. St. Rep. 904; 31 So. 87.

⁴ *Bluthenthal v. Headland*, 132 Ala. 249; 90 Am. St. Rep. 904; 31 So. 87.

⁵ *Niles Water Works v. Niles*, 59 Mich. 311; 26 N. W. 525.

⁶ *Dawson v. Waterworks Co.*, 106 Ga. 696; 32 S. E. 907.

tion for property furnished under such a contract.⁷ If the statute requires a contract of a certain class to be in writing, an oral executory contract is unenforceable.⁸ On the question of the effect of performance of such a contract there is a conflict of authority. In some jurisdictions it is held that performance by the adversary party creates no liability against the public corporation in *quantum valebat*.⁹ Thus if by statute extras can be ordered only by written agreement signed by both contractor and public officers, the contractor cannot recover in any form of action for extras furnished on oral order.¹⁰ In other jurisdictions performance by the adversary party is held to create a liability in *quantum valebat*.¹¹ So where the statute requires a contract to be in writing, a city is liable in *quantum valebat* for gas furnished after the written contract expired, a tax having been levied which was available only for paying for gas.¹² So extras furnished on oral order of the proper public officer must be paid for even if the statute requires a written order therefor.¹³ So if no written acceptance of an ordinance for lights is made as provided for by statute the city must pay for benefits received.¹⁴ If the statute requires advertisement for bids, contracts made in violation of such provisions are nullities.¹⁵ If advertisement is omitted when the law requires it, the contractor cannot enforce payment of his warrant

⁷ No recovery for a bridge. Berlin Iron Bridge Co. v. San Antonio, 62 Fed. 882.

⁸ See § 756.

⁹ Murphy v. Louisville, 9 Bush (Ky.) 189; Boston Electric Co. v. Cambridge, 163 Mass. 64; 39 N. E. 787; McBrien v. Grand Rapids, 56 Mich. 95; *sub nomine* McBrien v. Grand Rapids, 22 N. W. 206; Schumm v. Seymour, 24 N. J. Eq. 143; Dickinson v. Poughkeepsie, 75 N. Y. 65; Addis v. Pittsburg, 85 Pa. St. 379; McManus v. Philadelphia, 201 Pa. St. 619; 51 Atl. 320; Watterson v. Nashville, 106 Tenn. 410; 61 S. W. 782.

¹⁰ Watterson v. Nashville, 106 Tenn. 410; 61 S. W. 782.

¹¹ Cincinnati v. Cameron, 33 O. S. 336.

¹² Memphis Gaslight Co. v. Memphis, 93 Tenn. 612; 30 S. W. 25. To the same effect see San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

¹³ Cincinnati v. Cameron, 33 O. S. 336.

¹⁴ Baxter Springs v. Light & Power Co., 64 Kan. 591; 68 Pac. 63.

¹⁵ State v. Butler, — Mo. —; 77 S. W. 560; McCloud v. Columbus, 54 O. S. 439; 44 N. E. 95; Lancaster v. Miller, 58 O. S. 558; 51 N. E. 52.

by mandamus, if a warrant is given him after performance.¹⁶ Statutes which require advertisement for bids are intended to protect the public from collusion between contractors and public officials, and to secure to the public the best terms possible. The policy of such statutes would be violated as well by permitting recovery for a reasonable compensation as by allowing recovery on an express contract. Accordingly if bids are not advertised for no recovery can be had on *quantum meruit*.¹⁷ No liability attaches to a municipal corporation by reason of a contract entered into by it for the construction of a sewer, when the cost exceeds \$500, and there is neither advertisement for bids nor certificate that there is sufficient money in the treasury to the credit of such fund.¹⁸ So no liability exists for supplies bought by the secretary of state for the legislature and used by the state if bids are not advertised for.¹⁹ So if the contract is not let to the lowest and best bidder,²⁰ or if the contract is in excess of the amount authorized by law,²¹ or is made before an appropriation is made for the contract,²² where such acts respectively are mandatory, no recovery can be had either on the contract or on *quantum meruit*. If the statute requires an election as a condition precedent a contract made without such election is a nullity.²³ It cannot be ratified,²⁴

¹⁶ State v. Yeatman, 22 O. S. 546.

¹⁷ City Improvement Co. v. Broderick, 125 Cal. 139; 57 Pac. 776; Zottman v. San Francisco, 20 Cal. 96; 81 Am. Dec. 96; Mulnix v. Ins. Co., 23 Colo. 71; 33 L. R. A. 827; 46 Pac. 123; McBrien v. Grand Rapids, 56 Mich. 95; *sub nomine* McBrien v. Grand Rapids, 22 N. W. 206; McDonald v. New York, 68 N. Y. 23; 23 Am. Rep. 144; Buchanan Bridge Co. v. Campbell, 60 O. S. 406; 54 N. E. 372 (nor was the contracting company allowed in this case to recover the material furnished).

¹⁸ Lancaster v. Miller, 58 O. S. 558; 51 N. E. 52.

¹⁹ Mulnix v. Ins. Co., 23 Colo. 71; 33 L. R. A. 827; 46 Pac. 123.

²⁰ People v. Gleason, 121 N. Y. 631; 25 N. E. 4.

²¹ Black v. Detroit, 119 Mich. 571; 78 N. W. 660.

²² Roberts v. Fargo, 10 N. D. 230; 86 N. W. 726.

²³ Smith v. Dublin, 113 Ga. 833; 39 S. E. 327; Grady v. Pruitt, 111 Ky. 100; 63 S. W. 283; Harrodsburg v. Water Co. (Ky.), 64 S. W. 658; Painter v. Norfolk, 62 Neb. 330; 87 N. W. 31; Duncan v. Charleston, 60 S. C. 532; 39 S. E. 265.

²⁴ State v. Pullman, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265.

nor is there any liability on *quantum meruit*.²⁵ But a contract is valid if a proposition made by proper authority is accepted by the water company to which it is made and a favorable vote is then taken upon it.²⁶ Amendments in a contract made by the council after acceptance do not avoid the contract, but are themselves invalid.²⁷

§1061. Estoppel.

Since all are bound to know the powers of a public corporation and the formalities necessary to valid contracts¹ there can ordinarily be no question of estoppel to deny the validity of an *ultra vires* contract.² Payment of interest on invalid obligations does not estop the corporation from alleging their invalidity,³ even if the payments are continued for twenty years.⁴ So a town cannot consent to a compromise judgment by which it issues a smaller amount of bonds than it voted, the judgment

²⁵ State v. Pullman, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265; Davis v. Wayne Co., 38 W. Va. 104; 18 S. E. 373 (as binding future levies).

²⁶ Lexington v. Bank, 165 Mo. 671; 65 S. W. 943.

²⁷ Lexington v. Bank, 165 Mo. 671; 65 S. W. 943.

¹ See § 1009.

² Lake County v. Graham, 130 U. S. 674; Stevens v. St. Mary's Training School, 144 Ill. 336; 36 Am. St. Rep. 438; 18 L. R. A. 832; 32 N. E. 962; Seeger v. Mueller, 133 Ill. 86; 24 N. E. 513; Pettis v. Johnson, 56 Ind. 139; Cedar Rapids Water Co. v. Cedar Rapids, 117 Ia. 250; 90 N. W. 716; Day v. Green, 4 Cush. (Mass.) 433; Black v. Detroit, 119 Mich. 571; 78 N. W. 660; State v. Ry. Co., 80 Minn. 108; 50 L. R. A. 656; 83 N. W. 32; State v. Murphy, 134 Mo. 548; 56 Am. St. Rep. 515; 34 L. R. A. 369; 31 S. W. 784; 34 S. W. 51; 35 S. W. 1132; Wash-

ington County v. David (Neb); 89 N. W. 737; Syracuse Water Co. v. Syracuse, 116 N. Y. 167; 5 L. R. A. 546; 22 N. E. 381; Cleveland v. Bank, 16 O. S. 236; 88 Am. Dec. 445; Dube v. Peck, 22 R. I. 443, 467; 48 Atl. 477; McAleer v. Angell, 19 R. I. 688; 36 Atl. 588.

³ Marsh v. Fulton Co., 10 Wall. (U. S.) 676; Town of South Ottawa v. Perkins, 94 U. S. 260; Lewis v. Shreveport, 108 U. S. 282; Daviess Co. v. Dickinson, 117 U. S. 657; Doon Township v. Cummins, 142 U. S. 366; Board, etc., of Oxford v. Bank, 96 Fed. 293; 37 C. C. A. 493; Debnam v. Chitty, 131 N. C. 657; 43 S. E. 3; Glenn v. Wray, 126 N. C. 730; 36 S. E. 167; Buncombe Co. v. Payne, 123 N. C. 432; 31 S. E. 711; Noel, etc., Co. v. Mitchell Co., 21 Tex. Civ. App. 638; 54 S. W. 284.

⁴ Clark v. Northampton, 105 Fed. 312.

not involving the power of the town to issue such bonds.⁵ So as a warrant is non-negotiable, recitals of validity of its purpose are not conclusive even in the hands of a *bona fide* holder.⁶ So performance for several years of an *ultra vires* contract with a railroad company, whereby the city agrees to erect and maintain a bridge over the railroad track, which it was the duty of the railroad to erect and maintain, does not estop the city to avoid such contract.⁷ While acquiescence in issuing *ultra vires* bonds does not work an estoppel, it may lead the court to a more liberal construction of the statute in favor of the bondholders than would otherwise be made.⁸ Payment of interest for a long period is a fact to be considered, if in the meantime the bonds have been transferred to *bona fide* holders, in determining whether the bond was originally valid. Thus where bonds are issued irregularly, but within the powers of the corporation, payment of interest for nine years is a circumstance tending to show the original validity of such bond.⁹ If, however, the contract is one which on its face is within the powers of the corporation, a question of estoppel may arise if by reason of facts not known to the adversary party such contract is in fact entered into for an *ultra vires* purpose.¹⁰ If bonds show on their face that they are issued for a lawful purpose, they are not invalidated by the fact that they were in fact issued for other purposes,¹¹ or that their proceeds were misapplied.¹² So if a building is contracted for for a lawful purpose, the fact that it is used for other purposes does not defeat the right of the contractor to recover.¹³

⁵ Board, etc., of Oxford v. Bank, 96 Fed. 293; 37 C. C. A. 493 (citing Norton v. Shelby Co., 118 U. S. 425; Kelley v. Milan, 127 U. S. 139; Doon Township v. Cummins, 142 U. S. 366).

⁶ Watson v. Huron, 97 Fed. 449; 38 C. C. A. 264.

⁷ St. Paul v. Ry., 80 Minn. 108; 50 L. R. A. 656; 83 N. W. 32.

⁸ Washington County v. Williams, 111 Fed. 801; 49 C. C. A. 621.

⁹ Wetzell v. Paducah, 117 Fed. 647.

¹⁰ Ft. Scott v. Brokerage Co., 117 Fed. 51; 54 C. C. A. 437.

¹¹ Board of Education v. McLean, 106 Fed. 817; 45 C. C. A. 658; Thompson v. Mecosta, 127 Mich. 522; 86 N. W. 1044.

¹² Jones v. City of Camden, 44 S. C. 319; 51 Am. St. Rep. 819; 23 S. E. 141.

¹³ Hubbell v. Custer City, 15 S. D. 55; 87 N. W. 520.

§1062. Estoppel by recitals.

The common form of estoppel in contracts of public corporations is found in cases of negotiable instruments in the hands of *bona fide* holders, where such instruments contain recitals of fact which, if true, make the instrument valid, and which are made by officers authorized to pass upon such facts. The public corporation in such case is estopped to deny the truth of such recitals as against a *bona fide* holder.¹ Thus where the recital was that the instrument was issued pursuant to an election, the instrument is valid, though the vote was on a proposition making the bonds redeemable after ten years, which provision was not inserted in the bond.² Where the recital is as to the amount of pre-existing indebtedness,³ or that the constitutional limit has not been exceeded where no record is to be inspected, by statute or constitution, at the peril of the purchaser,⁴ or where it shows the finding of a board authorized by law to take final action on the question whether the limit is exceeded,⁵ or where the recitals show that the bonds are issued

¹ Mercer Co. v. Hackett, 1 Wall. 83; Town of Coloma v. Eaves, 92 U. S. 484; Commissioners, etc., of Douglas Co. v. Bolles, 94 U. S. 104; Commissioners v. January, 94 U. S. 202; San Antonio v. Mehaffy, 96 U. S. 312; Warren Co. v. Marcy, 97 U. S. 96; Hackett v. Ottawa, 99 U. S. 86; Wilson v. Salamanca Tp., 99 U. S. 499; Sherman Co. v. Simons, 109 U. S. 735; Andes v. Ely, 158 U. S. 312; Commissioners, etc., of Gunnison Co. v. Rollins, 173 U. S. 255; Waite v. Santa Cruz, 184 U. S. 302; Fairfield v. School District, 116 Fed. 838; reversing, 111 Fed. 453; Clapp v. Marice City, 111 Fed. 103; 49 C. C. A. 251; Independent School District v. Rew, 111 Fed. 1; 55 L. R. A. 364; 49 C. C. A. 198; Hardy Township v. Bank, 106 Fed. 986; 46 C. C. A. 66 (affirming without opinion, Brattleboro Savings Bank v. Hardy Tp., 98 Fed. 524). Clapp

v. Otoe Co., 104 Fed. 473; 45 C. C. A. 579; Hughes Co. v. Livingston, 104 Fed. 306; 43 C. C. A. 541; Board, etc., of Barber Co. v. Society, 101 Fed. 767; 41 C. C. A. 667; Brown v. Ingalls Township, 81 Fed. 485; South Hutchinson v. Barnum, 63 Kan. 872; 66 Pac. 1035.

² Board, etc., of Cowley Co. v. Heed, 101 Fed. 768; 41 C. C. A. 668; affirming, Heed v. Cowley Co., 82 Fed. 716, which disapproved, Lewis v. Bourbon Co., 12 Kan. 186.

³ Dallas Co. v. McKenzie, 110 U. S. 686; Buchanan v. Litchfield, 102 U. S. 278; Chaffee Co. v. Potter, 142 U. S. 355; Board, etc., of Gunnison Co. v. Rollins, 173 U. S. 255; E. H. Rollins & Sons v. Gunnison Co., 80 Fed. 692.

⁴ Board, etc., of Lake Co. v. Sutliff, 97 Fed. 270; 38 C. C. A. 167.

⁵ Chilton v. Gratton, 82 Fed. 873.

to refund debts,⁶ or are issued in satisfaction of judgments,⁷ or where the recitals are as to the completion of a railroad by a certain date, which completion is a condition precedent to the validity of the bonds,⁸ or where the recitals are of specific facts showing compliance with formalities,⁹ or recite in general terms that the provisions of the statute,¹⁰ or all requirements of the constitution and statutes¹¹ have been complied with, the corporation is estopped to deny the truthfulness of such recitals. So a recital in a bond that the seal of the city is attached estops the city to deny that the clerk's seal attached to the bond is the seal of the city.¹² However, if the question of fact is one of which purchasers are bound to take notice at their peril,¹³ as where they must take notice of amount of indebtedness,¹⁴ or of the facts apparent on the assessment roll, which with the recitals in the bonds in question show that the limit is exceeded,¹⁵ or if the resolution under which the bonds were issued shows on its face that they exceed the constitutional

⁶ *Pierre v. Duscomb*, 106 Fed. 611; 45 C. C. A. 499; *Kiowa Co. v. Howard*, 83 Fed. 296; 27 C. C. A. 531; *Wesson v. Mt. Vernon*, 98 Fed. 804; 39 C. C. A. 301; *Waite v. Santa Cruz*, 89 Fed. 619; *Huron v. Bank*, 86 Fed. 272; 49 L. R. A. 534; 30 C. C. A. 78; *State v. Wichita County*, 62 Kan. 494; 64 Pac. 45.

⁷ *Geer v. Ouray*, 97 Fed. 435; 38 C. C. A. 250.

⁸ *Oregon v. Jennings*, 119 U. S. 74.

⁹ *Evansville v. Dennett*, 161 U. S. 434; *Town of Coloma v. Eaves*, 92 U. S. 484; *Wesson v. Saline Co.*, 73 Fed. 917; 20 C. C. A. 227; *Ashman v. Pulaski Co.*, 73 Fed. 927; 20 C. C. A. 232; *South St. Paul v. Lamprecht Bros.*, 88 Fed. 449.

¹⁰ *Evansville v. Dennett*, 161 U. S. 434; *Village of Kent v. Dana*, 100 Fed. 56; 40 C. C. A. 281; *Pickens Township v. Post*, 99 Fed. 659; 41 C. C. A. 1; *Meade Co. v. Ins. Co.*, 90 Fed. 237; 32 C. C. A. 600;

Haskell Co. v. Ins. Co., 90 Fed. 228; 32 C. C. A. 591. Examples of recitals. "In pursuance of" the statute. *Grattan Township v. Chilton*, 97 Fed. 145; 38 C. C. A. 84; affirming, 82 Fed. 873; "full compliance with all requirements of" the statute. *Miller v. Irrigation District*, 99 Fed. 143.

¹¹ *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225; 75 N. W. 1050.

¹² *Schmidt v. Defiance*, 117 Fed. 702.

¹³ *Gunnison Co. v. Rollins*, 173 U. S. 255.

¹⁴ *State v. Helena*, 24 Mont. 521; 63 Pac. 99.

¹⁵ *Geer v. School District*, 97 Fed. 732; 38 C. C. A. 392; *Shaw v. Independent School District*, 77 Fed. 277; 23 C. C. A. 169; *National Life Ins. Co. v. Mead*, 13 S. D. 37; 48 L. R. A. 785; 82 N. W. 78; affirmed on rehearing, 13 S. D. 342; 83 N. W. 335; *Citizens' Bank v. Terrell*, 78 Tex. 450; 14 S. W. 1003.

limit of indebtedness,¹⁶ or if the bond shows on its face that the election was held so soon after the organization of the county that by law the township could not issue the bonds,¹⁷ or if the fact recited is one which under the law the officers are not authorized to decide,¹⁸ no estoppel arises. So a recital of full compliance does not estop the corporation from showing that no ordinance had been passed authorizing the issue of bonds, as required by statute.¹⁹ No recitals can prevent even a *bona fide* holder from being charged with notice of the statute and the construction thereof,²⁰ or the validity of the ordinance²¹ by virtue of which the bonds are issued. Thus if the recital is of an election on a given day and the statute under which the bonds are issued shows that no legal election could then have been held, the bonds are invalid.²²

An erroneous recital of the statute authorizing the issue,²³ or a recital of both a valid and an invalid act authorizing such issue,²⁴ do not invalidate bonds. Purchasers are chargeable with notice of the original order of the commissioners' court as to the purpose for which the bonds are to be used, but not of a subsequent order;²⁵ and with notice apparent on the face

¹⁶ *Fairfield v. School District*, 111 Fed. 453 (even if they recite that they are within the limit of indebtedness and issued "in strict compliance with the laws of the State.")

¹⁷ *Sage v. Fargo Township*, 107 Fed. 383; 46 C. C. A. 361.

¹⁸ *Crow v. Oxford*, 119 U. S. 215; *Geer v. School District*, 97 Fed. 732; 38 C. C. A. 392.

¹⁹ *Swan v. Arkansas City*, 61 Fed. 478.

²⁰ *Hill v. Memphis*, 134 U. S. 198; *Kelley v. Milan*, 127 U. S. 139; *Wells v. Supervisors of Pontotoc Co.*, 102 U. S. 625; *Township of East Oakland v. Skinner*, 94 U. S. 255; *McClure v. Township of Oxford*, 94 U. S. 429; *Supervisors of Marshal Co. v. Cook*, 38 Ill. 44; 87 Am. Dec. 282; *Bissell v. Kankakee*, 64 Ill. 249; 16 Am. Rep. 554;

Kirsch v. Braun, 153 Ind. 247; 53 N. E. 1082; *Uncas National Bank v. Superior*, 115 Wis. 340; 91 N. W. 1004.

²¹ *Klamath Falls v. Sachs*, 35 Or. 325; 76 Am. St. Rep. 501; 57 Pac. 329 (citing *Barnett v. Denison*, 145 U. S. 135; *Hackett v. Ottawa*, 99 U. S. 86; *Risley v. Howell*, 57 Fed. 544); *Peck v. Hempstead*, 27 Tex. Civ. App. 80; 65 S. W. 653.

²² *Sage v. Fargo Township*, 107 Fed. 383; 46 C. C. A. 361; *Manhattan Co. v. Ironwood*, 74 Fed. 535; 20 C. C. A. 642.

²³ *D'Esterre v. New York*, 104 Fed. 605; 44 C. C. A. 75.

²⁴ *Evansville v. Dennett*, 161 U. S. 434.

²⁵ *Mitchell Co. v. Bank*, 91 Tex. 361; 43 S. W. 880; reversing, 15 Tex. Civ. App. 172; 39 S. W. 628.

of the county records as to a bond election, as where the votes are canvassed by a board having no authority so to do,²⁶ and as to the fact that the persons signing the bonds had ceased to be public officers and had antedated the bonds.²⁷ A bond is valid if signed by a *de facto* officer,²⁸ but invalid if signed by one who is not an officer at all.²⁹ Where there is no recital of compliance with the statute, the registration and certification of bonds in compliance with statute does not effect an estoppel.³⁰ Recitals do not work an estoppel as against one who acquires bonds from the municipality with knowledge of the facts making such bonds invalid. Thus if the bond issue exceeds the constitutional limits of indebtedness, and one purchaser buys them all, he is charged with notice of their invalidity.³¹ So if there are no recitals in an original issue of bonds, recitals in refunding bonds given to take up the original issue cannot work an estoppel in favor of holders of the original bonds who receive the new issue.³² Estoppel by recitals operates only in favor of the holder of the bonds. The holder of bonds may contradict recitals therein for the purpose of establishing the validity of the bonds.³³

§1063. Ratification.

If a contract is invalid because it is outside of the power of the public corporation, or not in compliance with a mandatory requirement of the law as to its form, ratification is impossible.¹ Thus the allowance by county commissioners of an

²⁶ Brown v. Ingalls Township, 81 Fed. 485.

²⁷ Lehman v. San Diego, 73 Fed. 105.

²⁸ Ralls Co. v. Douglass, 105 U. S. 728; National Life Ins. Co. v. Huron, 62 Fed. 778; 10 C. C. A. 637.

²⁹ Coler v. Cleburne, 131 U. S. 162.

³⁰ Citizens, etc., Association v. Perry Co., 156 U. S. 692; German Savings Bank v. Franklin Co., 128

U. S. 526; Bolles v. Perry Co., 92 Fed. 479; 34 C. C. A. 478.

³¹ Burlington Savings Bank v. Clinton, 111 Fed. 439.

³² Salmon v. Allison, 125 Fed. 235.

³³ Chicago, etc., Ry. v. Dundy County (Neb.), 91 N. W. 554.

¹ Sage v. Fargo Township, 107 Fed. 383; 46 C. C. A. 361; Smeltzer v. Miller, 125 Cal. 41; 57 Pac. 668; Berka v. Woodward, 125 Cal. 119; 73 Am. St. Rep. 31; 57 Pac. 777;

invalid claim does not make it valid,² and if money is paid under such allowance it may be recovered.³ If the invalid contract was one which the corporation could make, and is not void because not in compliance with a mandatory provision of the law, it may be ratified.⁴ Thus a breach of condition avoiding the original liability may be waived by refunding such liability,⁵ and a contract invalid because no appropriation was made therefor may be ratified by an appropriation.⁶ Thus a subsequent resolution may make valid a contract void for want of such resolution.⁷ A contract made by the members of a board of education acting individually may be ratified by their conduct as a board in accepting and using goods delivered thereunder.⁸ Ratification, where possible, must be unequivocal. Where the individual members of a city council encouraged an attorney to bring an action, and the council as a body ordered the city's attorney to aid in such suit and

Paxton v. Bogardus, 201 Ill. 628; 66 N. E. 853; Indianapolis v. Wann, 144 Ind. 175; 31 L. R. A. 743; 42 N. E. 901; Gemmill v. Arthur, 125 Ind. 258; 25 N. E. 283; Grady v. Pruitt, 111 Ky. 100; 63 S. W. 283; Wadsworth v. Concord, 133 N. C. 587; 45 S. E. 948; McAleer v. Angell, 19 R. I. 688; 36 Atl. 588; State v. Pullman, 23 Wash. 583; 83 Am. St. Rep. 836; 63 Pac. 265; Balch v. Beach, 119 Wis. 77; 95 N. W. 132. (Distinguishing McGillivray v. School District, 112 Wis. 354; 88 Am. St. Rep. 969; 58 L. R. A. 100; 88 N. W. 310, as a case where the act ratified was within the power of the corporation, though without the power of the agent originally making it.) Uncas National Bank v. Superior, 115 Wis. 340; 91 N. W. 1004. "When a corporation or an agent thereof does an act or makes a promise that is forbidden by its charter or is not authorized thereby, either expressly or by fair implication, the act or promise is a

nullity and cannot be binding by a subsequent ratification." City of Memphis v. Gas. Co., 9 Heisk. (Tenn.) 531, 543, quoted in Waterson v. Nashville, 106 Tenn. 410, 424; 61 S. W. 782.

² Commissioners v. Heaston, 144 Ind. 583; 55 Am. St. Rep. 192; 41 N. E. 457; 43 N. E. 651; Jones v. Lucas Co., 57 O. S. 189; 63 Am. St. Rep. 710; 48 N. E. 882.

³ Gross v. Whitley County, 158 Ind. 531; 58 L. R. A. 394; 64 N. E. 25.

⁴ Supervisors v. Schenck, 5 Wall. (U. S.) 772; State v. Milling Co., 156 Mo. 620; 57 S. W. 1008; Bell v. Waynsboro, 195 Pa. St. 299; 45 Atl. 930.

⁵ Graves v. Saline Co., 161 U. S. 359.

⁶ Hill v. Indianapolis, 92 Fed. 467.

⁷ Cooper v. Cedar Rapids, 112 Ia. 367; 83 N. W. 1050.

⁸ Johnson v. School Corporation, 117 Ia. 319; 90 N. W. 713.

appropriated money for getting testimony therein, such official acts are not a ratification, the city not being a party to the action.⁹ Ratification must be by acts as formal as were necessary to make the original contract valid. If a contract must be made by ordinance, it must be ratified by ordinance.¹⁰ Ratification, if valid, makes the entire contract valid. Thus it validates a bond given by the contractor to the city to protect laborers and material men.¹¹

§1064. Curative legislation.

The legislature may ratify and validate any obligation of a public corporation which it had power to authorize in advance.¹ Thus debts in excess of the statutory limit may be made valid by subsequent legislation.² Thus the legislature may authorize a vote to be taken to validate debts incurred in excess of the limit of indebtedness under a constitutional provision making void debts in excess of the limit unless pursuant to a vote.³ So a statute may require a county to repay the amount received from the sale of bonds, invalid because their proceeds were to be devoted to a state armory, though most of the proceeds have been expended on such armory.⁴ So the legislature may validate a debt incurred when the legislature had power to authorize

⁹ *Root v. Topeka*, 63 Kan. 129; 65 Pac. 233.

¹⁰ *McCracken v. San Francisco*, 16 Cal. 591; *Durango v. Pennington*, 8 Colo. 257; 7 Pac. 14.

¹¹ *Devers v. Howard*, 88 Mo. App. 253.

¹ *Steele Co. v. Erskine*, 98 Fed. 215; 39 C. C. A. 173; (affirming, 87 Fed. 630); *Yavapai Co. v. McCord*, — Ariz. —; 59 Pac. 99; *Schneck v. Jeffersonville*, 152 Ind. 204; 52 N. E. 212; *Board, etc., of Linn Co. v. Snyder*, 45 Kan. 636; 23 Am. St. Rep. 742; 26 Pac. 21; *Erskine v. Nelson Co.*, 4 N. D. 66; 27 L. R. A. 696; 58 N. W. 348; *Mill Creek, etc., Ry. Co. v. Carthage*, 18 Ohio C. C.

216; *Coleman v. Broad River Township*, 50 S. C. 321; 27 S. E. 774; *Bell v. R. R. Co.*, 91 Va. 99; 20 S. E. 942; *State v. Winter*, 15 Wash. 407; 46 Pac. 644. *Contra*, *Choisser v. People*, 140 Ill. 21; 29 N. E. 546; *Post v. Pulaski Co.*, 49 Fed. 628; 9 U. S. App. 1; affirming, 47 Fed. 282.

² *Erskine v. Nelson Co.*, 4 N. D. 66; 27 L. R. A. 696; 58 N. W. 348; *Darke v. Salt Lake Co.*, 15 Utah 467; 49 Pac. 257.

³ *West v. Chehalis*, 12 Wash. 369; 50 Am. St. Rep. 896; 41 Pac. 171.

⁴ *New York, etc., Co. v. Board, etc.*, 106 Fed. 123; 45 C. C. A. 233.

it, though the statute is not passed till after a new constitutional provision is adopted, limiting debts so as to make the amount unlawful.⁵ So Congress may validate a bond of a territory.⁶ Such a curative act makes bonds valid, even if after the passage of such act a judgment is rendered in a suit instituted before such act was passed adjudging such bonds invalid.⁷ Such curative acts must be complied with strictly. A statute making valid bonds issued in compliance with a certain ordinance does not make valid any bonds not so issued.⁸

⁵ *Schneck v. Jeffersonville*, 152 Ind. 204; 52 N. E. 212; (distinguishing *Sykes v. Columbus*, 55 Miss. 115.

⁶ *Utter v. Franklin*, 172 U. S. 416.

⁷ *Middleton v. St. Augustine*, 42 Fla. 287; 29 So. 421.

⁸ *Lehman v. San Diego*, 83 Fed. 669; 27 C. C. A. 668; (where the denomination of the bonds was not fixed in accordance with the ordinance).

CHAPTER XLIX.

PRIVATE CORPORATIONS.

§1065. Nature and definition of private corporation.

A private corporation is in fact a number of natural persons acting together for certain purposes under a definite organization and endowed by law with certain attributes different from those of a partnership, a voluntary association, or any other union of natural persons. The most characteristic of its attributes are the so-called perpetual succession, which means that the death or withdrawal of one or all of the natural persons does not necessarily dissolve the corporate organization, and the right to contract, sue and the like as a person.¹

By the fiction of the law a corporation is an artificial person, distinct from the natural persons that in reality compose it, and possessed of certain limited powers.² Thus a change in stockholders of a corporation has no effect upon pre-existing liability of a corporation.³ So directors who have taken property as security for a corporation may convey it to the corporation by

¹Home Fire Ins. Co. v. Barber, — Neb. —; 60 L. R. A. 927; 93 N. W. 1024.

²Blackstone calls corporations "artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality." Black. Com. I, 467. Marshall, C. J., said that a corporation is "an artificial being, invisible, intangible and immortal, and existing only in contemplation of the law." Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 636. Substantially similar definitions are common. Nashua, etc., R. R. Co. v.

Lowell, etc., R. R. Co., 136 U. S. 356; Baltimore, etc., R. R. Co. v. Church, 108 U. S. 317; Bank v. Earle, 13 Pet. (U. S.) 519; Smith v. Hurd, 12 Metc. (Mass.) 371; 46 Am. Dec. 690; Landers v. Church, 114 N. Y. 626; 21 N. E. 420; Rudd v. Robinson, 126 N. Y. 113; 22 Am. St. Rep. 816; 12 L. R. A. 473; 26 N. E. 1046; Weyeth, etc., Co. v. James, etc., Co., 15 Utah 110; 47 Pac. 604; State v. Ry. Co., 45 Wis. 579.

³Andres v. Morgan, 62 O. S. 236; 78 Am. St. Rep. 712; 56 N. E. 874.

public sale, free from the equity of redemption of the creditor.⁴ So where the same persons own all the stock of two corporations the contract of one is not the contract of the other.⁵ The existence of the corporation apart from its stockholders is a legal fiction.⁶ Thus where A transferred his business to a corporation in which he owned practically all the stock it was held to be substantially a transfer to himself,⁷ and a corporation organized without capital or assets to cover a real partnership was treated as not existing.⁸ This contradiction between fact and theory is the cause of the undoubted confusion that now exists in the law of corporations. The courts vacillate between a desire to effect justice by treating contracts and other transactions of a corporation as they would those of a partnership or other association of individuals as far as rights of creditors

⁴ *Copsey v. Bank*, 133 Cal. 659; 85 Am. St. Rep. 238; 66 Pac. 7.

As to contracts between a corporation and its officers, see § 181.

⁵ *Way Cross, etc., R. R. Co. v. R. R. Co.*, 109 Ga. 827; 35 S. E. 275.

⁶ "The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood." "Now so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored." *State v. Standard Oil Co.*, 49 O. S. 137, 177; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279. "Modern decisions are tending to a disregard of the mental conception that a corporation is an entity separate from its incorporators, as in many in-

stances it is simply a 'stumbling block' in the way of doing justice between real persons." *Andres v. Morgan*, 62 O. S. 236, 245; 78 Am. St. Rep. 712; 56 N. E. 875. And see *People v. Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843; 9 L. R. A. 33; 24 N. E. 834.

⁷ "His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before." *Bank v. Trebein*, 59 O. S. 316, 325; 52 N. E. 834; (citing *Hibernia Ins. Co. v. Transportation Co.*, 13 Fed. 516; *Kellogg v. Bank*, 58 Kan. 43; 62 Am. St. Rep. 596; 48 Pac. 587; *Terhune v. Bank*, 45 N. J. Eq. 344; 19 Atl. 377; *Bennett v. Minott*, 28 Or. 339; 39 Pac. 997; 44 Pac. 288; *Montgomery, etc., Co. v. Drenelt*, 133 Pa. St. 585; 19 Am. St. Rep. 663; 19 Atl. 428).

⁸ *Christian, etc., Co. v. Lunber Co.*, 121 Ala. 340; 25 So. 566.

are concerned, and a desire, in conformity to precedent, to treat them as those of an artificial person of limited powers, distinct from its stockholders. This confusion as to the legal effect of contracts of corporations is increased by additional causes. First, rules which properly apply to public corporations which exercise governmental powers affecting the whole public have been extended to private corporations. Second, rules which properly determine the extent of corporate power as between the state and the corporation in a direct proceeding to oust the corporation from unlawful exercise of franchises, have been extended to determine the validity of contracts entered into voluntarily between the corporation and private individuals. Third, rules which properly determine the rights of stockholders who actively dissent from the management of the corporation to invoke the action of courts of equity to restrain the directors from exceeding their authority, have been extended so as to determine the validity of contracts entered into by a corporation without objection from its stockholders, and often with their active assent; and these rules have been so applied as to render invalid contracts which the stockholders might not have been able to prevent the directors from making

§1066. The charter of the corporation.

The charter of the corporation measures the powers which it may exercise lawfully.¹ This charter is given by the state and accepted by the corporation. Under the old system of incorporation a corporation was created by a special act of the legislature, which was known as its charter, and which created, determined and limited its corporate powers. Many state constitutions now provide that corporations must be incorporated under general laws. Under such provisions a corporation is usually created by filing articles of incorporation in accordance with the provisions of the general incorporation laws; and when its charter is spoken of this is a convenient and stereotyped form of expression used to denote its articles

¹ *Sturdevant Bros., etc., Co. v. affirming on rehearing*, 62 Neb. 472, Bank, — Neb. —; 95 N. W. 819; 87 N. W. 156.

of incorporation, together with the general laws applicable to a corporation, which determine its corporate powers.² A corporation cannot by its articles of association assume a greater power than that given in the general statute,³ though such addition does not invalidate the powers authorized by statute.⁴ Since the charter of a corporation is given by the state, the members of a corporation cannot alter or increase the powers of the corporation as the members of a partnership can alter or increase the powers of the partnership. This distinction results in many of the practical differences between the contracts of partnerships and those of corporations.

The moment at which a corporation *de jure* comes into existence depends on local statute. In Wisconsin it exists as soon as its articles of association are recorded;⁵ in Ohio it does not exist until it organizes by electing a board of directors, after the stock is subscribed.⁶

§1067. Scope and construction of corporate charters.

The original rule for determining the powers of a corporation was that the charter must be construed strictly against the corporation,¹ and this is still repeated by some courts.² It is

² *Danville v. Water Co.*, 178 Ill. 209; 69 Am. St. Rep. 304; 53 N. E. 118; *McLeod v. Medical College*, — Neb. —; 96 N. W. 265.

³ *Oregon, etc., Co. v. Ry. Co.*, 130 U. S. 1; *People v. Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; 72 Am. St. Rep. 326; 54 N. E. 407.

⁴ *Shoun v. Armstrong* (Tenn. Ch. App.), 59 S. W. 790.

⁵ *Badger Paper Co. v. Rose*, 95 Wis. 145; 37 L. R. A. 162; 70 N. W. 302.

⁶ *State v. Ins. Co.*, 49 O. S. 440; 34 Am. St. Rep. 573; 16 L. R. A. 611; 31 N. E. 658.

¹ *Perrine v. Canal Co.*, 9 How.

(U. S.) 172; *Bartram v. Turnpike Co.*, 25 Cal. 283; *St. Louis, etc., Co. v. Haller*, 82 Ill. 208; *Lincoln, etc., Co. v. Lincoln*, 61 Neb. 109; 84 N. W. 802; *Mayor of Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 547; *Morris Canal, etc., Co. v. R. R.*, 16 N. J. Eq. 419; *Bank v. Swayne*, 8 Ohio 257; 32 Am. Dec. 707; *Bonham v. Taylor*, 10 Ohio 108; *Straus v. Insurance Co.*, 5 O. S. 59; *State v. Cincinnati, etc., Co.*, 18 O. S. 262; *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464; *Commonwealth v. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471; *Talmdge v. Transportation*, 3 Head. (Tenn.) 337.

² *Oregon, etc., Co. v. Oregonian Ry.*, 130 U. S. 1; *Louisville, etc., Ry.*

still in force when the grant construed is a gift of franchises or exclusive privileges,³ or of exemption from taxation,⁴ or other gift in derogation of sovereign authority; but it has little application to the construction of corporate powers when the rights and liabilities of those dealing with the corporation are concerned. After the Supreme Court of the United States held, in the Dartmouth College case,⁵ that the charter of a corporation might be a contract between the state and the corporation, and accordingly, under the clause of the Federal Constitution prohibiting a state from impairing the obligation of contracts, it would be beyond the power of the state to revoke corporate powers once granted, the state courts were more than ever disposed to adhere to the old rule. But when by express reservation in state constitutions corporate powers remain under state control the tendency is toward a more reasonable construction of grants of corporate authority.⁶ In determining the scope of corporate power in making contracts two rules have been advanced, which in their abstract form are not perfectly consistent. The first is that corporate power includes only such as is expressly granted by the corporate charter, together with those powers which are necessary to carry the express powers into execution.⁷ The second rule is that corporate power includes express powers and such incidental powers as are proper and

Co. v. Kentucky, 161 U. S. 677; Pearsall v. Ry., 161 U. S. 646; reversing 73 Fed. 933; American, etc., Co. v. R. R., 157 Ill. 641; 42 N. E. 153; Illinois Health University v. People, 166 Ill. 171; 46 N. E. 737.

³ Covington, etc., Co. v. Sandford, 164 U. S. 578; Stein v. Water Supply Co., 141 U. S. 67; Indianapolis, etc., R. R. Co. v. R. R. Co., 127 Ind. 369; 8 L. R. A. 539; 24 N. E. 1054; 26 N. E. 893; State v. Hamiltons, 47 O. S. 52; 23 N. E. 935; State v. Cincinnati, etc., Co., 18 O. S. 262.

⁴ Chesapeake, etc., Ry. Co. v. Miller, 114 U. S. 176.

⁵ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

⁶ National Bank v. Insurance Co., 41 O. S. 1.

⁷ Minturn v. Larue, 23 How. (U. S.) 435; Charles River Bridge v. Warren Bridge, 11 Pet. 420; Vandal v. Dock Co., 40 Cal. 83; People *ex rel.* Moloney v. Pullman's, etc., Co., 175 Ill. 125; 51 N. E. 664; Chicago, etc., Co. v. Coke Co., 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; People *ex rel.* Peabody v. Trust Co., 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; National, etc., Association v. Bank, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619; Franklin National Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 302;

convenient for executing the express powers given by the charter;⁸ or as otherwise expressed it has within the limits of its general grant of power all the powers that an individual would have in executing such general power.⁹ In practical application there is little difference between these two rules, as the term "necessary" in the first rule is usually treated as equivalent to "suitable" or "appropriate." "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it."¹⁰

§1068. Implied powers.

If power is either expressly given or expressly denied to a corporation by its charter, the only question open for discussion is the meaning of the express terms of the charter. But where a corporation attempts to exercise power neither expressly given nor withheld by its charter the question presented

39 L. R. A. 725; 49 N. E. 592; Bankers' Union v. Crawford, 67 Kan. 449; 73 Pac. 79; Fulton v. Land, etc., Co., 47 Kan. 621; 28 Pac. 720; State v. Newman, 51 La. Ann. 833; 72 Am. St. Rep. 476; 25 So. 408; Lindenborough Glass Co. v. Glass Co., 111 Mass. 315; State ex rel. Crow v. Trust Co., 144 Mo. 562; 46 S. W. 593; Equitable Trust Co. v. Garis, 190 Pa. St. 544; 70 Am. St. Rep. 644; 42 Atl. 1022; Union Bank v. Jacobs, 6 Humph. (Tenn.) 515; Northside Ry. Co. v. Worthington, 88 Tex. 562; 53 Am. St. Rep. 778; 30 S. W. 1055. "It is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities such as an individual or an ordinary partnership, and if such a power is claimed for it, the words giving the power, or from which it is necessarily implied must be found in the

charter or it does not exist." National, etc., Association v. Bank, 181 Ill. 35, 40; 72 Am. St. Rep. 245; 54 N. E. 619.

⁸ White Water, etc., Co. v. Vallette, 21 How. 414; McKiernan v. Lenzen, 56 Cal. 61; Gould v. Fuller, 79 Minn. 414; 82 N. W. 673; Central, etc., Co. v. Dairy Co., 60 O. S. 96; 53 N. E. 711; Malone v. Lancaster, etc., Co., 182 Pa. St. 309; 37 Atl. 932.

⁹ Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907; Thompson v. Lambert, 44 Ia. 239; Stockton v. Tobacco Co., 55 N. J. Eq. 352; 36 Atl. 971; Ohio, etc., Co. v. Merchants', etc., Co., 11 Humph. (Tenn.) 1; 53 Am. Dec. 742.

¹⁰ Hood v. New York, etc., R. R. Co., 22 Conn. 1, 16; quoted in Niccollet National Bank v. Frisk-Turner Co., 71 Minn. 413, 418; 70 Am. St. Rep. 334; 74 N. W. 160.

is whether the power is implied from those expressly given. An exhaustive discussion of this question would occupy more space than can be given to it here, and properly belongs to corporation law. The following propositions are given rather as suggestive examples than as an exhaustive enumeration of implied powers.

§1069. Borrowing money.

A corporation has an implied power to borrow money for corporate purposes,¹ and to give its notes for its debts,² to pledge its bonds for its indebtedness,³ and to secure its debts by mortgage.⁴ Thus a corporation formed to buy land may mortgage land thus bought for the purchase money,⁵ and after acquired property may be mortgaged.⁶ Under a statute requiring the consent of the stockholders at a regularly called meeting as a condition precedent to the validity of a mortgage, a mortgage given under other circumstances is said to be *ultra vires*.⁷ However, such a statute restricting the power of mortgage, requiring a majority of the stockholders to acquiesce, applies to the *corpus* of the property, not to the output.⁸

¹ Kneeland v. Ry. Co., 167 Mass. 161; 45 N. E. 86.

² Tod v. Land Co., 57 Fed. 47; Temple, etc., Co. v. Hellman, 103 Cal. 634; 37 Pac. 530; Kneeland v. Ry. Co., 167 Mass. 161; 45 N. E. 86; Merchants', etc., Bank v. Gaslight Co., 159 Mass. 505; 38 Am. St. Rep. 453; 34 N. E. 1083; Peninsular, etc., Bank v. Hosie, 112 Mich. 351; 70 N. W. 890; Africa v. News-Tribune Co., 82 Minn. 283; 84 N. W. 1019; National Bank v. Young, 41 N. J. Eq. 531; 7 Atl. 488.

³ New Memphis Gaslight Co. Cases, 105 Tenn. 268; 80 Am. St. Rep. 880; *sub nomine* Rawlings v. Gaslight Co., 60 S. W. 206.

⁴ Jones v. Guaranty, etc., Co., 101 U. S. 622; Wood v. Whelen, 93 Ill. 153; Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907; Bell, etc., Co. v. Glass-Works Co.,

106 Ky. 7, 23; 50 S. W. 2, 1092; 51 S. W. 180; reversing on rehearing, 48 S. W. 440; Burrill v. Bank, 2 Met. (Mass.) 163; 35 Am. Dec. 395; Hays v. Galion, etc., Co., 29 O. S. 330; Hunt v. Gaslight Co., 95 Tenn. 136; 31 S. W. 1006; Threadgill v. Pumphrey, 87 Tex. 573; 30 S. W. 356; affirming 9 Tex. Civ. App. 184; 28 S. W. 450.

⁵ Sheppard v. Mining Co., 25 Ont. 305.

⁶ Frank v. Hicks, 4 Wyom. 502; 35 Pac. 475; rehearing denied, 4 Wyom. 534; 35 Pac. 1025. By statute in Georgia, a corporation cannot mortgage future income. Lubroline Oil Co. v. Bank, 104 Ga. 376; 30 S. E. 409.

⁷ Southern, etc., Association v. Stable Co., 128 Ala. 624; 29 So. 654.

⁸ Alabama, etc., Co. v. McKeever, 112 Ala. 134; 20 So. 84.

§1070. Borrowing in excess of limitation of indebtedness.

If a corporation borrows money in excess of its limitation of indebtedness, the weight of authority is that the corporation is liable therefor,¹ at least to the extent of benefits received in the transaction,² or as far as it is used to pay pre-existing indebtedness.³ One lending money is subrogated to prior debts as far as they are discharged by the new loan,⁴ but is not subrogated to the security or priority of such creditors.⁵ Subsequent creditors who knew that the prior indebtedness exceeded the limit cannot attack the validity of a mortgage given to secure such debt.⁶ Its mortgage for such indebtedness cannot be attacked by subsequent lienholders.⁷ Some jurisdictions hold that the corporation is liable only up to the amount limited,⁸ and where the subsequent creditors do not know of the prior debt the mortgage is void as to the excess above the limit of indebtedness as against their rights, and recording the mortgage is not notice.⁹

¹ *Weber v. Bank*, 64 Fed. 208; *Wood v. Water Works Co.*, 44 Fed. 146; 12 L. R. A. 168; *Warfield v. Canning Co.*, 72 Ia. 666; 2 Am. St. Rep. 263; 34 N. W. 467; *Garrett v. Plow Co.*, 70 Ia. 697; 59 Am. Rep. 461; 29 N. W. 395; *Humphrey v. Association*, 50 Ia. 607.

² *Peatman v. Centreville, etc., Co.*, 100 Ia. 245; 69 N. W. 541; *Beach v. Wakefield*, 107 Ia. 567, 591; 76 N. W. 688; modified on rehearing, 78 N. W. 197.

³ *In re Cork, etc., Co.*, L. R. 4 Ch. App. 748; *Powell v. Blair*, 133 Pa. St. 550; 19 Atl. 559.

⁴ *In re Cork, etc., Co.*, L. R. 4; Ch. App. 748.

⁵ *In re Wrexham, etc., Ry.* (1899), 1 Ch. 440; 68 L. J. Ch. 270.

⁶ *Central Trust Co. v. Columbus etc., Ry. Co.*, 87 Fed. 815; (citing *Union National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Fritts v. Palmer*, 132 U. S. 282; *Logan, etc., Bank v. Townsend*, 139 U. S. 67); *Beach v. Wakefield*, 107 Ia. 567, 591; 76 N. W. 688; 78 N. W. 197.

⁷ *Beach v. Wakefield*, 107 Ia. 567, 591; 76 N. W. 688; 78 N. W. 197.

⁸ *Covington First National Bank v. Kiefer, etc., Co.*, 95 Ky. 97; 23 S. W. 675; *Kraniger v. Building Society*, 60 Minn. 94; 61 N. W. 904.

⁹ *Bell, etc., Co. v. Glass Works*, 106 Ky. 7, 23; 50 S. W. 2, 1092; 51 S. W. 180; reversing on rehearing 48 S. W. 440.

§1071. Accommodation paper.

A corporation has no power to issue accommodation paper.¹ Hence a corporation cannot guarantee commercial paper executed by another.² So a corporate note, signed for the corporation by its president, payable to himself, is *prima facie* void, even if the holder of the note requested that it be made payable to the president.³ Some authorities seem to dissent from this view, and to hold that the assent of all the stockholders and directors may bind the corporation on accommodation paper.⁴ But where the corporation is really the principal debtor its note is binding, though it takes the form of accommodation paper.⁵ Thus a corporation is liable on an indorsement made in part for the benefit of corporation and in part for the benefit of another, where the corporation received and retained benefits;⁶ it may buy goods by indorsing a note of another;⁷ and it is liable where the money was nominally lent to its stockholders⁸ or its directors,⁹ but really to the corporation, though

¹ *Tod v. Land Co.*, 57 Fed. 47; *Lyon, etc., Co. v. Bank*, 85 Fed. 120; 29 C. C. A. 45; *Park Hotel Co. v. Bank*, 86 Fed. 742; 30 C. C. A. 409; *Steiner v. Lumber Co.*, 120 Ala. 128; 26 So. 494; *Hall v. Turnpike Co.*, 27 Cal. 255; 87 Am. Dec. 75; *Aetna, etc., Bank v. Ins. Co.*, 50 Conn. 167; *Wheeler v. Bank*, 188 Ill. 34; 58 N. E. 598; *Lucas v. Transfer Co.*, 70 Ia. 541; 59 Am. Rep. 449; 30 N. W. 771; *Trapp v. Bank*, 101 Ky. 485; 41 S. W. 577; modified on rehearing 43 S. W. 470; *M. V. Monarch Co. v. Bank*, 105 Ky. 430; 88 Am. St. Rep. 310; 49 S. W. 317; *Monument, etc., Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Preston v. Cereal Co.*, — Neb. —; 93 N. W. 136; *Blake v. Mfg. Co.* (N. J. Ch.), 38 Atl. 241; *National, etc., Bank v. German, etc., Co.*, 116 N. Y. 281; 5 L. R. A. 673; 22 N. E. 567; *Bank of Genesee v. Bank*, 13

N. Y. 309; *Benedict v. Bank*, 4 Ohio N. P. 231; 6 Ohio Dec. 320; *Culver v. Reno, etc., Co.*, 91 Pa. St. 367; *Madison, etc., Co. v. Road Co.*, 7 Wis. 59.

² *M. V. Monarch Co. v. Bank*, 105 Ky. 430; 88 Am. St. Rep. 310; 49 S. W. 317.

³ *Porter v. Grain Co.*, 78 Minn. 210; 80 N. W. 965.

⁴ *Murphy v. Improvement Co.*, 97 Fed. 723; *Martin v. Mfg. Co.*, 122 N. Y. 165; 25 N. E. 303 (obiter).

⁵ *Beacon Trust Co. v. Souther*, 183 Mass. 413; 67 N. E. 345; *Bank v. Flour Co.*, 41 O. S. 552.

⁶ *Lyon, etc., Co. v. Bank*, 85 Fed. 120; 29 C. C. A. 45.

⁷ *National Bank v. Allen*, 90 Fed. 545; 33 C. C. A. 169.

⁸ *Stough v. Mill Co.*, 54 Neb. 500; 74 N. W. 868.

⁹ *Allen v. Hotel Co.*, 95 Tenn. 480; 32 S. W. 962.

the transaction takes the form of the corporation's securing their personal debts. A real estate company may give its note for the debt of another, which is secured by attachment on land previously purchased by such corporation;¹⁰ and where a partnership incorporates and the corporation becomes liable for partnership obligations,¹¹ a note for such obligation, signed by the corporation as surety, is binding on the corporation, since as to the payee it is a corporation debt.¹² So a corporation may buy a business, and assume the debts thereof.¹³ A corporation is liable on its accommodation paper if in the hands of a *bona fide* holder for value and before maturity.¹⁴ But where certain warehouse receipts were given by a corporation as collateral security to a bank, for its loan, and before the loan was entirely paid, the treasurer of the corporation notified the bank that the corporation was indebted to him and that the receipts were to remain to secure his existing indebtedness to the bank and this statement was false, it was held that the pledging of the receipt for his debt was *ultra vires*.¹⁵

§1072. Suretyship.

A contract of suretyship in no way beneficial to the corporation is *ultra vires*.¹ The courts are divided as to the power of a corporation to enter into contracts of guaranty as an inci-

¹⁰ Leonard, etc., Co. v. Bank, 86 Fed. 502; 30 C. C. A. 221.

¹¹ Pratt v. Mfg. Co., 64 Fed. 589; Schufeldt v. Smith, 139 Mo. 367; 40 S. W. 887; Reed Bros. Co. v. Bank, 46 Neb. 168; 64 N. W. 701; Andres v. Morgan, 62 O. S. 236; 78 Am. St. Rep. 712; 56 N. E. 875. Apparently *contra*, Lamkin v. Mfg. Co., 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042, where it seems to be held that the corporation may assume the partnership debts, but is not otherwise liable.

¹² Andres v. Morgan. 62 O. S. 236; 78 Am. St. Rep. 712; 56 N. E. 875.

¹³ Dominion, etc., Co. v. Publish-

ing Co., 32 N. B. 692; Farmers' Bank v. Steamboat Co., 108 Ky. 447; 56 S. W. 719.

¹⁴ Jacobs, etc., Co. v. Banking, etc., Co., 97 Ga. 573; 25 S. E. 171; Monument National Bank v. Globe Works, 101 Mass. 57; 3 Am. Rep. 322; American, etc., Bank v. Gluck, 68 Minn. 129; 70 N. W. 1085; National Bank of Republic v. Young, 41 N. J. Eq. 531; 7 Atl. 488.

¹⁵ Wheeler v. Bank, 188 Ill. 34; 80 Am. St. Rep. 161; 58 N. E. 598; reversing, 85 Ill. App. 28.

¹ Wheeler v. Bank, 188 Ill. 34; 80 Am. St. Rep. 161; 58 N. E. 598.

dental means of carrying on its business. It is often stated as an abstract proposition that a corporation may guarantee performance of the contracts of others whenever it is reasonably necessary or proper for carrying its own express powers into effect;² but like other abstract rules this form of statement is of little practical value. Some authorities hold that a contract of suretyship is invalid where not expressly authorized, even if on an independent consideration³ or if very beneficial to the corporation. Thus it cannot guarantee performance of a contract for erecting a plant to get the sale of iron work for the plant to the contractor whose contract it guarantees;⁴ nor can it sign an appeal bond as surety in order to keep the defendant in business so that he can continue to buy beer of the corporation,⁵ or to obtain a preference in collecting claims by suit;⁶ nor can a bank become surety on a replevin bond;⁷ nor can a railway guarantee expenses of a festival to induce an increase in passenger traffic.⁸

Other authorities uphold contracts of guaranty which are adapted to give collateral assistance to the chief business of the corporation. Thus it has been held that a corporation formed for the purpose of selling lumber may become surety on the bond of a contractor in order to secure the sale of lumber to him.⁹ A railroad, to obtain consent for its right of way, may

² *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381; *Marbury v. Land Co.*, 62 Fed. 335; 10 C. C. A. 393; *Tod v. Land Co.*, 57 Fed. 47; *Mercantile Trust Co. v. Kiser*, 91 Ga. 636; 18 S. E. 358; *Ellerman v. Chicago, etc., Co.*, 49 N. J. Eq. 217; 23 Atl. 287; *Holmes v. Willard*, 125 N. Y. 75; 11 L. R. A. 170; 25 N. E. 1083.

³ *Great Northwest, etc., Ry. v. Charlebois* (1899), App. Cas. 114; *Ward v. Joslin*, 105 Fed. 224; 44 C. C. A. 456; *Rogers v. Belting Co.*, 184 Ill. 574; 56 N. E. 1017; reversing, *Jewell Belting Co. v. Rogers*, 84 Ill. App. 249.

⁴ *Humboldt, etc., Co. v. Milling Co.*, 62 Fed. 356; 10 C. C. A. 415.

⁵ *Best Brewing Co. v. Klassen*, 185 Ill. 37; 76 Am. St. Rep. 26; 50 L. R. A. 765; 57 N. E. 20.

⁶ *Kelly, etc., v. Varnish Co.*, 90 Ill. App. 287.

⁷ *Sturdevant Bros. v. Bank*, — Neb. —; 95 N. W. 819; affirming on rehearing, 62 Neb. 472; 87 N. W. 156. (It not appearing that such course of action was necessary to protect the bank's interests.)

⁸ *Davis v. R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221.

⁹ *Central Lumber Co. v. Kelter*, 201 Ill. 503; 66 N. E. 543; affirming, 102 Ill. App. 333; *F. Wittmer, etc., Co. v. Rice*, 23 Ind. App. 586; 55 N. E. 868; *Wheeler, etc.,*

guarantee the value of lots or agree to pay the difference between a fixed price and what the lots will bring at auction.¹⁰ A corporation formed to sell land may agree to join with another person in repurchasing land sold and to divide the profit and loss with such co-purchaser in order to diminish its own losses;¹¹ a guaranty by a brewing company of the rent of a hotel in which its beer is sold has been upheld;¹² a hotel may subscribe toward the expenses of a military encampment to draw trade;¹³ a corporation formed to manufacture and deal in merchandise may make a subscription to secure the location of a post-office in an adjoining building in order to increase its trade;¹⁴ and a lumber company may guarantee bonds of a railroad to carry its lumber to market.¹⁵ A corporation formed to lay out and sell lots and promote a town may guarantee the location and operation of a railway in order to induce a store to move to the town,¹⁶ and a street railway company may subscribe to induce a baseball company to locate its grounds on said car line.¹⁷ So where a debtor corporation had given a creditor corporation an order for the proceeds of the sale of certain articles in process of manufacture, it was held that the creditor corporation might guarantee payment for finishing such articles.¹⁸ A corporation cannot guarantee the bonds of another corporation¹⁹

Co. v. Land Co., 14 Wash. 630; 45 Pac. 316; Interior Woodwork Co. v. Prasser, 108 Wis. 557; 84 N. W. 833.

¹⁰ Vanderveer v. Ry. Co., 82 Fed. 355.

¹¹ Bates v. Beach Co., 109 Cal. 160; 41 Pac. 855; same case, Bates v. Babcock, 95 Cal. 479; 30 Pac. 605.

¹² Winterfield v. Brewing Co., 96 Wis. 239; 71 N. W. 101.

¹³ Richelieu Hotel Co. v. Encampment Co., 140 Ill. 248; 33 Am. St. Rep. 234; 29 N. E. 1044.

¹⁴ B. S. Green Co. v. Blodgett, 159 Ill. 169; 50 Am. St. Rep. 146; 42 N. E. 176.

¹⁵ Mercantile Trust Co. v. Kiser, 91 Ga. 636; 18 S. E. 358.

¹⁶ Arkansas, etc., Co. v. Lincoln, 56 Kan. 145; 42 Pac. 706.

¹⁷ Temple, etc., Ry. Co. v. Hellman, 103 Cal. 634; 37 Pac. 530.

¹⁸ Flint, etc., Co. v. Mfg. Co. (Ind.), 56 N. E. 858.

¹⁹ Louisville, etc., Co. v. Ohio, etc., Co., 69 Fed. 431; Northside Ry. Co. v. Worthington, 88 Tex. 562; 53 Am. St. Rep. 778; 30 S. W. 1055. (A land company was not allowed to guarantee bonds of a street railway company to secure passenger service to the addition laid out by the land company.)

nor dividends on stock,²⁰ though it may guarantee bonds of another company which it has taken for a debt, in order to effect a sale.²¹ A corporation which may lease another road may guarantee the bonds of such other road as a consideration for the lease.²² A corporation cannot assume individual debts of a stockholder,²³ or give a mortgage,²⁴ or issue corporate securities,²⁵ or stock therefor,²⁶ though where a corporation receives its assets in fraud of the creditors of the chief stockholders and issues stock for such assets it may buy the judgments and secure release of the assets from attachment;²⁷ and it cannot assume the debts of another corporation except to the extent of the assets which it receives.²⁸ While the conflict in some of the cases cited is hopeless, many of them may be reconciled by this statement of the rule. Where the contract of guaranty is the consideration of a valid contract of sale, to or by the corporation, it is valid. The corporation may agree to pay for the goods, as well as it may pay cash for them, and it makes no difference to whom the money is to be paid. But where the contract of guaranty is merely collateral to the authorized contract of sale, and forms an inducement therefor, the conflict is hopeless. Where power is given to one corporation to aid another, it may do so by guaranteeing its bonds.²⁹

§1073. Lending money.

A corporation has usually an implied power to lend money where this is an appropriate means of carrying on its business.¹

²⁰ *Rhorer v. Middlesboro, etc., Co.*, 103 Ky. 146; 44 S. W. 448.

²¹ *Marbury v. Land Co.*, 62 Fed. 335; 10 C. C. A. 393; *Ellerman v. Chicago, etc., Co.*, 49 N. J. Eq. 217; 23 Atl. 287. See also *Broadway National Bank v. Baker*, 176 Mass. 294; 57 N. E. 603.

²² *Low v. R. R. Co.*, 52 Cal. 53; 28 Am. Rep. 629.

²³ *Gilbert v. Mfg. Co.*, 98 Fed. 208.

²⁴ *Singer Piano Co. v. Barnard, etc.*, 113 Ia. 664; 83 N. W. 725 (the debts being for unpaid subscriptions for stock).

²⁵ *Wheeler v. Bank*, 188 Ill. 34; 80 Am. St. Rep. 161; 58 N. E. 598; *Wilson v. Ry. Co.*, 120 N. Y. 145; 17 Am. St. Rep. 625; 24 N. E. 384.

²⁶ *Farrington v. R. R. Co.*, 150 Mass. 406; 15 Am. St. Rep. 222; 5 L. R. A. 849; 23 N. E. 109.

²⁷ *Sutton v. Dudley*, 193 Pa. St. 194; 44 Atl. 438.

²⁸ *Kentucky, etc., Association v. Lawrence*, 106 Ky. 88; 49 S. W. 1059.

²⁹ *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381.

¹ *Brown v. Elwell*, 17 Wash. 442; 49 Pac. 1068.

It may loan undivided profits.² So a mutual benefit society may take a note for money lent.³ A statute restricting the manner of lending on the security of chattels "or otherwise," does not apply to real estate mortgages.⁴ A statute forbidding any corporation except a building and loan association to lend money to a stockholder prevents an insurance company from advancing money to its stockholders.⁵

§1074. Power to acquire real property.

A corporation may acquire and hold realty which is proper for the exercise of its corporate powers.¹ It cannot acquire land for purposes not connected with the purposes of its creation.² Thus a company formed to build cars cannot own land to build a town on and operate a sewage system and a sewage farm.³ A building and loan association cannot buy as an investment realty on which it has no prior lien.⁴ In New Jersey it was held that a cemetery company may exchange its stock of little value for land to prevent competition.⁵ A corporation may acquire land in exchange for its stock of merchandise when it is going out of business.⁶ A corporation authorized to hold land may contract for proper easements for such land:

² Dock v. Cordage Co., 167 Pa. St. 370; 31 Atl. 636.

³ Kripner v. Lincoln, 66 Ill. App. 532.

⁴ Commercial, etc., Association v. Mackenzie, 85 Md. 132; 36 Atl. 754.

⁵ Fisher v. Parr, 92 Md. 245; 48 Atl. 621.

¹ Lathrop v. Bank, 8 Dana (Ky.) 114; 33 Am. Dec. 481; Richardson v. Mechanic Association, 131 Mass. 174; Thompson v. Waters, 25 Mich. 214; 12 Am. Rep. 243; People v. O'Brien, 111 N. Y. 1; 7 Am. St. Rep. 684; 2 L. R. A. 255; 18 N. E. 692; Overmyer v. Williams, 15 Ohio 26; Covington, etc., Co. v. Magruder, 63 O. S. 455; 59 N. E. 216.

² Case v. Kelly, 133 U. S. 21;

Coleman v. Turnpike Co., 49 Cal. 517; People v. Car Co., 175 Ill. 125; 51 N. E. 664; Taber v. Ry. Co., 15 Ind. 459; Cynthiana, etc., Co. v. Hutchinson (Ky.), 60 S. W. 378; Thompson v. West, 59 Neb. 677; 49 L. R. A. 337; 82 N. W. 13; State v. Newark, 26 N. J. L. 519; affirming, 25 N. J. L. 315.

³ People v. Car Co., 175 Ill. 125; 51 N. E. 664.

⁴ National, etc., Association v. Bank, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619.

⁵ Rural Homestead Co. v. Wildes, 54 N. J. Eq. 668; 35 Atl. 896.

⁶ Morissette v. Howard, 62 Kan. 463; 63 Pac. 756.

as a bank may contract for an easement of light and air,⁷ and a street railway company which has acquired a right to operate a road by horse-power over the roadbed of a turnpike company may contract for the right to use electricity by paying an extra amount for the additional servitude;⁸ or a corporation formed to lay out lots and sell them may build a bridge for access to such lots.⁹ A corporation having legal capacity to hold property may hold it in trust as an individual could if not inconsistent with its corporate powers.¹⁰

§1075. Power to acquire personal property.

The power of a corporation to acquire personal property suitable for its business,¹ such as supplies of material for manufacturing,² or means of transportation for its materials and product,³ is so much broader than its power to acquire realty that it is rarely questioned. A corporation cannot, however, buy property suitable only for purposes outside the scope of the corporate business. Thus a bank cannot buy a manufacturing plant.⁴ So a corporation formed to manufacture and sell cotton-seed products, including fertilizer, cannot buy a different kind of fertilizer to resell at a profit.⁵ So a manufacturing or trading corporation cannot buy up claims against others as a speculation.⁶ It may buy up claims, however, as a means of carrying its own powers into execution. Thus a hardware company may buy up claims against its debtor for its own protection.⁷ So a corporation has implied power to purchase all

⁷ First, etc., *Church v. Bank*, 57 N. J. L. 27; 29 Atl. 320.

⁸ Little, etc., *Co. v. Ry. Co.*, 194 Pa. St. 144; 75 Am. St. Rep. 690; 45 Atl. 66.

⁹ *Fort Worth City Co. v. Bridge Co.*, 151 U. S. 294.

¹⁰ *White v. Rice*, 112 Mich. 403; 70 N. W. 1024.

¹ *Adams Mining Co. v. Senter*, 26 Mich. 73.

² *National, etc., Bank's Appeal*, 55 Conn. 469; 12 Atl. 646.

³ *Callaway, etc., Co. v. Clark*, 32 Mo. 305.

⁴ *Harding v. Glucose Co.*, 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577.

⁵ *Richmond Guano Co. v. Oil Mill & Ginnery*, 119 Fed. 709.

⁶ *Farwell Co. v. Wolf*, 96 Wis. 10; 65 Am. St. Rep. 22; 37 L. R. A. 138; 70 N. W. 289; 71 N. W. 109.

⁷ *Mahoney v. Hardware Co.*, 19 Mont. 377; 48 Pac. 545; same case, 27 Mont. 463; 71 Pac. 674.

the assets of a partnership, including an action for damages in tort.⁸

§1076. Power to purchase its own stock.

Whether a corporation can buy its own stock is another disputed point. The greater number of cases hold that it may except when it is insolvent and such purchases would defraud creditors.¹ In some of the cases cited on this point, the only power involved was the power to rescind a conditional contract for the sale of stock on breach of that condition,² or where the purchaser has never paid for his stock,³ or where the capital expended for stock was expended under a statute authorizing the reduction of the capital stock.⁴ Other authorities deny the right of a corporation to buy its own stock,⁵ except where it acquires such stock to secure a debt due to the corporation from the stockholder. All the authorities agree that it may then

⁸ Central Ohio Nat'l Gas and Fuel Company v. Dairy Company, 60 O. S. 96; 53 N. E. 711.

¹ Chicago, etc., R. R. Co. v. Marshalls, 84 Ill. 145; Clapp v. Peterson, 104 Ill. 26; Republic, etc., Ins. Co. v. Swigert, 135 Ill. 150; 12 L. R. A. 328; 25 N. E. 680; Iowa Lumber Co. v. Foster, 49 Ia. 25; 31 Am. Rep. 140; Rollins v. Wagon, etc., Co., 80 Ia. 380; 20 Am. St. Rep. 427; 45 N. W. 1037; Davis v. Proprietors, etc., 8 Met. (Mass.) 321; Dupee v. Power Co., 114 Mass. 37; New England Trust Co. v. Abbott, 162 Mass. 148; 27 L. R. A. 271; 38 N. E. 432; Oliver v. Ice Co., 64 N. J. Eq. 596; 54 Atl. 460; Berger v. Steel Corporation, 63 N. J. Eq. 809; 53 Atl. 68; reversing, 63 N. J. Eq. 506; 53 Atl. 14; Chapman v. Rheostat Co., 62 N. J. L. 497; 41 Atl. 690; Strong v. R. R. Co., 93 N. Y. 426; City Bank v. Bruce, 17 N. Y. 507; Blalock v. Mfg. Co., 110 N. C. 99; 14 S. E. 501; Eby v. Guest, 94

Pa. St. 160; Dock v. Cordage Co., 167 Pa. St. 370; 31 Atl. 656; Howe, etc., Co. v. Jones, 21 Tex. Civ. App. 198; 51 S. W. 24; Shoemaker v. Lumber Co., 97 Wis. 585; 73 N. W. 333.

² Chicago, etc., Co. v. Marseilles, 84 Ill. 145 (subscription conditioned on completion of road in one year); Chapman v. Rheostat Co., 62 N. J. L. 497; 41 Atl. 690.

³ Shoemaker v. Lumber Co., 97 Wis. 585; 73 N. W. 333.

⁴ Strong v. Ry. Co., 93 N. Y. 426.

⁵ Bellerby v. S. S. Co. (1902), 2 Ch. 14; San Luis Obispo Bank v. Wickersham, 99 Cal. 655; 34 Pac. 444; Abeles v. Cochran, 22 Kan. 805; 31 Am. Rep. 194; Price v. Coal Co. (Ky.), 32 S. W. 267; Coppin v. Greenlees, etc., Co., 38 O. S. 275; 43 Am. Rep. 425; Adams, etc., Co. v. Devette, 8 S. D. 119; 59 Am. St. Rep. 751; 31 L. R. A. 497; 65 N. W. 471; same case, 5 S. D. 418; 49 Am.

acquire its own stock.⁶ If the creditors of the corporation object such purchase may be avoided as far as concerns their interests.⁷ A loan to an insolvent corporation to enable it to buy its own stock was held to be illegal and void as in fraud of its creditors.⁸

§1077. Power to purchase stock in other corporation.

It is usually held that a corporation has no implied power to buy and hold stock in another corporation;¹ as where the incorporation laws gave no authority to a manufacturing corporation to purchase stock, but such power was inserted by the incor-

St. Rep. 887; 59 N. W. 214; *Herring v. Co-operative Association* (Tenn. Ch. App.), 52 S. W. 327 (orally affirmed by Supreme Court).

⁶ *Union National Bank v. Hunt*, 7 Mo. App. 42; *Taylor v. Exporting Co.*, 6 Ohio 176; *Morgan v. Lewis*, 46 O. S. 1; 17 N. E. 558.

⁷ *Hall v. Henderson*, 126 Ala. 449; 85 Am. St. Rep. 53; 61 L. R. A. 621; 28 So. 531.

⁸ *Adams, etc., Co. v. Deyette*, 8 S. D. 119; 59 Am. St. Rep. 751; 31 L. R. A. 497; 65 N. W. 471.

¹ *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40; *California National Bank v. Kennedy*, 167 U. S. 362; *Pauly v. Coronado Beach Co.*, 56 Fed. 428; *Marbury v. Land Co.*, 62 Fed. 335; 10 C. C. A. 393; *Lanier Lumber Co. v. Rees*, 103 Ala. 622; 49 Am. St. Rep. 57; 16 So. 637 (indirectly through a trustee); *Lester v. Lumber Co.*, 71 Ark. 379; 74 S. W. 518; *Knowles v. Sandercock*, 107 Cal. 629; 40 Pac. 1047; *Chemical National Bank v. Havermale*, 120 Cal. 601; 65 Am. St. Rep. 206; 52 Pac. 1071; *Glengary, etc., Co. v. Boehmer*, 28 Colo. 1; 62 Pac. 839; *Hazelhurst v. Ry.*, 43 Ga. 13; *McCoy v. Columbian Exposition*, 186 Ill. 356; 78 Am. St. Rep. 288; 57 N. E. 1043; affirming, 87 Ill.

App. 605; *People ex rel. Moloney v. Pullman's, etc., Co.*, 175 Ill. 125; 51 N. E. 664; *Martin v. Stove Co.*, 78 Ill. App. 105; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Hunt v. Malting Co.*, 90 Minn. 282; 96 N. W. 85; *Bank of Commerce v. Hart*, 37 Neb. 197; 40 Am. St. Rep. 479; 20 L. R. A. 780; 55 N. W. 631; *Nebraska Shirt Co. v. Horton* (Neb.), 93 N. W. 225; *Central R. R. Co. v. R. R. Co.*, 31 N. J. Eq. 475; *Talmage v. Pell*, 7 N. Y. 328; *Coler v. Power Co.*, — N. J. Eq. —; 54 Atl. 413; reversing, 64 N. J. Eq. 117; 53 Atl. 680; *Valley Ry. Co. v. Iron Co.*, 46 O. S. 44; 1 L. R. A. 412; 18 N. E. 486; *Buckeye, etc., Co. v. Harvey*, 92 Tenn. 115; 36 Am. St. Rep. 71; 18 L. R. A. 252; 20 S. W. 427; *Denny Hotel Co. v. Schram*, 6 Wash. 134; 36 Am. St. Rep. 130; 32 Pac. 1002. *Contra*, that a corporation may be a stockholder in another corporation. *United, etc., Co. v. Electric Light Co.*, 68 Fed. 673. By statute in Indiana a corporation cannot purchase stock in another corporation without the written consent of all the stockholders of each corporation. *Midland Steel Co. v. Bank*, 26 Ind. App. 71; 59 N. E. 211.

porators in the articles of incorporation.² But it may acquire stock in the usual course of its business as it may other property. Thus a bank may lend money on stock as collateral, and sell the stock, buying it itself;³ or may take it in payment of a debt,⁴ and a corporation, formed to deal in jewelry, may trade jewelry for stock in another corporation,⁵ or a corporation lawfully going out of business may take the stock in another corporation in payment for its assets.⁶ A corporation cannot purchase the stock of a rival in order to suppress competition.⁷ If power to own stock in other corporations is expressly granted, it may of course be exercised.⁸ So power to consolidate and power to guarantee bonds includes power to buy stock;⁹ as does power to buy, sell

² *People v. Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798.

³ *Chemical, etc., Bank v. Havermale*, 120 Cal. 601; 65 Am. St. Rep. 206; 52 Pac. 1071; *Calumet Paper Co. v. Investment Co.*, 96 Ia. 147; 59 Am. St. Rep. 362; 64 N. W. 782; *Talmage v. Pell*, 7 N. Y. 328.

⁴ *National Bank v. Case*, 99 U. S. 628; *First National Bank v. Exchange Bank*, 92 U. S. 128; *Holmes, etc., Co. v. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448; 27 N. E. 831.

⁵ *White v. Marquardt & Sons*, 105 Ia. 145; 74 N. W. 930; affirming (on rehearing), 70 N. W. 193.

⁶ *Metcalf v. Furniture Co.*, 122 Fed. 115; *Holmes v. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448; 27 N. E. 831.

⁷ *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40; *Memphis, etc., Co. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81; 7 L. R. A. 605; 7 So. 108; *People v. Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; *Pearson v. R. R.*, 62 N. H. 537; 13 Am. St. Rep. 590; *State v. Distilling Co.*, 29 Neb. 700; 46 N. W. 155.

Contra, "under our liberal corporation laws," *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 524; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; affirming in part and reversing in part, 56 N. J. Eq. 680; 39 Atl. 923. It depends on the objects to be attained, agreements to pool stock not being necessarily illegal. *Chapman v. Bates*, 61 N. J. Eq. 658; 47 Atl. 638; affirming, 60 N. J. Eq. 17; 46 Atl. 591.

⁸ *Rogers v. Ry. Co.*, 91 Fed. 299; 33 C. C. A. 517; *Tod v. Land Co.*, 57 Fed. 47; *Trust Co. v. State*, 109 Ga. 736; 48 L. R. A. 520; 35 S. E. 323; *Atchinson, etc., R. R. Co. v. Cochran*, 43 Kan. 225; 19 Am. St. Rep. 129; 7 L. R. A. 414; 23 Pac. 151; *Atchison, etc., R. R. Co. v. Davis*, 34 Kan. 209; 8 Pac. 530; *Atchison, etc., R. R. Co. v. Fletcher*, 35 Kan. 236; 10 Pac. 596; *Rubino v. Car Co.*, — N. J. Eq. —; 53 Atl. 1050; *Ditman v. Distilling Co.*, 64 N. J. Eq. 537; 54 Atl. 570; *Northern Central Ry. Co. v. Walworth*, 193 Pa. St. 207; 74 Am. St. Rep. 683; 44 Atl. 253.

⁹ *Louisville, etc., Co. v. Ry. Co.*, 75 Fed. 433.

and deal in public and private stock;¹⁰ or power to buy "bonds, other securities and personal property."¹¹ Authority to buy stock does not include the right to get control of a corporation so as to prevent payment of interest on bonds, and resistance to a foreclosure suit,¹² nor to manage such other corporation.¹³ But power to "take stock" is not power to sell all its assets in exchange for stock of other corporation.¹⁴ Even where the statute forbids a corporation to buy stock in another it may take stock in a building and loan association as a means of borrowing money, where such borrowing is proper.¹⁵

§1078. Partnership contracts.

A corporation cannot enter into a partnership, since this places in the hands of others than the corporation's agents power to incur obligation due from the corporation,¹ though it may be co-owner with another,² and a purchaser of land by a corporation and another, the appointee of the corporation taking the legal title and managing the property, is valid.³ A contract between corporations supplying a city with water to work together, a director of each corporation acting together as trustees with limited powers of management, is valid since it is not a part-

¹⁰ Market, etc., Co. v. Hellman, 109 Cal. 571; 42 Pac. 225.

¹¹ Calumet Paper Co. v. Investment Co., 96 Ia. 147; 59 Am. St. Rep. 362; 64 N. W. 782.

¹² Farmers', etc., Co. v. Ry. Co., 150 N. Y. 410; 55 Am. St. Rep. 689; 34 L. R. A. 76; 44 N. E. 1043.

¹³ State v. Newman, 51 La. Ann. 833; 72 Am. St. Rep. 476; 25 So. 408.

¹⁴ Elyton Land Co. v. Dowdell, 113 Ala. 177; 59 Am. St. Rep. 105; 20 So. 981.

¹⁵ Norwalk, etc., Co. v. Norwalk, etc., Co., 14 Ohio C. C. 1; 7 Ohio C. D. 275; reversing, 6 Ohio Dec. 70.

¹ Pearce v. R. R., 21 How. (U. S.) 441; Central, etc., Co. v. Smith, 76 Ala. 572; 52 Am. Rep. 353; Bishop

v. Preservers' Co., 157 Ill. 284; 48 Am. St. Rep. 317; 41 N. E. 765; Whittenton Mills v. Upton, 10 Gray (Mass.) 582; 71 Am. Dec. 681; People v. Refining Co., 121 N. Y. 582; 18 Am. St. Rep. 843; 9 L. R. A. 33; 24 N. E. 834; Geurincx v. Alcott, 66 O. S. 94; 63 N. E. 714; Merchants' National Bank v. Wagon Co., 6 Ohio N. P. 264; Boyd v. Carbon-Black Co., 182 Pa. St. 206; 37 Atl. 937; Mallory v. Oil Works, 86 Tenn. 598; 8 S. W. 396; Sabine, etc., Co. v. Bancroft, 16 Tex. Civ. App. 170; 40 S. W. 837.

² Calvert v. Stage Co., 25 Or. 412; 36 Pac. 24.

³ Bates v. Beach Co., 109 Cal. 160; 41 Pac. 855.

nership.⁴ Accordingly a corporation cannot be held liable for acts of a person whom it has held out as a partner.⁵ Some jurisdictions hold that such a partnership is valid as to third parties, either to enable them to recover against such partnerships,⁶ or to enable the partnership to recover against them.⁷ It has also been suggested that the corporation is estopped to deny the partnership: though the final disposition of the case made discussion of this question unnecessary.⁸

§1079. Power to dispose of corporate property.

The power of a corporation to dispose of its property may be considered under three general heads. First, its power to dispose of such property as does not interfere with the continuance of its corporate functions is an implied one.¹ Thus a corporation formed to establish a soldiers' home and to hold land, may sell land not needed by it.² A corporation may sell surplus steam for heating purposes;³ or may lease property not then used;⁴ or may temporarily lease all its plant in order to get money to conduct its business,⁵ even if the minority stock-

⁴ *San Diego, etc., Co. v. Flume Co.*, 108 Cal. 549; 29 L. R. A. 839; 41 Pac. 495. But in *Mallory v. Oil Works*, 86 Tenn. 598; 8 S. W. 396, a similar arrangement in which the trustees had more extensive powers of management was held a co-partnership.

⁵ *Murray, etc., Co. v. Bank* (Tex. Civ. App.), 61 S. W. 508.

⁶ *Johnson v. Mfg. Co.*, 103 Wis. 291; 79 N. W. 236.

⁷ *Wilson v. Oil Co.*, 46 W. Va. 469; 33 S. E. 249.

⁸ *Willey v. Bank*, 141 Cal. 508; 75 Pac. 106; reversing in banc, 72 Pac. 832.

¹ *State v. Canal Co.*, 40 Kan. 96; 10 Am. St. Rep. 166; 19 Pac. 349; *State v. Warehouse Co.*, 109 La. 64; 33 So. 81; *Joy v. Road Co.*, 11 Mich. 155; *Stockton Attorney-General v.*

Tobacco Co., 55 N. J. Eq. 352; 36 Atl. 971; *Holmes, etc., Mfg. Co. v. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448; 27 N. E. 831; *Benbow v. Cook*, 115 N. C. 324; 44 Am. St. Rep. 454; 20 S. E. 453; *Reynolds v. County*, 5 Ohio 204; *Davis v. Lee Camp* (Va.), 18 S. E. 839.

² *Davis v. Lee Camp* (Va.), 18 S. E. 839.

³ *People v. Car Co.*, 175 Ill. 125; 51 N. E. 664.

⁴ *Simpson v. Hotel Co.*, 8 H. L. Cas. 711; *People v. Car Co.*, 175 Ill. 125; 51 N. E. 664; *Brown v. Winnisimmet Co.*, 11 All. (Mass.) 326; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121.

⁵ *Plant v. Macon, etc., Ice Co.*, 103 Ga. 666; 30 S. E. 567; citing *Simpson v. Hotel Co.*, 8 H. L. Cas. 711; *Hancock v. Holbrook*, 9 Fed.

holders object.⁶ A corporation authorized to hold land may lease it to be used for purposes for which the corporation could not itself have used it.⁷ Thus a steamship company may lease its land for hotel purposes, reserving a certain cash rent and a per cent of the income from the hotel in excess of a fixed sum.⁸ So a lease may be valid where the business of the lessee is incidental to the business of the lessor. A railroad company may lease property not needed in its own business to a public warehouse company.⁹ Second, as to property essential to carrying on its business, a corporation may dispose of such property on going out of business,¹⁰ and a solvent water power company going out of business may, by consent of all interested, convey its land in satisfaction of its own stock.¹¹ Franchises for use of streets may be alienated.¹² A corporation formed to deal in plate glass, etc., may sell its stock of glass, and agree not to compete for twenty years.¹³ Third, a corporation cannot retain its corporate existence and transfer its property to another corporation, not as a means of winding up, but as a permanent investment.¹⁴ Such transactions are contrary to public policy as by such means the corporation maintains a corporate exist-

353; *Treadwell v. Mfg. Co.*, 7 Gray (Mass.) 393; 66 Am. Dec. 490; distinguishing, *Thomas v. R. R. Co.*, 101 U. S. 71; *Pennsylvania, etc., Co. v. Ry. Co.*, 118 U. S. 290; *Cass v. Steel Co.*, 9 Fed. 640.

⁶ *Bartholomew v. Rubber Co.*, 69 Conn. 521; 61 Am. St. Rep. 57; 38 Atl. 45.

⁷ *Nye v. Storer*, 168 Mass. 53; 46 N. E. 402; *Benton v. Elizabeth*, 61 N. J. L. 693; 40 Atl. 1132; affirming, 61 N. J. L. 411; 39 Atl. 683.

⁸ *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147; 65 N. E. 57.

⁹ *State v. Warehouse Co.*, 109 La. 64; 33 So. 81.

¹⁰ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Warfield v. Canning Co.*, 72 Ia. 666; 2 Am. St. Rep. 263; 34 N. W. 467; *State v. Canal Co.*, 40 Kan. 96; 10

Am. St. Rep. 166; 19 Pac. 349; *Morisette v. Howard*, 62 Kan. 463; 63 Pac. 756; *Detroit v. Gaslight Co.*, 43 Mich. 594; 5 N. W. 1039; *Reynolds v. Stark Co.*, 5 Ohio 204.

¹¹ *Dupee v. Power Co.*, 114 Mass. 37.

¹² *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502; 47 L. R. A. 87; 80 N. W. 383; *Detroit v. Gaslight Co.*, 43 Mich. 594; 5 N. W. 1039.

¹³ *McCausland v. Hill*, 23 Ont. App. 738.

¹⁴ *McCutcheon v. Merz & Co.*, 71 Fed. 787; 31 L. R. A. 415; affirming, 67 Fed. 414; *Byrne v. Mfg. Co.*, 65 Conn. 336; 28 L. R. A. 304; 31 Atl. 833; *People v. Ballard*, 134 N. Y. 269; 17 L. R. A. 737; 32 N. E. 54.

ence and yet makes it impossible for the corporation to exercise those functions for which it was created by the state.¹⁵ This principle applies with especial force to contracts whereby corporations of a public character attempt to transfer their powers and functions.¹⁶ Thus neither a turn-pike company¹⁷ nor a gas company¹⁸ can transfer their property so that they disable themselves from serving the public. Under a statute, however, which authorizes a corporation to lease its property or franchises a lease may be made for so long a time as to amount practically to a conveyance in fee.¹⁹

§1080. Examples of powers of particular corporations.

A corporation formed "to encourage immigration" may advertise;¹ a railroad may establish a relief fund for its employees, to insure them against accidents and relieve itself from liability therefor;² a corporation may defend its employee in a libel suit,

¹⁵ *Central Transportation Co. v. Palace Car Co.*, 139 U. S. 24; *Thomas v. R. R. Co.*, 101 U. S. 71; *People v. Sugar Refining Co.*, 121 N. Y. 582; 18 Am. St. Rep. 843; 9 L. R. A. 33; 24 N. E. 834; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; 8 S. W. 396.

¹⁶ *Smith v. Cornelius*, 41 W. Va. 59; 30 L. R. A. 747; 23 S. E. 599.

¹⁷ *Lancaster, etc., Co. v. Rhoads*, 116 Pa. St. 377; 2 Am. St. Rep. 608; 9 Atl. 852.

¹⁸ *Chicago, etc., Co. v. Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169.

¹⁹ *Dickinson v. Traction Co.*, 119 Fed. 871.

¹ *Colorado Springs Co. v. Publishing Co.*, 97 Fed. 843; 38 C. C. A. 433.

² *Beck v. R. R. Co.*, 63 N. J. L. 232; 76 Am. St. Rep. 211; 43 Atl. 908; citing and following, *Owens v. Ry. Co.*, 35 Fed. 715; 1 L. R. A. 75; *State v. Ry. Co.*, 36 Fed. 655; *Otis*

v. Ry. Co., 71 Fed. 136; *Vickers v. Ry. Co.*, 71 Fed. 139; *Eckman v. R. R. Co.*, 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496; *Pittsburg, etc., Ry. Co. v. Moore*, 152 Ind. 345; 44 L. R. A. 638; 53 N. E. 290; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; 37 N. E. 423; *Donald v. Ry. Co.*, 93 Ia. 284; 33 L. R. A. 492; 61 N. W. 971; *Fuller v. Relief Association*, 67 Md. 433; 10 Atl. 237; *Chicago, etc., R. R. Co. v. Bell*, 44 Neb. 44; 62 N. W. 314; *Pittsburg, etc., Co. v. Cox*, 55 O. S. 497; 35 L. R. A. 507; 45 N. E. 641; *Ringle v. R. R.*, 164 Pa. St. 529; 44 Am. St. Rep. 628; 30 Atl. 492; and disapproving, *Miller v. Ry. Co.*, 65 Fed. 305; *Pittsburg, etc., Ry. Co. v. Montgomery*, 152 Ind. 1; 71 Am. St. Rep. 301; 49 N. E. 582. This is not *ultra vires*, and is not engaging in the insurance business. *State v. Ry.*, 68 O. S. 9; 96 Am. St. Rep. 635; 67 N. E. 93.

where the paper was published in the usual course of business;³ a bridge company may acquire land for the bridge and its approaches;⁴ and a land company may employ a surveyor.⁵ A mutual insurance company, if not forbidden by statute, may write ordinary insurance.⁶ On the other hand, a boom company,⁷ or a corporation formed to improve the navigation of a stream,⁸ cannot handle or drive logs. A corporation formed for "manufacturing and selling heating and ventilating apparatus" cannot act as a broker of bonds;⁹ one formed to make insulated cables cannot contract to lay an electric conduit, taking risk of liability for damages;¹⁰ and a corporation formed for the purpose of "discussing arbitrating and settling all matters pertaining to the prosperity and promotion of the jobbing plumber's supply business," cannot engage in notifying creditors of delinquencies of debtors.¹¹ Since a bank cannot conduct a manufacturing business, a mortgage, in which the bank undertakes to carry on such business is invalid.¹²

§1081. Contracts collateral to corporate business.

A corporation may make valid contracts in a business, collateral to that for which it was incorporated, if such business is a reasonably proper method for carrying on the principal business. A corporation may bind itself by an offer of reward;¹ or by a contract which extends over a period of time beyond the charter of the contracting corporation,² and it may make a deposit of se-

³ Breay v. Nurses' Association, (1897), 2 Ch. 272; 66 L. J. Ch. N. S. 587.

⁴ Covington, etc., Co. v. Magruder, 63 O. S. 455; 59 N. E. 216.

⁵ Heinze v. Dock Co., 109 Wis. 99; 85 N. W. 145.

⁶ Continental Fire Association v. Masonic Temple Co., 26 Tex. Civ. App. 139; 62 S. W. 930.

⁷ Bangor Boom Co. v. Whiting, 29 Me. 123.

⁸ Northwestern, etc., Co. v. O'Brien, 75 Minn. 335; 77 N. W. 989.

⁹ Peck-Williamson, etc., Co. v. Board, etc., 6 Okla. 279; 50 Pac. 236.

¹⁰ Safety, etc., Co. v. Mayor, etc., of Baltimore, 74 Fed. 363; 20 C. C. A. 453.

¹¹ Hartnett v. Plumbers', etc., Association, 169 Mass. 229; 38 L. R. A. 194; 47 N. E. 1002.

¹² Louis Bletz & Co. v. Bank (Ky.), 55 S. W. 697.

¹ Norwood, etc., Co. v. Andrews, 71 Miss. 641; 16 So. 262.

² Union Pacific Ry. Co. v. Ry. Co., 163 U. S. 564.

curities in order to obtain permission to do business in another state, as required by the laws of such state.³ It may give a bonus in stock, to induce buyers to take bonds, and a dissenting stockholder cannot have the value of the stock bonus deducted from bonds,⁴ or may pay reasonable commission to brokers for placing shares.⁵ Thus a mining corporation, with power to build or subscribe to the stock of a railroad necessary to facilitate the transportation of its produce to market, may join with a railroad company in a mortgage to obtain money for the purpose of enlarging the facilities of the railroad to transport the coal;⁶ a gas company may buy the right to use steam heater, radiating mantel and gas consuming appliances, if proper for the gas business;⁷ and a railroad company, authorized to erect all convenient buildings for the accommodation and use of its passengers, may lease a summer hotel and covenant to insure it,⁸ or may operate steam-boats as part of its line of transportation.⁹ A corporation may make a *bona fide* contract for future purchase of material necessary to its business,¹⁰ though it cannot deal in futures regularly, unless specially authorized;¹¹ nor can a manufacturing corporation buy in order to sell at a profit.¹² Thus a corporation formed to manufacture and sell ready-made clothing has no implied power to buy ready-made clothing to resell it at a profit.¹³ The right of a mining or manufacturing corporation

³ *Lewis v. American, etc., Association*, 98 Wis. 203; 39 L. R. A. 559; 73 N. W. 793.

⁴ *Dickerman v. Trust Co.*, 176 U. S. 181.

⁵ *Metropolitan, etc., Association v. Scrimgeour* (1895), 2 Q. B. 604.

⁶ *Central Trust Co. v. Columbus, etc., Co.*, 87 Fed. 815; citing *Attorney-General v. Ry. Co.*, L. R. 5 App. Cas. 473; *Green Bay, etc., R. R. Co. v. Union, etc., Steamboat Co.*, 107 U. S. 98; *Zabriskie v. R. R. Co.*, 23 How. (U. S.) 381; *Vandall v. Dock Co.*, 40 Cal. 83; *Hill v. Nisbet*, 100 Ind. 341; *Whetstone v. University*, 13 Kan. 320.

⁷ *Malone v. Lancaster, etc., Co.*,

182 Pa. St. 309; 37 Atl. 932; citing *Brown v. Winnisimmet Co.*, 11 All. (Mass.) 326; *Lyndeborough Glass Co. v. Glass Co.*, 111 Mass. 315.

⁸ *Jacksonville, etc., Co. v. Hooper*, 160 U. S. 514.

⁹ *Green Bay, etc., Co. v. R. R. Union, etc., Steamboat Co.*, 107 U. S. 98.

¹⁰ *Sampson v. Cotton Mills*, 82 Fed. 833.

¹¹ *Jemison v. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482; 9 L. R. A. 708; 25 N. E. 264.

¹² *Day v. Buggy Co.*, 57 Mich. 146; 58 Am. Rep. 352; 23 N. W. 628.

¹³ *Nicollet National Bank v.*

to operate a store for its employees is thus open to question,¹⁴ though a manufacturing company may undoubtedly sell its own goods at a retail store,¹⁵ and a corporation formed to do "a general brewing and malting business, and manufacture and sell soda water," may lease a "saloon," as it could not be said as a matter of law that a saloon was not a place for the sale of soda water.¹⁶ The mere fact, however, that a branch of business is profitable or advantageous to a corporation does not make it one of the implied powers of a corporation. "The exercise of a power that might be beneficial to the principal business is not necessarily incident to it."¹⁷ A land company cannot operate a street car line, and a street car company cannot buy land and sell it in lots.¹⁸ It has been held that a corporation formed for the purpose of manufacturing and selling electricity cannot engage in the business of selling electrical appliances.¹⁹ The power to increase the capital stock is not implied.²⁰ A corporation cannot change its principal office without amending its fundamental law and articles of association.²¹ There is, it must be admitted, some lack of harmony in the cases discussed in this section.

Frisk-Turner Co., 71 Minn. 413; 70 Am. St. Rep. 334; 74 N. W. 160.

¹⁴ That it can, see *Searight v. Payne*, 6 Lea (Tenn.) 283. That it cannot, see *Chewacla Lime Works v. Dismukes, etc.*, 87 Ala. 344; 4 L. R. A. 100; 6 So. 122.

¹⁵ *Dauchy v. Brown*, 24 Vt. 197.

¹⁶ *Brewer, etc., Co. v. Boddie*, 181 Ill. 622; 55 N. E. 49; affirming, 80 Ill. App. 353.

¹⁷ *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413, 418; 70 Am. St. Rep. 334; 74 N. W. 160; quoted in *Burke v. Mead*, 159 Ind. 252; 64 N. E. 880. "It cannot be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested which, though beneficial to

the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case." *Best Brewing Co. v. Klassen*, 185 Ill. 37, 40; 76 Am. St. Rep. 26; 50 L. R. A. 765; 57 N. E. 20.

¹⁸ *Northside Ry. Co. v. Worthington*, 88 Tex. 562; 53 Am. St. Rep. 778; 30 S. W. 1055.

¹⁹ *Burke v. Mead*, 159 Ind. 252; 64 N. E. 880.

²⁰ *Cooke v. Marshall*, 191 Pa. St. 315; 43 Atl. 314.

²¹ *Bastian v. Modern Woodmen*, 166 Ill. 595; 46 N. E. 1090; reversing, 68 Ill. App. 378.

§1082. The origin of the doctrine of *ultra vires*.

When it is once ascertained that a given contract is in excess of corporate power, only the first step has been taken to determine its legal effect. As with contracts of infants and insane persons, rights and liabilities may grow out of contracts made by corporations which have not the legal capacity to bind themselves thereby fully and completely.

The rules determining the legal effect of such contracts are grouped under the general head of the doctrine of *ultra vires*. This term means "beyond the powers" of the corporation; that the contract in question is beyond and outside of the scope of the powers conferred by its founders.¹ The use of the technical Latin phrase has probably helped to obscure the real meaning of the doctrine. Rules have been formulated as to the effect of *ultra vires* contracts which could scarcely have been applied had the subject been discussed under its English name.² The real difficulty of this topic is that there was practically no foundation for it at Common Law, since no business corporations existed; and that, without such foundation and without opportunity to observe the practical working of the rules that they were laying down, the courts were forced, by reason of the sudden growth of manufacturing, trading and transportation corporations, to develop new rules, and to elaborate a subject whose fundamental principles were not understood. Early precedents, hastily decided, present difficulties in many jurisdictions, as they do not harmonize with the modern trend of judicial decision; and the courts, unwilling to overrule them, follow them blindly, or distinguish them in cases often indistinguishable. The modern cases are therefore in hopeless confusion. There are conflicting views, not only upon isolated rules, but upon the whole theory of the subject; upon the question of what facts are operative as well as upon the question of what decision is to be rendered upon the facts given. No general statement can therefore be made of the

¹ *Citizens' Savings Bank v. Hawkins*, 71 Fed. 369; 18 C. C. A. 78; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

² *National Bank v. Porter*, 125 Mass. 333; 28 Am. Rep. 235.

present scope of the doctrine of *ultra vires*, except that *ultra vires* contracts do not, under some circumstances, have the validity of contracts entered into within the limits of corporate power. In its early form, the doctrine of *ultra vires* was severely simple. Contracts which were *ultra vires* were void.³ Thus where an insurance company engaged in the banking business and discounted notes, it could not recover upon such notes, though it might on the loan.⁴ This rule proved so disastrous in its effects on modern business that it was promptly "barnacled over with exceptions, and muzzled by estoppels,"⁵ and practically discarded in many jurisdictions.⁶

§1083. Preliminary considerations.

All persons dealing with a corporation must take notice of its charter,¹ and of statutory limitations on its corporate

³ *Pearce v. R. R.*, 21 How. (U. S.) 441; *Rock River Bank v. Sherwood*, 10 Wis. 230; 78 Am. Dec. 669.

⁴ *Philadelphia Loan Co. v. Town-er*, 13 Conn. 249; *Utica Insurance Co. v. Scott*, 19 Johns (N. Y.) 1; *Life, etc., Ins. Co. v. Insurance Co.*, 7 Wend. (N. Y.) 31.

⁵ Walker's Am. Law, p. 242n ('10th ed.).

⁶ "The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds." *Directors, etc., of the Eastern, etc., Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 371; quoted in *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 34; 36 L. R. A. 664; 45 N. E. 390.

¹ *McCormick v. Bank*, 165 U. S. 538; *Salt Lake City v. Hollister*, 118 U. S. 256; *Pearce v. R. R.*, 21 How. (U. S.) 441; *Sherwood v. Alvis*, 83 Ala. 115; 3 Am. St. Rep. 695; 3 So. 307; *National, etc., Association v. Bank*, 181 Ill. 35; 72 Am.

St. Rep. 245; 54 N. E. 619; *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340; 40 N. E. 626; affirming, 53 Ill. App. 396; *Humphrey v. Association*, 50 Ia. 607; *New Orleans, etc., Co. v. Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90; *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Davis v. R. R.*, 131 Mass. 258; 41 Am. Rep. 221; *Kraniger v. Building Society*, 60 Minn. 94; 61 N. W. 904; *Nicollet National Bank v. Frisk-Turner Co.*, 71 Minn. 413; 70 Am. St. Rep. 334; 74 N. W. 160; *Jemison v. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482; 9 L. R. A. 708; 25 N. E. 264; *Elevator Co. v. Memphis, etc., Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798; 5 S. W. 52; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815; 23 S. W. 123; *Smith v. Cornelius*, 41 W. Va. 59; 30 L. R. A. 747; 23 S. E. 599. "A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of

power.² Why this rule applies to corporations and not to partnerships,³ is by no means clear on principle. It is not limited to those cases of general laws alone, but extends to private acts of the legislature, foreign laws which are a part of the charter of the foreign corporation in question and to the articles of incorporation.⁴ A rigid application of this rule would charge persons with knowledge which it might be absolutely impossible for them to acquire, and would seriously affect the validity of contracts of corporations.⁵

It will not be presumed that a corporation has exceeded its powers in making a contract.⁶ This is merely an application of the broader principle that capacity is always presumed, and that a lack of it must be shown affirmatively.

Furthermore, while persons may be arbitrarily required to take notice of the powers of a corporation, they cannot be required to know all the facts and circumstances connected with the business of the corporation.⁷ Accordingly, if a contract may, under some states of fact, be within the power of the corporation, persons dealing with the corporation may assume that the proper facts exist which are requisite to the validity

them and their limitations, and cannot plead ignorance in avoidance of the defense." *National, etc., Association v. Bank*, 181 Ill. 35, 44; 72 Am. St. Rep. 245; 54 N. E. 619.

² *National, etc., Association v. Bank*, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619.

³ See § 950.

⁴ *McCormick v. Bank*, 165 U. S. 538. The rule applies "whether such charter be a private act or a general law under which corporations of this class are organized." *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 59; (citing *Zabriskie v. R. R.*, 23 How. (U. S.) 381; *Thomas v. R. R.*, 101 U. S. 71; *Pennsylvania Co. v. R. R.*, 118 U. S. 290, 630; *Oregon Ry. Co. v. Ry. Co.*, 130 U. S. 1; *Pittsburgh, etc., Ry. Co. v. Bridge Co.*, 131 U. S. 371).

⁵ See §§ 1066, 1067.

⁶ *Ohio, etc., Ry. Co. v. McCarthy*, 96 U. S. 258; *International, etc., Association v. Wall*, 153 Ind. 554; 55 N. E. 431; *Wardner, etc., Co. v. Jack*, 82 Ia. 435; 48 N. W. 729; *West v. Grocery Co.*, 109 Ia. 488; 80 N. W. 555; *Gorder v. Plattsmouth, etc., Co.*, 36 Neb. 548; 54 N. W. 830; *Elkins v. R. R.*, 36 N. J. Eq. 241.

⁷ *Kennedy v. Bank*, 101 Cal. 495; 40 Am. St. Rep. 69; 35 Pac. 1039; *Monument National Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Bissell v. R. R.*, 22 N. Y. 258; *Miller v. Ins. Co.*, 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39; *North Hudson, etc., Association v. Bank*, 79 Wis. 31; 11 L. R. A. 845; 47 N. W. 300.

of the contract,⁸ and it is no defense to an action on the contract that it was under the existing facts *ultra vires*, unless it can be shown that the contracting party knew the facts which rendered it *ultra vires*. This doctrine is applied generally to contracts performed by one party,⁹ as where one who does not know that the limit of corporate indebtedness has been reached, loans money to the corporation;¹⁰ or where a corporation purchases property which it might buy for a given purpose from one who does not know that it is to be used for other purposes.¹¹

§1084. What *ultra vires* includes.

Ultra vires contracts are, strictly speaking, only those which are defective solely because they are beyond the power of the corporation.¹ Where the legislature has forbidden a corporation to engage in certain transactions, by statutes either declaratory of the Common Law, or modifying it, such transactions are in some respects decided on different principles from *ultra vires* contracts.² *Ultra vires* is also loosely used by some authorities to cover two classes of contracts which do not belong to it. First: Contracts which the corporation might lawfully have made, but which the agents making them were not authorized to make, are not properly *ultra vires* contracts. Their validity turns on questions of agency as affected by the nature of the corporation.³ Second: If the contract is one which is

⁸ Colorado Springs Co. v. Publishing Co., 97 Fed. 843; 38 C. C. A. 433; Kennedy v. Bank, 101 Cal. 495; 40 Am. St. Rep. 69; 35 Pac. 1039; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; 99 Am. Dec. 300; Monument National Bank v. Globe Works, 101 Mass. 57; 3 Am. Rep. 322; Bissell v. R. R., 22 N. Y. 258; Miller v. Ins. Co., 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39; North Hudson, etc., Association v. Bank, 79 Wis. 31; 11 L. R. A. 845; 47 N. W. 300.

⁹ Tourtelot v. Whithed, 9 N. D. 407; 84 N. W. 8.

¹⁰ Humphrey v. Association, 50 Ia. 607; Auerbach v. Mill Co., 28 Minn. 291; 41 Am. Rep. 285; 9 N. W. 799; Ellsworth v. St. Louis, etc., Co., 98 N. Y. 553.

¹¹ Cowell v. Springs Co., 100 U. S. 55; Thompson v. Lambert, 44 Ia. 239; Luttrell v. Martin, 112 N. C. 593; 17 S. E. 573.

¹ Kadish v. Association, 151 Ill. 531; 42 Am. St. Rep. 256; 38 N. E. 236; Leslie v. Lorillard, 110 N. Y. 519; 1 L. R. A. 456; 18 N. E. 363.

² See § 327 *et seq.*

³ Kelley, etc., v. Varnish Co., 90 Ill. App. 287.

treated as illegal if made by a natural person, it is as illegal if made by a corporation, but as a rule, no more so and no less. These contracts are treated elsewhere.⁴ An *ultra vires* contract in the proper sense, is "nothing criminal or against good morals."⁵ In many cases it is however said that an *ultra vires* contract is "unlawful and void."⁶ This is undoubtedly a loose use of the terms "unlawful" and "void." This confusion in terms often arises in cases, such as contracts tending to create monopolies,⁷ or transferring the performance of duties toward the public,⁸ where the contract is both *ultra vires* and illegal. If the contract is illegal as in violation of established principles of public policy it cannot, of course, be enforced.⁹

If the contract is not merely *ultra vires* but is also forbidden by statute, no action can be brought on such contract.¹⁰ Thus, if the statute provides an exclusive method of giving a mort-

⁴ See Ch. XV-XXXI.

⁵ Illinois, etc., Bank v. Ry. Co., 117 Cal. 332, 343; 49 Pac. 197; "*ultra vires* and illegality represent totally different and distinct ideas." Bissell v. R. R., 22 N. Y. 258, 269.

⁶ McCormick v. Bank, 165 U. S. 538, 549; quoted in California, etc., Bank v. Kennedy, 167 U. S. 362; 368.

⁷ People v. Gas Trust Co., 130 Ill. 268; 17 Am. St. Rep. 319; 8 L. R. A. 497; 22 N. E. 798; Harding v. Glucose Co., 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577; Inter Ocean Publishing Co. v. Associated Press, 181 Ill. 438; 75 Am. St. Rep. 184; 48 L. R. A. 568; 56 N. E. 822. (Holding that the Associated Press cannot give a monopoly of its news to one paper.)

⁸ Central Transportation Co. v. Car Co., 139 U. S. 24; Oregon, etc., R. R. v. Oregonian, etc., R. R., 130 U. S. 1; Chicago, etc., Co. v. Gas-light Co., 121 Ill. 530; 2 Am. St. Rep. 124; 13 N. E. 169; Brunswick

Gas Light Co. v. Gas, etc., Co., 85 Me. 532; 35 Am. St. Rep. 385; 27 Atl. 525; Stockton v. R. R., 50 N. J. Eq. 52; 17 L. R. A. 97; 24 Atl. 964; Smith v. Cornelius, 41 W. Va. 59; 30 L. R. A. 747; 23 S. E. 599.

⁹ Contract by one insurance company to buy out another. McClure v. Levy, 147 N. Y. 215; 41 N. E. 492.

¹⁰ Visalia Gas Co. v. Sims, 104 Cal. 326; 43 Am. St. Rep. 105; 37 Pac. 1042; McNulta v. Bank, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; *In re* Assignment Mutual, etc., Ins. Co., 107 Ia. 143; 70 Am. St. Rep. 149; 77 N. W. 143; Beecher v. Mill Co., 45 Mich. 103; 7 N. W. 695; New York, etc., Trust Co. v. Helmer, 77 N. Y. 64. The United States Supreme Court cases cited in the next paragraph are many of them cases involving contracts forbidden by statute or invalid as against public policy. The court, however, places its decision on the broad ground of *ultra vires*.

gage, a mortgage executed in any other manner and under any other circumstances is void.¹¹ So if the statute provides a limit to the rate of interest which a corporation may agree to pay, a contract for a higher rate is void.¹² But the purpose of a statute restricting the exercise of corporate power must always be considered in construing it, and if intended to protect those dealing with the corporation, as where a corporation is forbidden to transact business until its stock subscription is made,¹³ or a foreign insurance company is forbidden to write policies until it complies with certain statutory provisions intended for the security of policy holders,¹⁴ such provisions will not make such contracts void. Nor can a statute as to the mode of pledging property, enacted for benefit of stockholders, be taken advantage of by creditors.¹⁵

§1085. The reasons underlying the doctrine of *ultra vires*.

“The doctrine of *ultra vires* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests as this court has often recognized and affirmed upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.”¹ These reasons cannot be considered conclusive.

¹¹ Southern, etc., Association v. Stable Co., 128 Ala. 624; 29 So. 654.

¹² Southern, etc., Association v. Stable Co., 119 Ala. 175; 24 So. 886.

¹³ City of Spokane v. Amsterdamsch Trustees, etc., 22 Wash. 172; 60 Pac. 141.

¹⁴ Union, etc., Co. v. McMillen, 24 O. S. 67.

¹⁵ Anderson v. Bank, 122 Ala. 275; 25 So. 523.

¹ McCormick v. Bank, 165 U. S. 538, 549; citing Pearce v. R. R., 21 How. (U. S.) 441; Pittsburgh, etc., Co. v. Bridge Co., 131 U. S. 371; Central, etc., Co. v. Car Co., 139 U. S. 24; quoted in California, etc., Bank v. Kennedy, 167 U. S. 362, 368, which cites on this point the English cases, Mann v. Tramways Co. (1893), App. Cas. 69; Ooregum Mining Co. v. Roper (1892), App. Cas. 125; Directors, etc., Iron Co. v. Riche, L. R. 7 H. L. 653. So

Even if all persons are required to take notice of the powers of a corporation, it is hard to see why *ultra vires* contracts should be nullities, any more than the contracts of an infant should be nullities. All persons are bound to take notice of the contractual powers of an infant and of the fact of infancy,² yet his contracts are not unlawful or void. Stockholders who acquiesce in *ultra vires* contracts cannot rightfully complain that they never undertook the risk; and the interest of the state would be better subserved by a greater willingness to take away charters for abuse of corporate powers, than by treating as void a contract of which the corporation has had the full benefit. Accordingly, many courts place the doctrine on different grounds, with different practical results.³

§1086. Who can take advantage of *ultra vires*.

To have the question of the validity of *ultra vires* contracts raised at all, there must be some one in a position to raise such question. The first point in any proceeding to determine the validity of an *ultra vires* transaction is to determine whether the party attacking the contract can be allowed to raise the question.¹ While this principle does not, any more than any other that has been suggested, solve all difficulties or reconcile all cases, it is a very material help in determining the validity of any given contract. First, the state can attack the validity of any *ultra vires* transaction by a direct proceeding in *quo warranto*,² although it may decline through its courts to revoke a charter because of isolated *ultra vires* acts, since the essential purpose and object of such a suit is the determination of a private right.³ Second, persons not parties to the con-

Lucas v. Transfer Co., 70 Ia. 541; 59 Am. Rep. 449; 30 N. W. 771.

² See § 893.

³ See § 1086, *et seq.* § 1097.

¹ Benton v. Elizabeth, 61 N. J. L. 693; 40 Atl. 1132; affirming, 61 N. J. L. 411; 39 Atl. 683, 906.

² See §§ 1093, 1097. State v. Oil Co., 153 Ind. 483; 74 Am. St. Rep. 314; 53 L. R. A. 413; 53 N. E. 1089;

State v. Standard Oil Co., 49 O. S. 137; 34 Am. St. Rep. 541; 15 L. R. A. 145; 30 N. E. 279; State v. Dairy Co., 62 O. S. 350; 57 L. R. A. 181; 57 N. E. 62; State v. Water Co., 107 Wis. 441; 83 N. W. 697.

³ People v. Cooper, 139 Ill. 461; 29 N. E. 872; Cupit v. Bank, 20 Utah 292; 58 Pac. 839.

tract cannot attack it, where not directly prejudiced thereby.⁴ Thus, where a corporation laid oil pipes in a street, claiming under a transfer of property rights,⁵ or had obtained leave of the city to cross the streets,⁶ third persons cannot question its power to do so. Where a bank bought notes,⁷ or a judgment and a certificate of sale,⁸ or land,⁹ as where a foreign corporation acquired land and then conveyed it without complying with the local statutes,¹⁰ persons not parties to the transfer cannot resist the enforcement of rights thus acquired. Thus even if a corporation bought property in an *ultra vires* transaction, a lessee from such corporation cannot attack the validity of such conveyance; nor can a guarantor of such rent.¹¹ So the right of a corporation to acquire realty cannot be inquired into in an action brought by it to enforce payment of a debt.¹² A creditor of a corporation cannot attack a transaction as *ultra vires* unless the effect of such transaction is to divert corporate assets from the payment of his debt.¹³ The judgment creditor

⁴ "None but a person directly interested in the corporation, or the state, can question such authority."

John V. Farwell Co. v. Wolf, 96 Wis. 10, 14; 65 Am. St. Rep. 22; 37 L. R. A. 138; 70 N. W. 289; 71 N. W. 109 (citing Fritts v. Palmer, 132 U. S. 282; National Bank v. Whitney, 103 U. S. 99; National Bank v. Matthews, 98 U. S. 621; Natoma, etc., Co. v. Clarkin, 14 Cal. 544; Alexander v. Tolleston Club, 110 Ill. 65; Shewalter v. Pirner, 55 Mo. 218; Ragan v. McElroy, 98 Mo. 349; 11 S. W. 735). To the same effect see Springer v. Trust Co., 202 Ill. 17; 66 N. E. 850; affirming, 102 Ill. App. 294; Beach v. Wakefield, 107 Ia. 567, 591; 76 N. W. 688; 78 N. W. 197; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Read v. Ry., 110 Tenn. 316; 75 S. W. 1056.

⁵ Benton v. Elizabeth, 61 N. J. L. 693; 40 Atl. 1132; affirming, 61 N. J. L. 411; 39 Atl. 683, 906.

⁶ Pennsylvania, etc., R. R. Co. v. R. R. Co., 160 Pa. St. 277; 28 Atl. 784.

⁷ Prescott National Bank v. Butler, 157 Mass. 548; 32 N. E. 909.

⁸ Hennessy v. St. Paul, 54 Minn. 219; 55 N. W. 1123 (citing National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Fortier v. Bank, 112 U. S. 439; Merchants' National Bank v. Hanson, 33 Minn. 40; 53 Am. Rep. 5; 21 N. W. 849).

⁹ Bank v. Matthews, 98 U. S. 621.

¹⁰ Fritts v. Palmer, 132 U. S. 282.

¹¹ Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147; 65 N. E. 57.

¹² Advance Thresher Co. v. Rockafellow, — S. D. —; 93 N. W. 652.

¹³ Force v. Age-Herald Co., 136 Ala. 271; 33 So. 866.

of the president of a corporation cannot attack the title of such corporation to property bought by it on an execution sale of such president's property.¹⁴ So a third person,¹⁵ such as a subsequent judgment creditor,¹⁶ cannot attack a mortgage given by a corporation as *ultra vires*. One liable on a claim for damages cannot attack the purchase of such claim by a corporation if it is assignable,¹⁷ and one liable to a lessee of a railroad cannot attack the validity of the lease in a suit by lessee.¹⁸ So one liable on a note cannot attack the transfer of it by the payee corporation incident to a genuine sale of its business, as *ultra vires*.¹⁹ One who with full knowledge of the material facts has accepted an assignment of a chattel mortgage given by a corporation cannot subsequently avoid the assignment on the ground that the mortgage was *ultra vires*.²⁰ So if a stockyards corporation has erected a railroad and used it for an *ultra vires* purpose, it can resist its unauthorized removal by a city.²¹ A trustee created in a trust deed given by a corporation cannot attack a conveyance to the corporation as *ultra vires*.²² Up to this point the courts are practically unanimous in their decisions as to who can plead *ultra vires*. These holdings show absolutely that an *ultra vires* contract is not, properly speaking, void; since a void contract or transac-

¹⁴ *Scott v. Bank*, — Tex. —; 75 S. W. 7; reversing (Tex. Civ. App.), 67 S. W. 343, which denied rehearing of 66 S. W. 485.

¹⁵ *Collins v. Rea*, 127 Mich. 273; 86 N. W. 811; *Smith v. Bank*, 45 Neb. 444; 63 N. W. 796.

¹⁶ *Beels v. Park Association*, 54 Neb. 226; 74 N. W. 581.

¹⁷ *Central Ohio, etc., Co. v. Dairy Co.*, 60 O. S. 96; 53 N. E. 711; *John V. Farwell Co. v. Wolf*, 96 Wis. 10; 65 Am. St. Rep. 22; 37 L. R. A. 138; 70 N. W. 289; rehearing denied, 37 L. R. A. 142; 71 N. W. 109 (this claim was held not assignable). *Contra*, where a corporation bought certain lots and thereafter the grantor assigned to

the corporation his claim against the city for damages to such lots due to the construction of a viaduct and these facts appeared on the petition, it was held that demurrer would lie. *Pueblo v. Investment Co.*, 28 Colo. 524; 89 Am. St. Rep. 221; 67 Pac. 162.

¹⁸ *Southern Pacific Co. v. United States*, 28 Ct. Cl. 77.

¹⁹ *Ehrman v. Ins. Co.*, 35 O. S. 324.

²⁰ *Woodcock v. Bank*, 113 Mich. 236; 71 N. W. 477.

²¹ *Chicago v. Transit Co.*, 164 Ill. 224; 35 L. R. A. 281; 45 N. E. 430.

²² *Hagerstown, etc., Co. v. Keedy*, 91 Md. 430; 46 Atl. 965.

tion may be attacked by any one whose interests are adverse to the validity of the transaction. In all these cases, it will be noticed that the person who seeks to invoke the doctrine of *ultra vires* is not in any way prejudiced by the *ultra vires* transactions, as it makes no difference to him whether the corporation or the other party to the transaction asserts the rights in question. This rule, therefore, extends no farther than its reason. A third person who is prejudiced by an *ultra vires* contract may attack it, as creditors when their rights are endangered by the *ultra vires* contract.²³ Thus where a corporation has borrowed money in excess of its limit of borrowing, a subsequent creditor who did not know of such excessive debt, may attack the transaction as far as his claim is thereby diminished.²⁴ Thus a policy holder in a corporation may raise the question of *ultra vires*, where such corporation has acquired his notes to use them as a set-off.²⁵ Stockholders who act promptly may restrain the officers of the company from entering into *ultra vires* contracts,²⁶ though they cannot compel the directors to avoid the contract while retaining the benefits,²⁷ and they must act promptly.²⁸ This leaves the question of the validity of the contract as far as the corporation itself is concerned, as the only remaining question to consider under *ultra vires*. In discussing the right of a corporation to avoid an *ultra vires* contract in order to protect non-assenting stockholders, it must first be determined whether the contract is purely *ultra vires*, or whether it is also subject to attack because beyond the power of the agents who made it on behalf

²³ Washington Mill Co. v. Lumber Co., 19 Wash. 165; 52 Pac. 1067.

²⁴ See § 1070.

²⁵ Hart v. Insurance Co., 21 Mo. 91; Straus v. Insurance Co., 5 O. S. 59; though it will not be presumed that the notes were so acquired. Hart v. Insurance Co., 21 Mo. 91.

²⁶ Pratt v. Pratt, etc., 33 Conn. 446; Harding v. Glucose Co., 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577; Teachout v. Ry., 75 Ia. 722; 38 N. W. 145. Thus where

the contract is *ultra vires* and also illegal, as creating a monopoly, a stockholder may enjoin execution and performance. Harding v. Glucose Co., 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577.

²⁷ Alexander v. Searcy, 81 Ga. 536; 12 Am. St. Rep. 337; 8 S. E. 630; Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907.

²⁸ Boyce v. Coal Co., 37 W. Va. 73; 16 S. E. 501.

of the corporation. In so far as it is free from questions of agency and illegality, the legal effect of the contract depends upon how far it has been performed; whether it is wholly executory, wholly executed, or partly executed.

§1087. Executory contracts.

If a contract is executory on both sides, it is subject to the defense of *ultra vires* by the corporation.¹ If the doctrine of *ultra vires* has any force at all, it applies to cases like this where the adversary party as yet parted with nothing of value in reliance on the contract. Thus notes given by an insurance company under a contract whereby it was to purchase another insurance company are void.² The other party may also treat the contract as invalid. Since the only consideration for his promise is the invalid promise of the corporation, his promise is in legal effect without consideration.³ The foregoing principles are necessarily based on the proposition that an *ultra vires* contract, while executory on both sides, is more than merely voidable. For many purposes it may be treated as absolutely void.

¹ Thomas v. R. R., 101 U. S. 71; First National Bank v. Winchester, 119 Ala. 168; 72 Am. St. Rep. 904; 24 So. 351; Simmons v. Iron Works, 92 Ala. 427; 9 So. 160; Coleman v. Turnpike Co., 49 Cal. 517; McNulta v. Bank, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; affirming, 63 Ill. App. 593; Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907; Sherman, etc., Co. v. Morris, 43 Kan. 282; 19 Am. St. Rep. 134; 23 Pac. 569; Garrett v. Mining Co., 113 Mo. 330; 35 Am. St. Rep. 713; 20 S. W. 965; Nassau Bank v. Jones, 95 N. Y. 115; 47 Am. Rep. 14; Jemison v. Bank, 122 N. Y. 135; 19 Am. St. Rep. 482; 9 L. R. A. 708; 25 N. E. 264; Simpson v. Association, 38 O. S. 349; Coppin v. Greenlees, etc.,

Co., 38 O. S. 275; 43 Am. Rep. 425.

² McClure v. Levy, 147 N. Y. 215; 41 N. E. 492.

³ Governor, etc., v. Fox, 16 Q. B. 229; 71 E. C. L. 227; First National Bank v. Winchester, 119 Ala. 168; 72 Am. St. Rep. 904; 24 So. 351; Screven Hose Co. v. Philpot, 53 Ga. 625. Thus the court held that "an executory contract, the enforcement of which by the plaintiff could be successfully resisted by the defendant on the ground that the former was not authorized by its charter to enter into it," was formed by the acceptance by a corporation of a proposition to enter into an *ultra vires* contract and bound neither while executory. Bosshardt, etc., Co. v. Oil Co., 171 Pa. St. 109, 120; 32 Atl. 1120.

§1088. **Contracts performed by one party.—Performance by the corporation.**

If a contract is fully performed by the corporation, so that whatever was to be done in excess of corporate power has been done, the corporation can recover on the contract and the adversary party cannot defend on the ground that the contract was *ultra vires*.¹ Thus a lessee of gas works from a corporation was held liable for rent on the lease during the time for which the lessee used it.² This was a contract between two corporations; and many authorities hold that part performance of such contract can give it no validity.³ The opposite result from that reached in *Bath Gaslight Co. v. Claffy* was reached in *Brunswick, etc., Co. v. Light Co.*⁴ The court said: "We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission of what is a reasonable rent, it cannot be allowed to govern or

¹ *Union Gold Mining Co. v. Bank*, 96 U. S. 640; *Union National Bank v. Matthews*, 98 U. S. 621; *Union Water Co. v. Fluming Co.*, 22 Cal. 620; *Eckman v. R. R.*, 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496; *Lurton v. Building Association*, 187 Ill. 141; 58 N. E. 218; affirming, 87 Ill. App. 395; *Poeck v. Association*, 71 Ind. 357; *Chicago, etc., R. R. v. Derkes*, 103 Ind. 520; 3 N. E. 239; *Bowditch v. Ins. Co.*, 141 Mass. 292; 55 Am. Rep. 474; 4 N. E. 798; *McIndoe v. St. Louis*, 10 Mo. 575; *Ashenbroel Club v. Finlay*, 53 Mo. App. 256; *Equitable, etc., Association v. Bidwell*, 60 Neb. 169; 82 N. W. 384; *Same v. Baird*, 60 Neb. 173; 82 N. W. 385; *Whitney Arms Co. v. Bar-*

low, 63 N. Y. 62; 20 Am. Rep. 504; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24; 36 L. R. A. 664; 45 N. E. 390; *Oil Creek, etc., R. R. Co. v. Transportation Co.*, 83 Pa. St. 160.

² *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24; 36 L. R. A. 664; 45 N. E. 390.

³ *Oregon, etc., R. R. v. Oregonian, etc., R. R.*, 130 U. S. 1; *Brunswick Gas Light Co. v. Light Co.*, 85 Me. 532; 35 Am. St. Rep. 385; 27 Atl. 525. See post this section, decisions of U. S. Supreme Court.

⁴ 85 Me. 532; 35 Am. St. Rep. 385; 27 Atl. 525.

control the amount."⁵ A sub-contract was assigned to a national bank, which was obliged to complete the performance of such contract. In an action by the bank on such contract neither the owner nor the original contractor can set up *ultra vires*.⁶ A corporation which has issued accommodation paper may recover on an indemnity mortgage given to protect it in becoming surety.⁷ An *ultra vires* loan, made by a corporation,⁸ as a loan to an officer of the corporation,⁹ a loan for a period of two years made by a corporation authorized to loan money for one year only,¹⁰ or a discount by a safe deposit company of a note,¹¹ may be recovered. A loan to an individual in excess of a twenty-five per cent limit imposed by law, is good at least to such limit.¹² Thus, where a national bank made an *ultra vires* loan on real estate mortgage security, the party receiving the money can not use *ultra vires* as a defense.¹³ A corporation which has sold and delivered goods in which it is not authorized by its charter to deal, can recover the contract price;¹⁴ and where a corporation made an *ultra vires* contract to construct a railroad in reliance upon subscriptions, and did so construct it, it can enforce such subscriptions.¹⁵ This view is not unanimously entertained, however. Some authorities insist that no liability exists by reason of the contract, but only on a *quantum meruit*. Thus, where a corporation bought stock in another corporation, paid for it and had it transferred, the vendor agreeing to indemnify the vendee against such judgments as might be rendered in suits then pending

⁵ 85 Me. 541.

⁶ Security National Bank v. Power Co., 117 Wis. 211; 94 N. W. 74.

⁷ Butterworth, etc., v. Milling Co., 115 Mich. 1; 72 N. W. 990.

⁸ Union Water Co. v. Fluming Co., 22 Cal. 620.

⁹ Bowditch v. Ins. Co., 141 Mass. 292; 55 Am. Rep. 474; 4 N. E. 798. (Enforcing a pledge by a third person, of bonds to secure such debt.)

¹⁰ Germantown, etc., Co. v. Dhein,

43 Wis. 420; 28 Am. Rep. 549.

¹¹ Pratt v. Short, 79 N. Y. 437; 35 Am. Rep. 531.

¹² McClintock v. Bank, 120 Mo. 127; 24 S. W. 1052.

¹³ Union National Bank v. Matthews, 98 U. S. 621.

¹⁴ Chester Glass Co. v. Dewey, 16 Mass. 94; 8 Am. Dec. 128; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504.

¹⁵ Chicago, etc., R. R. v. Derkes, 103 Ind. 520; 3 N. C. 239.

against the corporation whose stock was sold, it was held that the vendee corporation could not enforce the contract of indemnity.¹⁶ At any rate the corporation may recover on *quantum meruit* for the property received under such contract by the adversary party.¹⁷

§1089. Performance by adversary party.—Liability on contract.

If the adversary party to the contract has performed his part thereof and by such performance the corporation has received something of value, some liability exists,¹ though the courts are divided as to its nature. Many jurisdictions hold that in such case the liability is on the contract.² The corporation cannot

¹⁶ Buckeye, etc., Co. v. Harvey, 92 Tenn. 115; 36 Am. St. Rep. 71; 18 L. R. A. 252; 20 S. W. 427. The cases here cited and followed are many of them cases arising on contracts between two corporations, *ultra vires* as to each, so that nothing but full performance on each side could eliminate the *ultra vires* feature of the contract, and on principle are different from this case.

¹⁷ Even if such contract is forbidden by statute, as long as it is not illegal. Philadelphia Loan Co. v. Towner, 13 Conn. 249; Vanatta v. State Bank, 9 O. S. 27.

¹ Kadish v. Association, 151 Ill. 531; 42 Am. St. Rep. 256; 38 N. E. 236; Williams v. Bank, 71 Miss. 858; 42 Am. St. Rep. 503; 16 So. 238.

² Poole v. Association, 30 Fed. 513; Wood v. Corry, etc., Works, 44 Fed. 146; 12 L. R. A. 168; Bowman v. Hardware Co., 94 Fed. 592; Illinois, etc., Bank v. Ry. Co., 117 Cal. 332; 49 Pac. 197; People v. R. R. Co., 178 Ill. 594; 49 L. R. A. 650; 53 N. E. 349; Kadish v. Association, 151 Ill. 531; 42 Am. St. Rep. 256; 38 N. E. 236; Ward v.

Johnson, 95 Ill. 215; Peoria, etc., R. R. Co. v. Thompson, 103 Ill. 187; Thomas v. Ry. Co., 104 Ill. 462; R. R. Co. v. Flanagan, 113 Ind. 488; 3 Am. St. Rep. 674; 14 N. E. 370; Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907; Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492; 60 Am. St. Rep. 172; 46 N. E. 1022; White v. Marquardt, etc., 105 Ia. 145; 74 N. W. 930; Twiss v. Association, 87 Ia. 733; 43 Am. St. Rep. 418; 55 N. W. 8; Humphrey v. Association, 50 Ia. 607; Alexandria, etc., R. R. Co. v. Johnson, 58 Kan. 175; 48 Pac. 847; Sherman, etc., Co. v. Morris, 43 Kan. 282; 19 Am. St. Rep. 134; 23 Pac. 569; Louisville Tobacco Warehouse Co. v. Stewart (Ky.), 70 S. W. 285; Carson City, etc., Bank v. Elevator Co., 90 Mich. 550; 30 Am. St. Rep. 454; 51 N. W. 641; Auerbach v. Mill Co., 28 Minn. 291; 41 Am. Rep. 285; 9 N. W. 799; Winscott v. Investment Co., 63 Mo. App. 367; Manchester, etc., R. R. v. R. R., 66 N. H. 100; 49 Am. St. Rep. 582; Chapman v. Rheostat Co., 62 N. J. L. 497; 41 Atl. 690; Camden, etc., R. R. Co. v. R. R., 48 N. J.

receive the benefits of a transaction and repudiate liability arising out of the same transaction.³ It is said to be "a general rule that undertakings, though they be *ultra vires*, will be enforced against quasi public corporations, if said corporations retain and enjoy the benefits of concessions granted on condition such undertakings should be performed."⁴ It is properly said that this rule "may not be strictly logical, but it prevents a great deal of injustice."⁵ Thus where a corporation borrows money,⁶ as by selling bonds,⁷ and such money has come into the possession of the corporation, it cannot retain the money and plead *ultra vires*. If a corporation buys property

L. 530; 7 Atl. 523; Seymour v. Cemetery Association, 144 N. Y. 333; 26 L. R. A. 859; 39 N. E. 365; Linkauf v. Lombard, 137 N. Y. 417; 33 Am. St. Rep. 743; 20 L. R. A. 48; 33 N. E. 472; Duncomb v. R. R., 84 N. Y. 190; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; Jones v. Building Association, 94 Pa. St. 215; Wright v. Pipe Line Co., 101 Pa. St. 204; 47 Am. Rep. 701; Pittsburgh, etc., R. R. Co. v. R. R. Co., 196 Pa. St. 452; 46 Atl. 431; Northside Ry. Co. v. Worthington, 88 Tex. 562; 53 Am. St. Rep. 778; 30 S. W. 1055; Texas, etc., R. R. Co. v. Gentry, 69 Tex. 625; 8 S. W. 98; City of Spokane v. Amsterdamsch Trustees, etc., 22 Wash. 172; 60 Pac. 141; Horton v. Long, 2 Wash. 435; 26 Am. St. Rep. 867; 27 Pac. 271; North Hudson, etc., Association v. Bank, 79 Wis. 31; 11 L. R. A. 845; 47 N. W. 300; McElroy v. Horse Co., 96 Wis. 317; 71 N. W. 652; Bullen v. Trading Co., 109 Wis. 41; 85 N. W. 115.

³ Marion Trust Co. v. Investment Co., 27 Ind. App. 451; 87 Am. St. Rep. 257; 61 N. E. 688. "That kind of plunder which holds onto the property, but pleads the doctrine of *ultra vires* against the obli-

gation to pay for it, has no recognition or support in the laws of this state." Seymour v. Cemetery Association, 144 N. Y. 333, 341; 26 L. R. A. 859; 39 N. E. 365; (citing Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; Duncomb v. R. R. Co., 84 N. Y. 190; Woodruff v. R. R. Co., 93 N. Y. 609, 619). "Where an *ultra vires* contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account." Twiss v. Association, 87 Ia. 733, 737; 43 Am. St. Rep. 418; 55 N. W. 8; quoted in Beach v. Wakefield, 107 Ia. 567, 585; 76 N. W. 688; 78 N. W. 197.

⁴ People v. R. R. Co., 178 Ill. 594; 607; 49 L. R. A. 650; 53 N. E. 349; (citing Heims Brewing Co. v. Flannery, 137 Ill. 309; 27 N. E. 286; Kadish v. Association, 151 Ill. 531; 42 Am. St. Rep. 256; 38 N. E. 236; Eckman v. R. R. Co., 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 496).

⁵ Seymour v. Society, 54 Minn. 147, 149; 55 N. W. 907.

⁶ Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907.

⁷ International Trust Co. v. Mfg. Co., 70 N. H. 118; 46 Atl. 1054.

and retains it,⁸ or sells it to another person and retains the proceeds of such sale,⁹ it cannot invoke the doctrine of *ultra vires* to avoid liability on the contract for the purchase price. So where a corporation bought certain mining claims under a contract to pay the owner thereof a certain per cent of the sales as payment for such claims it cannot keep the claim and refuse to make such payments.¹⁰ An agreement to repay money borrowed by the corporation cannot be avoided as being *ultra vires*, even if the money borrowed was to be used for an unauthorized purpose,¹¹ if not known to the lender,¹² or even, it has been held, if such intention is known to the lender,¹³ as long as the contract of loan does not require such use. Even in cases of this sort the corporation cannot retain the benefits of the transaction and avoid liability thereon. A corporation cannot contest its liability on mortgage security bonds, though given to raise money with which to aid a street car line.¹⁴ Where a church sold land and the vendee paid the church therefor and then paid off pre-existing liens on such realty, the church cannot recover such realty, even if the contract was *ultra vires*, unless it restores the money thus paid.¹⁵ A corporation which has accepted the full benefit of the contract with a stockholder under which he became a member, cannot repudiate liability to him under such contract on the ground that it was *ultra vires*.¹⁶ In such a case the corporation "can-

⁸ *Miners' Ditch Co. v. Zellerback*, 37 Cal. 543; 99 Am. Dec. 300.

⁹ *Rutland, etc., Co. v. Proctor*, 29 Vt. 93.

¹⁰ *Wall v. Smelting Co.*, 20 Utah 474; 59 Pac. 399.

¹¹ *Bradley v. Ballard*, 55 Ill. 413; 8 Am. Rep. 656. (A corporation formed to mine in Illinois borrowed money and used it to mine in Colorado.)

¹² As where money was borrowed by a loan association to pay off retiring shareholders. *North Hudson, etc., Association v. Bank*, 79 Wis. 31; 11 L. R. A. 845; 47 N. W. 300.

¹³ Money borrowed by a loan association to pay off retiring shareholders. *Marion Trust Co. v. Investment Co.*, 27 Ind. App. 451; 87 Am. St. Rep. 257; 61 N. E. 688.

¹⁴ *Illinois, etc., Bank v. Ry. Co.*, 117 Cal. 332; 49 Pac. 197.

¹⁵ *Madison, etc., Church v. Church*, 73 N. Y. 82.

¹⁶ *Vought v. Loan Association*, 172 N. Y. 508; 92 Am. St. Rep. 761; 65 N. E. 496. This case was followed in *Eastern, etc., Association v. Williamson*, 189 U. S. 122; affirming *Williamson v. Loan Association*, 62 S. C. 390; 38 S. E. 616,

not be excused from payment upon the plea that the contract was beyond its power."¹⁷ Where A bought stock under an agreement with the corporation that he should be given employment and that at the end of such employment the corporation would purchase his stock, it cannot avoid liability on such contract after A has fully performed his part.¹⁸ Where one has rendered services to a corporation under a contract,¹⁹ *ultra vires* is no defense. Where an insurance company insured against a risk, not authorized by its charter and received the premium therefor, it was held liable on the policy.²⁰ It is chiefly with reference to contracts of this class that the principle is suggested as a reason for the decisions, that *ultra vires* can be used as a defense only when "consistent with the obligations of justice."²¹ This is a better statement of ethics than a practical rule of law. It has been repudiated as a mere dictum by some of the courts that have enunciated it.²²

which involved a construction of the same statute.

¹⁷ Vought v. Loan Association, 172 N. Y. 508; 518; 92 Am. St. Rep. 761; 65 N. E. 496; quoted in Eastern, etc., Association v. Williamson, 189 U. S. 122.

¹⁸ Chapman v. Rheostat Co., 62 N. J. L. 497; 41 Atl. 690.

¹⁹ Tyler v. Academy, etc., 14 Or. 485; 13 Pac. 329.

²⁰ Denver, etc., Co. v. McClelland, 9 Colo. 11; 59 Am. Rep. 134; 9 Pac. 771. *Contra*, where such policy was forbidden by statute. *In re Assignment Mutual, etc., Ins. Co.*, 107 Ia. 143; 70 Am. St. Rep. 149.

²¹ Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 37; 36 L. R. A. 664; 45 N. E. 390.

To the same effect are the following cases: Ohio, etc., Ry. Co. v. McCarthy, 96 U. S. 258; Union Water Co. v. Fluming Co., 22 Cal. 621; Burke, etc., Co. v. Wells Fargo &

Co., 7 Ida. 42; 60 Pac. 87; Chester Glass Co. v. Dewey, 16 Mass. 94; 8 Am. Dec. 128; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; Linkauf v. Lombard, 137 N. Y. 417; 33 Am. St. Rep. 743; 20 L. R. A. 48; 33 N. E. 472; Kadish v. Building Association, 151 Ill. 531; 42 Am. St. Rep. 256; 38 N. E. 236; Carson City, etc., Bank v. Elevator Co., 90 Mich. 550; 30 Am. St. Rep. 454; 51 N. W. 641; Portland, etc., Co. v. East Portland, 18 Or. 21; 6 L. R. A. 290; 22 Pac. 536; Bear, etc., Co. v. Hanley, 15 Utah 506; 50 Pac. 611; Lewis v. American, etc., Association, 98 Wis. 203; 39 L. R. A. 559; 73 N. W. 793.

²² It is called "a mere passing remark" in Central, etc., Co. v. Car Co., 139 U. S. 24, 55. So, Buckeye, etc., Co. v. Harvey, 92 Tenn. 115; 36 Am. St. Rep. 71; 18 L. R. A. 252; 20 S. W. 427.

§1090. Liability independent of contract.

Other jurisdictions, led by the Supreme Court of the United States, hold that no liability exists on the contract, since it is a contract exectuory as to the unauthorized act; but that an action in *quantum meruit* will lie, to recover a reasonable compensation for the benefits received by the corporation under the contract.¹ It is well settled that the corporation cannot retain what it has received under the contract without incurring any liability therefor.² So if a corporation sues in equity to have an *ultra vires* mortgage cancelled, it must offer to restore to the mortgagee the amount received by the corporation and remaining unpaid.³ The same rule applies if it seeks to avoid its contract.⁴ The liability is said to exist "irrespective of the invalid agreement."⁵ Where a land company and a street rail-

¹ "Whatever doubts may have been once entertained as to the power of corporations to set up the defense of *ultra vires* to defeat a recovery upon an executed contract, the rule is now well settled at least in this court, that where the action is brought upon the illegal contract, it is a good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a *quantum meruit* it may be compelled to respond for the benefit actually received." *De La Vergne, etc., Co. v. Savings Institution*, 175 U. S. 40, 58. Citing *Pearce v. R. R.*, 21 How. (U. S.) 441. So as to leases *ultra vires* of a corporation. *Thomas v. R. R. Co.*, 101 U. S. 71; *Pittsburgh, etc., Ry. v. Bridge Co.*, 131 U. S. 371; *McCormick v. Bank*, 165 U. S. 538; *California Bank v. Kennedy*, 167 U. S. 362; *Central, etc., Co. v. Car Co.*, 171 U. S. 138. Also citing *Buckeye Marble Co. v. Harvey*, 92 Tenn. 115; 36 Am. St. Rep. 71; 18 L. R. A. 252; 20 S. W. 427. See on this point, *Hitcock v. Galveston*, 96

U. S. 341; *Dickerman v. Trust Co.*, 176 U. S. 181; *Emmerling v. Bank*, 97 Fed. 739; 38 C. C. A. 399; *Whitney v. Peay*, 24 Ark. 22; *In re Assignment Mutual, etc., Ins. Co.*, 107 Ia. 143; 70 Am. St. Rep. 149; 77 N. W. 868 (prohibition by statute); *Brunswick Gas Light Co. v. Gas, etc., Co.*, 85 Me. 532; 35 Am. St. Rep. 385; 27 Atl. 525; *Moore v. Tanning Co.*, 60 Vt. 459; 15 Atl. 114; *Northwestern, etc., Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781.

² *Great Northwestern Ry. v. Charlebois* (1899), A. C. 114; *Louisiana, etc., Ry. v. Levee District*, 87 Fed. 594; 31 C. C. A. 121.

³ *Southern, etc., Association v. Stable Co.*, 128 Ala. 624; 29 So. 654.

⁴ *Louisiana, etc., Ry. v. Board, etc., of Levee District*, 87 Fed. 594; 31 C. C. A. 121.

⁵ *Manchester, etc., R. R. Co. v. R. R. Co.*, 66 N. H. 100, 132; 49 Am. St. Rep. 582; 9 L. R. A. 689; 20 Atl. 383; see *Davis v. R. R.*, 131 Mass. 258; 41 Am. St. Rep. 221;

way company issued bonds together and divided the money thus obtained, each company was held liable to pay the proportion of the bonds equal to the proportion of the money received by it.⁶ This view has been carried in some jurisdictions to the logical conclusion that even if the corporation does not seek to avoid the transaction, the party who has performed may ignore the contract and recover a reasonable value for what he has parted with. Thus a corporation in consideration of a loan of twenty thousand dollars agreed to repay it in preferred stock. When the contract was entered into it was *ultra vires*, as the corporation had no power to issue preferred stock. Subsequently the legislature gave to such corporation the power to issue preferred stock, and it was willing to deliver the proper amount to the creditor. It was held that such contract had no consideration, and that the creditor might ignore the contract and recover the amount of the loan.⁷ An *ultra vires* contract for the purchase of certain goods for speculation had been made by a manufacturing company. The vendor delivered part of the goods, repudiated the contract and sued for the value of the goods delivered; and recovery was allowed.⁸ In some cases it is held that the corporation is not liable on the contract, but no opinion is given as to its liability in any other theory.⁹ Thus a manufacturing corporation which had been exceeding its authority in operating a store for its employees, was allowed to use *ultra vires* as a defense in an action for goods sold and delivered.¹⁰ Thus it has been held that a corporation to manufacture and sell cotton-seed products, including fertilizers made

Morville v. Tract Society, 123 Mass. 129; 25 Am. Rep. 40; White v. Bank, 22 Pick. (Mass.) 181; Dill v. Wareham, 7 Met. (Mass.) 438; Greenville, etc., Co. v. Warehouse Co., 70 Miss. 669; 35 Am. St. Rep. 681; National Trust Co. v. Miller, 33 N. J. Eq. 155; Tennessee Ice Co. v. Raine, 107 Tenn. 151; 64 S. W. 29; Miller v. Ins. Co., 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39.

⁶ Northside Ry. Co. v. Worthing-

ton, 88 Tex. 562; 53 Am. St. Rep. 778; 30 S. W. 1055.

⁷ Anthony v. Sewing Machine Co., 16 R. I. 571; 5 L. R. A. 575; 18 Atl. 176.

⁸ Day v. Buggy Co., 57 Mich. 146; 58 Am. Rep. 352; 23 N. W. 628.

⁹ Sherwood v. Alvis, 83 Ala. 115; 3 Am. St. Rep. 695; 3 So. 307.

¹⁰ Chewacla, etc., Works v. Dis-mukes, 87 Ala. 344; 5 L. R. A. 100; 6 So. 122.

therefrom, is not liable on a note given by it for another kind of fertilizer which it intends to resell at a profit.¹¹

In some jurisdictions the liability of a corporation on an *ultra vires* contract which the other party has fully performed, is said to be in the nature of a liability in tort.¹²

§1091. Partial performance by one party.

If one party to an *ultra vires* contract has performed it in part, the executory part of such contract may nevertheless be avoided.¹ An *ultra vires* lease made by one railroad to another, on which rent had been paid for several years, can be repudiated as to the executory part thereof.² An *ultra vires* lease had been made, and installments paid for years. Suit was brought for an overdue installment of rent, the defendant still retaining the property. No recovery was allowed on the lease.³ If the corporation has partially performed the contract and it remains entirely executory on the other side, some authorities hold that no action can be maintained on the contract, but only to recover back what has been parted with under it.⁴ If a contract is partially performed by the adversary party, the corporation is liable to the extent at least of benefits received. Here again there is a conflict of opinion; some authorities holding that although the contract may be repudiated by the corporation as to the part not performed, the corporation

¹¹ Richmond Guano Co. v. Oil Mill & Ginnery, 119 Fed. 709.

¹² "If the agreement was *ultra vires* and the association entered into it knowing it could not perform its part thereof, and thereby induced plaintiff to part with its money in the purchase of stock, then it was a tort, and the defendant would be liable therefor." *Williamson v. Association*, 54 S. C. 582, 596; 71 Am. St. Rep. 822; 32 S. E. 765; *Miller v. Insurance Co.*, 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39.

¹ *Pennsylvania, etc., Co. v. R. R.*

Co., 118 U. S. 290; *Thomas v. R. R.*, 101 U. S. 71; *McNulta v. Bank*, 164 Ill. 427; 56 Am. St. Rep. 203; 45 N. E. 954; *Mallory v. Oil Works*, 86 Tenn. 598; 8 S. W. 396.

² *Oregon, etc., Ry. v. Oregonian, etc., Ry.*, 130 U. S. 1.

³ *Central, etc., Co. v. Car Co.*, 139 U. S. 24.

⁴ *Northwestern, etc., Co. v. Shaw*, 37 Wis. 655; 19 Am. Rep. 781; (where a packet company bought grain for speculation; and the corporation was not allowed to recover damages for non-performance).

is liable on the contract as to that part which is performed.⁶ Thus where a corporation formed a partnership with a stockholder, and he performed the contract, the corporation must account to him for the proceeds of the partnership received by it.⁶ Other authorities hold that in such case the liability is on *quantum meruit* for the benefits received, and not on the contract.⁷

§1092. Performance not conferring benefit on corporation.

Where performance does not pass anything of value to the corporation, performance by the adversary party does not impose any liability on the corporation. This is the case where the corporation has issued accommodation paper,¹ or has *ultra vires* acted as surety.² Thus a brewing company was allowed to plead *ultra vires* to an appeal bond on which it had become surety to enable the appellee to continue in the saloon business and to buy beer of the company;³ and a railroad could thus defend against its guaranty of the expenses of a festival.⁴

⁶ Macon, etc., Co. v. R. R. Co., 63 Ga. 103.

⁶ Boyd v. Carbon-Black Co., 182 Pa. St. 206; 37 Atl. 937. "While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life in fact for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed." Boyd v. Carbon-Black Co., 182 Pa. St. 206, 211. 37 Atl. 937.

⁷ Pittsburgh, etc., Co. v. Bridge Co., 131 U. S. 371; McCormick v. Bank, 165 U. S. 538; California, etc., Bank v. Kennedy, 167 U. S. 362; Nashua, etc., R. R. Co. v. R. R. Co., 164 Mass. 222; 49 Am. St. Rep. 454; 41 N. E. 268; Green-

ville, etc., Planter's, etc., Co., 70 Miss. 669; 35 Am. St. Rep. 68; 13 So. 879.

¹ Northside Ry. Co. v. Worthington, 88 Tex. 562; 53 Am. St. Rep. 778; 30 N. W. 1055; see also to the same effect M. V. Monarch Co. v. Bank, 105 Ky. 430; 88 Am. St. Rep. 310; 49 S. W. 317; see § 1071.

² See § 1072; see to the same effect First National Bank v. Winchester, 119 Ala. 168; 72 Am. St. Rep. 904; 24 So. 351.

³ Best Brewing Co. v. Klassen, 185 Ill. 37; 76 Am. St. Rep. 26; 50 L. R. A. 765; 57 N. E. 20.

⁴ Davis v. R. R., 131 Mass. 258; 41 Am. Rep. 221. *Contra*, a street railroad was not allowed to plead *ultra vires* to a subscription to a fair, in order to increase traffic. State Board v. R. R. Co., 47 Ind. 407; 17 Am. Rep. 702.

Where a building association bought land and assumed a mortgage; and subsequently repudiated the transaction and tendered a deed to the grantor, it was held that, as the contract to assume the debt was *ultra vires*, and the holder of the debt and mortgage had parted with nothing in reliance on such assuming the debt, he could not enforce the debt against the corporation.⁵ If a corporation by an *ultra vires* contract buys stock in another corporation, it cannot be compelled to pay a stock liability.⁶ This doctrine may properly be extended to cases where the corporation has no choice in receiving or retaining benefits. Thus where work was done under a contract, with an unauthorized (and possibly *ultra vires*) change made by the authority of the superintendent of the company, the contractor could not recover extra compensation for the change.⁷

§1093. Contracts fully performed.

If a contract has been fully performed on both sides, neither party can take advantage of the fact that it was *ultra vires*.¹ The right of attacking transaction *ultra vires*, but fully executed, belongs to the state alone.² Thus, the right of a corporation to hold land can be questioned only by the state, not

⁵ National, etc., Association v. Bank, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619.

⁶ Chemical National Bank v. Havermale, 120 Cal. 601; 65 Am. St. Rep. 206; 52 Pac. 1071; White v. Bank, 66 S. C. 491; 97 Am. St. Rep. 803; 45 S. E. 94.

⁷ Boynton v. Gas Light Co., 124 Mass. 197.

¹ Brown v. Schleier, 194 U. S. 18; Pennsylvania R. R. Co. v. R. R., 118 U. S. 290; Cincinnati, etc., Co. v. McKeen, 64 Fed. 36; 12 C. C. A. 14; Reorganized Church, etc., v. Church, etc., 60 Fed. 937; Long v. Ry. Co., 91 Ala. 519; 24 Am. St. Rep. 931; 8 So. 706; Bedford Belt Ry. Co. v. McDonald, 17 Ind. App. 492; 60 Am. St. Rep. 172; 46 N. E.

1022; Miller v. Turnpike Co., 109 Ky. 475; 59 S. W. 512; Hennessy v. St. Paul, 54 Minn. 219; 55 N. W. 1123; Manchester, etc., R. R. v. R. R., 66 N. H. 100; 49 Am. St. Rep. 582; 9 L. R. A. 689; 20 Atl. 383; Camden, etc., R. R. Co. v. R. R., 48 N. J. L. 530; 7 Atl. 523; Holmes, etc., Co. v. Metal Co., 127 N. Y. 252; 24 Am. St. Rep. 448; 27 N. E. 831; Parish v. Wheeler, 22 N. Y. 494.

² Benton v. Elizabeth, 61 N. J. L. 693; 40 Atl. 1132; affirming 61 N. J. L. 411; 39 Atl. 683, 906; Barrow v. Turnpike Co., 9 Humph. (Tenn.) 304; Heiskell v. Chickasaw Lodge, 87 Tenn. 668; 4 L. R. A. 699; 11 S. W. 825; Zinc Carbonate Co. v. Bank, 103 Wis. 125; 74 Am. St. Rep. 845; 79 N. W. 229; see §1086.

by a private individual.³ An illustration of several of these propositions is found in a case,⁴ in which A, who had subscribed for stock, defended a suit for his subscription on the ground that some of the stock was subscribed for by corporations; that such subscriptions were *ultra vires*; and that accordingly he could not be held, since the corporation had organized without a complete list of subscribers. The court held that as long as the subscriptions were executory, they were "illegal in the sense that they were *ultra vires*, and such corporations could make that defense or not at their pleasure";⁵ yet when fully performed they were absolutely binding. A national bank erected an office building upon realty on which it held a ninety-nine year lease at an annual rental, under a contract whereby the bank was to pay all taxes. Subsequently the bank became insolvent; rent and taxes were in arrears, and the income from the building did not pay fixed charges. Under these circumstances the bank agreed with the lessor to surrender the lease and to turn over the building to him, in consideration of his releasing the bank from all liability under the lease. Thereafter a receiver was appointed for the bank; and he sued the lessor in equity to set aside the lease and the surrender thereof. It was held that he had no such right.⁶

§1094. Estoppel.

The fact that an *ultra vires* contract, which is so often said to be void, does in many jurisdictions give rise to liability on

³ Union National Bank v. Matthews, 98 U. S. 621; Tidwell v. Cattle Co. (Ariz.), 53 Pac. 192; Water, etc., Co. v. Tenney, 24 Colo. 344; 51 Pac. 505; Chicago, etc., R. R. Co. v. Keegan, 185 Ill. 70; 56 N. E. 1088; Cooney v. Packing Co., 169 Ill. 370; 48 N. E. 406; Henderson v. Coal Co., 78 Ill. App. 437; Watts v. Gantt, 42 Neb. 869; 61 N. W. 104; Ray v. Foster (Tex. Civ. App.), 53 S. W. 54. This rule is applied in some jurisdictions to devisees to a corporation. Farrington v. Putnam,

90 Me. 405; 38 L. R. A. 339; 37 Atl. 652; *In re Stickney's Will*, 85 Md. 79; 60 Am. St. Rep. 308; 35 L. R. A. 693; 36 Atl. 654; Hanson v. Little Sisters, etc., 79 Md. 434; 32 L. R. A. 293; 32 Atl. 1052; Heiskell v. Chickasaw Lodge, 87 Tenn. 668; 4 L. R. A. 699; 11 S. W. 825.

⁴ McCoy v. Columbian Exposition, 186 Ill. 356; 78 Am. St. Rep. 288; 57 N. E. 1043; affirming 87 Ill. App. 605.

⁵ 186 Ill. 360.

⁶ Brown v. Schleier, 194 U. S. 18.

the contract, has caused many authorities to explain this apparent anomaly by invoking the doctrine of estoppel.¹ Thus whether a deposit of securities with state officers in compliance with the statutes thereof prescribing the terms on which foreign corporations may do business in such state is *ultra vires* of such foreign corporation or not, it cannot take advantage of its lack of power.² So where a corporation bought bank stock as an investment and received dividends thereon for years, with the acquiescence of its own stockholders, it was held to be estopped to deny that it was a stockholder, in a suit to enforce a stock liability.³ So where a corporation made a conveyance to one who agreed to pay the debts of the corporation, it was held that after a delay of five years and after third persons have acquired an interest in such property, the corporation cannot have such conveyance set aside.⁴ So one who has agreed to sell realty to a corporation is said to be estopped to avoid the contract after the corporation has taken possession of such

¹ Eastern, etc., Association v. Williamson, 189 U. S. 122; American National Bank v. Paper Co., 77 Fed. 85; Wood v. Corry, etc., Water Works, 44 Fed. 146; 12 L. R. A. 168; Kennedy v. Savings Bank, 101 Cal. 495; 40 Am. St. Rep. 69; 35 Pac. 1039; People v. R. R., 178 Ill. 594; 53 N. E. 349; Eckman v. R. R., 169 Ill. 312; 48 N. E. 496; Heims Brewing Co. v. Flannery, 137 Ill. 309; McCarthy v. Lavasche, 27 N. E. 286; 89 Ill. 270; 31 Am. Rep. 83; State Board v. Ry., 47 Ind. 407; 17 Am. Rep. 702; Wright v. Hughes, 119 Ind. 324; 12 Am. St. Rep. 412; 21 N. E. 907; White v. Marquardt, 105 Ia. 145; 74 N. W. 930; Sherman Center Town Co. v. Fletcher, 43 Kan. 282; 19 Am. St. Rep. 134; 23 Pac. 569; Nims v. School, 160 Mass. 177; 39 Am. St. Rep. 467; 22 L. R. A. 364; 35 N. E. 776; (a tort growing out of contract to carry as a ferryman); Carson, etc., Bank v. Carson, etc., Co., 90

Mich. 550; 30 Am. St. Rep. 454; 51 N. W. 641; Dewey v. Ry., 91 Mich. 351; 51 N. W. 1063; Manchester, etc., R. R. Co. v. R. R., 66 N. H. 100; 49 Am. St. Rep. 582; 9 L. R. A. 689; 20 Atl. 383; Bissell v. R. R., 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 N. Y. 62; 20 Am. Rep. 504; Kent v. Mining Co., 78 N. Y. 159; Linkauf v. Lombard, 137 N. Y. 417; 33 Am. St. Rep. 743; 20 L. R. A. 48; 33 N. E. 472; Hannon v. Siegel-Cooper Co., 167 N. Y. 244; 52 L. R. A. 429; 50 N. E. 597; Vought v. Loan Association, 172 N. Y. 508; 92 Am. St. Rep. 761; 65 N. E. 496; Tyler v. Academy, 14 Or. 485; 13 Pac. 329.

² Lewis v. American, etc., Loan Association, 98 Wis. 203; 39 L. R. A. 559; 73 N. W. 793.

³ Hunt v. Malting Co., 90 Minn. 282; 96 N. W. 85.

⁴ Bear Valley, etc., Co. v. Trust Co., 117 Fed. 941.

realty and made valuable improvements thereon.⁵ However, it was held that no estoppel existed where a stockholder who had not assented to an *ultra vires* sale by the corporation of corporate property, received some of the bonds issued in payment for such property as long as he did not assert any rights thereunder.⁶ Conversely, no estoppel exists if nothing of value is received by virtue of the transaction in question.⁷ An examination of these cases will show, however, that no technical estoppel is meant; and they may be explained by saying that such contracts were originally voidable, and that those who have elected by receiving and retaining benefits thereunder, to treat them as valid, are bound by such election.

Estoppel *in pais* exists only where one party by false representations of fact has induced the other to act so that he would be prejudiced were the first party allowed to deny the truth of the facts as represented by him. If the power is one which might under proper circumstances be exercised by the corporation, there may be a true estoppel,⁸ though the contract is much oftener, in such case, entered into in ignorance of the law. Where the power is one which the corporation cannot exercise under any circumstances, there can never be a technical estoppel if all are bound to take notice of the charter.⁹ The doctrine of estoppel is accordingly repudiated by some courts.¹⁰ For the

⁵ Coleridge Creamery Co. v. Jenkins. — Neb. —; 92 N. W. 123.

⁶ Morris v. Land Co., 125 Ala. 263; 28 So. 513.

⁷ Nebraska Shirt Co. v. Horton (Neb.), 93 N. W. 225. "No fruits of the transaction were received by the company and its mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers cannot give rise to an estoppel." Wheeler v. Bank, 188 Ill. 34, 38; 80 Am. St. Rep. 161; 58 N. E. 598.

⁸ Estoppel applies only where the "making of the contract is within the scope of the franchise and the contract is sought to be avoided be-

cause there was a failure to comply with some regulation, or the power was improperly exercised." National, etc., Association v. Bank, 181 Ill. 35, 46; 72 Am. St. Rep. 245; 54 N. E. 619; Davis v. R. R., 131 Mass. 258; 41 Am. Rep. 221.

⁹ See § 1066.

¹⁰ An *ultra vires* contract "cannot be enforced or rendered enforceable by the application of the doctrine of estoppel." Union Pacific Ry. v. Ry., 163 U. S. 564, 581; quoted in California, etc., Bank v. Kennedy, 167 U. S. 362, 371; Best Brewing Co. v. Klassen, 185 Ill. 37; 76 Am. St. Rep. 26; 50 L. R. A. 765; 57 N. E. 20; National, etc., Association v.

most part, however, these same courts say that such contracts are void.

If the contract is invalid as against policy or as forbidden by statute, estoppel has no application.¹¹

§1095. Ratification.

In the strict sense of the term, a contract which is *ultra vires* is not susceptible of ratification.¹ If it is in excess of the power of the corporation, there is, obviously, no power capable of ratifying it, not even all the stockholders.² "Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction."³ What is meant by using the term "ratification" in this connection is that by reason of performance on one or both sides, and acquiescence by parties affected thereby,

Bank, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619; Franklin National Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 302; 39 L. R. A. 725; 49 N. E. 592.

¹¹ Franklin National Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 302; 39 L. R. A. 725; 49 N. E. 592; *In re* Assignment Mutual, etc., Ins. Co., 107 Ia. 143; 70 Am. St. Rep. 149; 77 N. W. 868; Kent v. Mining Co., 78 N. Y. 159; Miller v. Ins. Co., 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39. "His position is not such as appeals very strongly to a court of equity. He paid his money knowing that the company had no right to accept it, and ought not to be allowed to base an estoppel thereon. Again, the company was expressly prohibited from issuing such a policy as the one in suit." *In re* Assignment Mutual, etc., Ins. Co., 107 Ia. 143, 149; 70 Am. St. Rep. 149; 77 N. W. 868.

¹ California Bank v. Kennedy, 167 U. S. 362; Central, etc., Co. v. Car Co., 139 U. S. 24; Pittsburgh, etc., Co. v. Bridge Co., 131 U. S. 371;

Chambers v. Falkner, 65 Ala. 448; San Diego, etc., R. R. Co. v. Pacific, etc., Co., 112 Cal. 53; 33 L. R. A. 788; 44 Pac. 333; National, etc., Association v. Bank, 181 Ill. 35; 72 Am. St. Rep. 245; 54 N. E. 619; Davis v. R. R., 131 Mass. 258; 41 Am. Rep. 221; Thompson v. West, 59 Neb. 677; 49 L. R. A. 337; 82 N. W. 13; Miller v. Ins. Co., 92 Tenn. 167; 20 L. R. A. 765; 21 S. W. 39. Such a contract is "*ultra vires*, void, and incapable of ratification." Wheeler v. Bank, 188 Ill. 34, 38; 80 Am. St. Rep. 161; 58 N. E. 598.

² Webster v. Machine Co., 54 Conn. 394; 8 Atl. 482; Washington, etc., Co. v. Lumber Co., 19 Wash. 165; 52 Pac. 1067.

³ McCutcheon v. Capsule Co., 71 Fed. 787, 794; 31 L. R. A. 415. They may acquiesce so as to prevent themselves from attacking its validity thereafter, but they cannot ratify so as to bind third persons, such as creditors who may be prejudiced by such transaction.

no one is in a position to take advantage of the fact that the contract was *ultra vires* in its inception. If the transaction is merely irregular, ratification is possible.⁴ This is not, however, a true case of *ultra vires*.

§1096. Laches.

Where the *ultra vires* contract is one which a dissenting stockholder or the corporation might at the outset have avoided, delay in proceeding to avoid it will bar whatever right originally existed.¹ The stockholders, or those representing them, must be vigilant and diligent to be entitled to be relieved in equity.² Thus where an *ultra vires* transfer had been acquiesced for seventeen years,³ no stockholder could complain.

§1097. "Modern doctrine" of *ultra vires*.

The proposition has been advanced in a number of recent cases, that only the state can take advantage of the fact that a contract is *ultra vires*, by a direct attack in *quo warranto* to oust the corporation from exercising such franchises; and that private persons cannot attack the validity of the corporation's contracts on the ground of *ultra vires*.¹ The reason underly-

⁴ Kessler v. Ensley Co., 123 Fed. 746.

¹ St. Louis, etc., R. R. Co. v. R. R. Co., 145 U. S. 393; Boston, etc., R. R. Co. v. R. R., 13 R. I. 260.

² Boston, etc., R. R. Co. v. R. R., 13 R. I. 260; Boyce v. Coal Co., 37 W. Va. 73; 16 S. E. 501.

³ St. Louis, etc., R. R. Co. v. R. R. Co., 145 U. S. 393.

¹ "That such doctrine cannot be resorted to as a weapon for attack and defense in the hands of mere private persons and used as a ready means of embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual

in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratification at the evidence of how certainly principles by natural growth and development adapt the law and its administration to the ever-changing needs of advancing civilization, so as best to promote justice and the common welfare." John V. Farwell Co. v. Wolf, 96 Wis. 10, 16; 65 Am. St. Rep. 22; 37 L. R. A. 138; 70 N. W. 289; 71 N. W. 109. "When a contract has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto,

ing this rule is that in its inception and true place in law, *ultra vires* was a doctrine for restraining the action of a corporation, not intended for the benefit of either party to the transaction, but applicable only to public corporations or to questions between private corporations and the state.² An analysis of the cases in which this doctrine has been advanced, will show that it has not in fact the radical and sweeping effect that it at first seems to have.³ It is applied chiefly to cases where one not a party to the *ultra vires* transaction seeks to avoid it;⁴ or to cases where the contract has been performed fully on one or both sides, and is therefore treated as valid and binding, whatever it may have been at its inception.⁵

who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation regardless of whether the corporation had a right to make it or not, unless its act in that regard was in violation of some written law of the State or sound public policy; (that) in such circumstances, if the corporation exceeds its power it commits a punishable offense against the sovereignty of the people, but cannot itself invoke the doctrine of *ultra vires* to avoid its act, at the same time inflicting a grievous wrong upon the one who has in good faith relied upon the assumption that it possessed in fact the power which it pretended to have authority to exercise." *Wuerfler v. Trustees Grand Grove*, 116 Wis. 19; 96 Am. St. Rep. 940; 92 N. W. 433.

² "The doctrine of *ultra vires* is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often; but to place that power in the hands of the corporation itself, or a private individual, to be used by it or him as a means

of obtaining or retaining something of value which belongs to another, would turn an instrument intended to effect justice between the state and corporations into one of fraud as between the latter and innocent parties." *Zinc Carbonate Co. v. Bank*, 103 Wis. 125, 131; 74 Am. St. Rep. 845; 79 N. W. 229. Expressing somewhat similar views are *Union National Bank v. Matthews*, 98 U. S. 621; *Wood v. Water Works Co.*, 44 Fed. 146; 12 L. R. A. 168; *Prescott National Bank v. Butler*, 157 Mass. 548; 32 N. E. 909; *State v. Thresher, etc., Co.*, 40 Minn. 213; 3 L. R. A. 510; 41 N. W. 1020; *Barrow v. Turnpike Co.*, 9 Humph. (Tenn.) 304.

³ *Wuerfler v. Trustees Grand Grove*, 116 Wis. 19; 96 Am. St. Rep. 940; 92 N. W. 433.

⁴ *John V. Farwell Co. v. Wolf*, 96 Wis. 10; 65 Am. St. Rep. 22; 37 L. R. A. 138; 70 N. W. 289; 71 N. W. 109.

⁵ *Henderson v. Coal Co.*, 78 Ill. App. 437; *Bank of Missouri v. Bank*, 10 Mo. 123; *Zinc Carbonate Co. v. Bank*, 103 Wis. 125; 74 Am. St. Rep. 845; 79 N. W. 229.

CHAPTER L.

IRREGULAR CORPORATIONS.

§1098. De facto private corporations.

A *de facto* corporation is one whose members are in fact exercising and enjoying the franchise of being a corporation, but whose members may be ousted of their right to exercise corporate power, in an action in *quo warranto*, instituted by the state, by reason of omissions or defects in the incorporation.¹ Thus an omission to record the final certificate,² or recording the original articles of incorporation instead of a verified copy thereof,³ or a defective acknowledgment,⁴ still leaves the organization a *de facto* corporation. Many authorities hold that "where there cannot lawfully be a corporation *de jure*, there

¹ "A corporation *de facto* is, in plain English, a corporation in fact." *Lamkin v. Mfg. Co.*, 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042. "A corporation *de facto* exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might lawfully be incorporated; . . . when there is an organization with color of law, and the exercise of corporate franchises and functions." *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 228; 24 Am. St. Rep. 887; 11 L. R. A. 515; 8 So. 658. To the same effect see *Duke v. Taylor*, 37 Fla. 64; 53

Am. St. Rep. 232; 31 L. R. A. 484; 19 So. 172; *Doty v. Patterson*, 155 Ind. 60; 56 N. E. 668; *Crowder v. Sullivan*, 128 Ind. 486; 13 L. R. A. 647; 28 N. E. 94; *Williams v. Ry.*, 130 Ind. 71; 30 Am. St. Rep. 201; 15 L. R. A. 64; 29 N. E. 408; *Tennessee, etc., Co. v. Massey* (Tenn. Ch. App.), 56 S. W. 35; *American Salt Co. v. Heidenheimer*, 80 Tex. 344; 26 Am. St. Rep. 743; 15 S. W. 1038; *Marsh v. Mathias*, 19 Utah 350; 56 Pac. 1074; *Franke v. Mann*, 106 Wis. 118; 48 L. R. A. 856; 81 N. W. 1014.

² *The Joliet v. Frances*, 85 Ill. App. 243; *Edwards v. Dryer Co.*, 83 Ill. App. 643.

³ *Slocum v. Head*, 105 Wis. 431; 81 N. W. 673.

⁴ *Franke v. Mann*, 106 Wis. 118; 48 L. R. A. 856; 81 N. W. 1014.

cannot be one *de facto*.”⁵ Other authorities hold that a *de facto* corporation may exist even when a *de jure* corporation would be impossible.⁶ A colorable compliance with the statute on the subject of incorporation is sufficient,⁷ and it has been held that not even a colorable compliance with the incorporation laws is necessary.⁸

A corporation, whose charter limits a certain length of time for its existence is not a *de facto* corporation after the time thus limited has elapsed, but has no legal existence of any kind.⁹ If the corporate existence is continued by statute for certain purposes, it is a valid corporation for those pur-

⁵ *McTighe v. Construction Co.*, 94 Ga. 306, 315; 47 Am. St. Rep. 153; 32 L. R. A. 208; 21 S. E. 701; cited also as *Georgia R. R. Co. v. Mercantile, etc., Co.*. To this effect are *Davis v. Stevens*, 104 Fed. 235; *People v. Toll Road Co.*, 100 Cal. 87; 34 Pac. 522; *Jones v. Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220; 29 L. R. A. 143; 40 Pac. 457; *American, etc., Co. v. R. R.*, 157 Ill. 641; 42 N. E. 153; *Cozzens v. Brick Co.*, 166 Ill. 213; 46 N. E. 788; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593; 72 Am. St. Rep. 326; 54 N. E. 407; *Heaston v. Ry. Co.*, 16 Ind. 275; 79 Am. Dec. 430; *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415; *Pape v. Bank*, 20 Kan. 440; 27 Am. Rep. 183; *Eaton v. Walker*, 76 Mich. 579; 6 L. R. A. 102; 43 N. W. 638; *Detroit, etc., Bund v. Verein*, 44 Mich. 313; 38 Am. Rep. 270; 6 N. W. 675; *St. Louis, etc., Association v. Hennessy*, 11 Mo. App. 555; *Johnson v. Okerstrom*, 70 Minn. 303; *sub nomine Johnson v. Schulin*, 73 N. W. 147; *Vanneman v. Young*, 52 N. J. L. 403; 20 Atl. 53; *Gibb's Estate*, 157 Pa. St. 59; 22 L. R. A. 276; 27 Atl. 383; *McLeary v. Dawson*, 87

Tex. 524; 29 S. W. 1044; *Evenson v. Ellingson*, 67 Wis. 634; 31 N. W. 342.

⁶ *Goff v. Flesher*, 33 O. S. 107; (where the purpose of the corporation was one not authorized by law).

⁷ *Bibb v. Hall*, 101 Ala. 79; 14 So. 98; *Central, etc., Co. v. Insurance Co.*, 70 Ala. 120; *Jones v. Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220; 29 L. R. A. 143; 40 Pac. 457; *Johnson v. Okerstrom*, 70 Minn. 303; *sub nomine Johnson v. Schulin*, 73 N. W. 147; (distinguishing *Johnson v. Corser*, 34 Minn. 355; 25 N. W. 799; and disapproving *Bergeron v. Hobbs*, 96 Wis. 641; 65 Am. St. Rep. 85; 71 N. W. 1056); *Pott v. Schmucker*, 84 Md. 535; 57 Am. St. Rep. 415; 35 L. R. A. 392; 36 Atl. 592.

⁸ *Finnegan v. Noerenberg*, 52 Minn. 239; 38 Am. St. Rep. 552; 18 L. R. A. 778; 53 N. W. 1150.

⁹ *Wilson v. Tesson*, 12 Ind. 285; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400; 24 Am. Rep. 585; *Bradley v. Reppell*, 133 Mo. 545; 54 Am. St. Rep. 685; 32 S. W. 645; 34 S. W. 841; *Sturges v. Vanderbilt*, 73 N. Y. 384.

poses, after the limitation of its existence has expired.¹⁰ The status of a *de facto* corporation is not limited to those dealing with it in such capacity, but exists as to the world at large,¹¹ except in cases where the state is suing in *quo warranto* to oust the *de facto* corporation of its franchises. In an action between a *de facto* corporation and the state other than *quo warranto*, the *de facto* corporation is to be treated as a corporation.¹²

§1099. Estoppel to deny corporate existence.

Persons who deal with a corporation, or with an organization purporting to be a corporation, as if it were a corporation, are estopped to deny that it is a corporation,¹ such as stockholders,² or a judgment creditor.³ A subscriber to a corporation cannot deny its existence.⁴ So the corporation is estopped to deny its

¹⁰ *Miller v. Coal Co.*, 31 W. Va. 836; 13 Am. St. Rep. 903; 8 S. E. 600.

¹¹ *People v. Water Co.*, 97 Cal. 276; 33 Am. St. Rep. 172; 32 Pac. 236; *Doty v. Patterson*, 155 Ind. 60; 56 N. E. 668; *Improvement Co. v. Small*, 150 Ind. 427, 431; 47 N. E. 11; 50 N. E. 476; *Taylor v. Ry.*, 91 Me. 193; 64 Am. St. Rep. 216; 39 Atl. 560; *Society Perun v. Cleveland*, 43 O. S. 481; 3 N. E. 357.

¹² *Coxe v. State*, 144 N. Y. 396; 39 N. E. 400; (where the receiver of such corporation sues the state.)

¹ *Andes v. Ely*, 158 U. S. 312; *Clo-c v. Cemetery*, 107 U. S. 466; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253; 90 Am. St. Rep. 907; 31 So. 81; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411; 6 So. 360; *Cahall v. Building Association*, 61 Ala. 232; *Raphael Weill, etc., Co. v. Crittenden*, 139 Cal. 488; 73 Pac. 238; *Fresno, etc., v. Warner*, 72 Cal. 379; 14 Pac. 37; *Jones v. Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220; 40 Pac. 457; *Winget v. Association*, 128 Ill. 67; 21 N. E. 12; *Cravens v. Mills Co.*, 120 Ind. 6;

16 Am. St. Rep. 298; 21 N. E. 981; *Hasselman v. Mtge. Co.*, 97 Ind. 365; *Butchers', etc., Bank v. McDonald*, 130 Mass. 264; *Stafflet v. Strome*, 101 Mich. 197; 59 N. W. 411; *Crete, etc., Association v. Patz*, 1 Neb. Rep. Unofficial 768; 95 N. W. 793; (following *Livingston, etc., Association v. Drummond*, 49 Neb. 200; 68 N. W. 375); *Otoe, etc., Association v. Doman*, 1 Neb. Rep. Unofficial 179; 95 N. W. 327; *Nebraska National Bank v. Ferguson*, 49 Neb. 109; 59 Am. St. Rep. 522; 68 N. W. 370; *Larned v. Beal*, 65 N. H. 184; 23 Atl. 149; *Washington, etc., Association v. Stanley*, 38 Or. 319; 58 L. R. A. 816; 63 Pac. 489; *Hooven Mercantile Co. v. Mining Co.*, 193 Pa. St. 28; 44 Atl. 277; *Hamilton v. R. R.*, 144 Pa. St. 34; 23 Atl. 53; *sub nomine Hamilton v. Jackson*, 13 L. R. A. 779.

² *Fish v. Smith*, 73 Conn. 377; 47 Atl. 711.

³ *Shoun v. Armstrong* (Tenn. Ch. App.), 59 S. W. 790.

⁴ *Mullen v. Driving Park*, 64 Ind. 202.

corporate existence.⁵ So persons who contract with a corporation after the time limited for its existence has expired, are estopped to deny that it is a corporation.⁶ The doctrine of estoppel is properly distinguished from the doctrine of corporations *de facto*. The former applies only to those dealing with the corporation; the latter to the world at large. In contracts of *de facto* corporations, the two doctrines necessarily exist together. Further, the doctrine of estoppel may apply to organizations which are not even *de facto* corporations.

§1100. Contracts of *de facto* corporation.—Corporate liability.

A *de facto* corporation is as liable on its contracts as a corporation *de jure*. It cannot deny its own corporate existence in order to evade liability.¹ Its mortgage of its property is valid.² On the other hand those who have dealt with such an organization on the theory that it is a corporation, cannot deny its corporate existence in an action based upon such dealings, and treat such corporation as a partnership.³ This rule rests

⁵ Crystal, etc., Co. v. Roseboom, 91 Ill. App. 551; Carroll v. Bank, 19 Wash. 639; 54 Pac. 32; Williams v. Lumber Co., 72 Wis. 487; 40 N. W. 154.

⁶ Citizens' Bank v. Jones, 117 Wis. 446; 94 N. W. 329.

¹ Lamkin v. Mfg. Co., 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593, 1042; Cravens v. Mills Co., 120 Ind. 6; 16 Am. St. Rep. 298; 21 N. E. 981; Doty v. Patterson, 155 Ind. 60; 56 N. E. 668; Larned v. Beal, 65 N. H. 184; 23 Atl. 149.

² McTighe v. Construction Co., 94 Ga. 306; 47 Am. St. Rep. 153; 32 L. R. A. 208; 21 S. E. 701; also cited as Georgia, etc., R. R. v. Mercantile, etc., Co.

³ Whitney v. Wyman, 101 U. S. 392; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Owensboro Wagon Co. v. Bliss, 132 Ala. 253; 90 Am. St. Rep. 907; 31 So. 81; Louis Snider's

Sons' Co. v. Troy, 91 Ala. 224; 24 Am. St. Rep. 887; 11 L. R. A. 515; 8 So. 658; Humphreys v. Mooney, 5 Colo. 282; Stafford National Bank v. Palmer, 47 Conn. 443; Planters & M. Bank v. Padgett, 69 Ga. 159; Arnold v. Conklin, 96 Ill. App. 373; Ward v. Brigham, 127 Mass. 24; Salem First National Bank v. Almy, 117 Mass. 476; Fay v. Noble, 7 Cush. (Mass.) 188; Merchants', etc., Bank v. Stone, 38 Mich. 779; Finnegan v. Noerenberg, 52; Minn. 239; 38 Am. St. Rep. 522; 18 L. R. A. 773; 53 N. W. 1150; Stout v. Zulick, 48 N. J. L. 599; 7 Atl. 362; Jessup v. Carnegie, 80 N. Y. 441; 36 Am. Rep. 643; Central City Savings Bank v. Walker, 66 N. Y. 424; Second National Bank v. Hall, 35 O. S. 158; Rowland v. Furniture Co., 38 O. S. 269; Rutherford v. Hill, 22 Or. 218; 29 Am. St. Rep. 596; 17 L. R. A. 549; 29 Pac. 546.

in part upon the theory of the nature of the *de facto* corporation; and in part upon the rule that persons who deal with an organization as if it were a corporation, are estopped to deny its corporate existence.⁴

§1101. Partnership liability.

There is a lack of harmony in the judicial utterances upon this question, however. In many cases a defective corporation, which has contracted as a corporation, has been treated as a partnership when it comes to enforcing liability.¹ The divergence in result often turns on a different wording of the incorporation statutes. There is, further, a real difference in opinion as to what constitutes a *de facto* corporation. Further, in many of these cases there was no attempt to comply with the incorporation statutes.² Thus, if the articles of incorporation are filed for record but no stock is subscribed nor is any attempt made to organize, the organization is a partnership, where the statute requires such subscription as essential to corporate existence.³ A change in the corporate name without complying with the statute makes the new organization a partnership,⁴ and an unincorporated bank owned by one person is not a *de facto* corporation.⁵ So a joint stock partnership organ-

⁴ See § 1099.

¹ Wechselberg v. Bank, 64 Fed. 90; 12 C. C. A. 56; 26 L. R. A. 470; Garnett v. Richardson, 35 Ark. 144; Jones v. Hardware Co., 21 Colo. 263; 32 Am. St. Rep. 220; 29 L. R. A. 143; 40 Pac. 457; Bigelow v. Gregory, 73 Ill. 197; Coleman v. Coleman, 78 Ind. 344; Kaiser v. Lawrence Sav. Bank, 56 Ia. 104; 41 Am. Rep. 85; 8 N. W. 772; Whipple v. Parker, 29 Mich. 369; Johnson v. Corser, 34 Minn. 355; 25 N. W. 799; Smith v. Warden, 86 Mo. 382; Ferris v. Thaw, 72 Mo. 446; Richardson v. Pitts, 71 Mo. 128; Abbott v. Refining Co., 4 Neb. 416; Hill v. Beach, 12 N. J. Eq. 31; Fuller v. Rowe, 57

N. Y. 23; Jessup v. Carnegie, 12 Jones & S. (N. Y.) 260; Ridenour v. Mayo, 40 O. S. 9.

² Liebold v. Green, 69 Ill. App. 527; Sebastian v. Academy Co. (Ky.), 56 S. W. 810.

³ Wechselberg v. Bank, 64 Fed. 90; 12 C. C. A. 56; 26 L. R. A. 470; Jones v. Hardware Co., 21 Colo. 263; 32 Am. St. Rep. 220; 29 L. R. A. 143; 40 Pac. 457; Bergeron v. Hobbs, 96 Wis. 641; 65 Am. St. Rep. 85; 71 N. W. 1056.

⁴ Cincinnati Cooperage Co. v. Bate, 96 Ky. 356; 49 Am. St. Rep. 300; 26 S. W. 538.

⁵ Longfellow v. Barnard, 58 Neb. 612; 76 Am. St. Rep. 117; 79 N. W.

ized as a corporation is not a corporation *de facto*.⁶ "Tramp" corporations, or corporations formed in one state for the purpose of doing business in another, are held liable as partnerships in some jurisdictions.⁷ If the members of an irregular corporation or a *de facto* corporation hold themselves out to the world as partners, they are held liable as such.⁸

§1102. *De facto* public corporations.

Contracts of a *de facto* public corporation are as valid as those of a corporation *de jure*,¹ though the corporation is dissolved by a decree of court as including more territory than it should.² So where a municipal corporation, organized under special act, tried to reorganize under general law, and issued bonds, and the new officers were removed, the bonds were valid.³ This rule applies only to *de facto* corporations, however, and not to aggregations of individuals who may assume to act as a public corporation. Accordingly, bonds issued by an unincorporated body, claiming to act as a town or city, are invalid.⁴

255; affirmed on rehearing 59 Neb. 455; 81 N. W. 307; (though it has officers like a corporation).

⁶ Allen v. Long, 80 Tex. 261; 26 Am. St. Rep. 735; 16 S. W. 43.

⁷ Taylor v. Branham, 35 Fla. 297; 48 Am. St. Rep. 249; 39 L. R. A. 362; 17 So. 552; Hill v. Beach, 12 N. J. Eq. 31.

⁸ Simmons v. Ingram, 78 Mo. App. 603; Slocum v. Head, 105 Wis. 431; 50 L. R. A. 324; 81 N. W. 673.

¹ Shapleigh v. San Angelo, 167 U. S. 646; Miller v. Irrigation District, 99 Fed. 143; Arapahoe v. Albee,

24 Neb. 242; 8 Am. St. Rep. 202; 38 N. W. 737; Coast v. Spring Lake, 56 N. J. Eq. 615; 51 L. R. A. 657; 36 Atl. 21; Coler v. School Township, 3 N. D. 249; 28 L. R. A. 649; 55 N. W. 587.

² Uvalde v. Spier, 91 Fed. 594; 33 C. C. A. 501.

³ Lampasas v. Talcott, 94 Fed. 547; 36 C. C. A. 318.

⁴ Guthrie v. Lumber Co., 9 Okl. 464; 60 Pac. 247; Ruohs v. Athens, 91 Tenn. 20; 30 Am. St. Rep. 858; 18 S. W. 400.

PART V.

CONSTRUCTION AND INTERPRETATION.

CHAPTER LI.

GENERAL PRINCIPLES OF CONSTRUCTION.

§1103. Nature of construction.

If a question of construction becomes material, this necessarily implies that the contract is in every respect valid and enforceable, at least under one of the constructions contended for. Questions as to the validity and enforceability of the contract cannot therefore be involved as a part of a question of construction. They may, of course, be presented in the same case; and a question of construction, when once determined, may also determine the validity of the contract itself. Accordingly, many questions of construction have already been anticipated in connection with the formation of the contract. Still questions of construction are easy to separate from questions of formation, until we reach the question of what terms of the negotiations constitute the terms of the contract. The line of demarkation between this subject and construction is an arbitrary one.¹ Construction is in reality a part of the contract. The division is solely for necessary convenience in discussion. When we attempt to distinguish questions of construction from those of the operation of the contract, or from those arising out of discharge, the difficulty of making any logical separation of topics is even greater. Operation and discharge are both dependent on the construction of the contract, if there is any dispute as to its meaning. Accordingly many questions of construction are necessarily left for discussion in connection with discharge.

§1104. Intention deduced primarily from words employed.

The primary object of construction in contract law is to discover the intention of the parties.¹ This intention in express

¹ See § 598 *et seq.*

Pac. 105, 236; Linehan, etc., Co. v.

¹ Porter v. Allen, — Ida. — 69 Ry., 107 La. 645. 31 So. 1026.

contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom.² This rule applies to oral contracts,³ as well as to contracts in writing, and is the rule recognized by courts of equity.⁴ It follows, therefor, that construction cannot be expressed in a series of rigid rules from which in each case the legal effect of the particular contract can be determined infallibly. The principles which follow are *prima facie* rules for determining the mutual intention of the contracting parties, liable in any particular case to be inapplicable because of some phrase in that contract showing a contrary intention. The value of precedents in construction depends largely on the kind of contract involved. Certain kinds, such as bills of lading, insurance policies, and negotiable instruments are drawn in set forms, and precedents

"The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used." *Di Sora v. Phillips*, 10 H. L. Cas. 624, 638; quoted in *Gibbons v. Grinsell*, 79 Wis. 365, 369; 48 N. W. 255.

² *Rockefeller v. Merritt*, 76 Fed. Rep. 909; 35 L. R. A. 633; 22 C. C. A. 608; *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126; 8 So. 114; *Schroeder v. Ins. Co.*, 132 Cal. 18; 84 Am. St. Rep. 17; 63 Pac. 1074; *McDermith v. Voorhees*, 16 Colo. 402; 25 Am. St. Rep. 286; 27 Pac. 250; *Atchison, etc., R. R. v. R. R.*, 162 Ill. 632; 35 L. R. A. 167; 44 N. E. 823; *Cravens v. Cotton Mills*, 120 Ind. 6; 16 Am. St. Rep. 298; 21 N. E. 981; *Heiple v. Reinhart*, 100 Ia. 525; 69 N. W. 871; superseding 65 N. W. 331; *Louisville, etc., Ry. v. Ry.*, 100 Ky. 690; 39 S. W. 42; *Yorston v. Brown*, 178 Mass. 103; 59 N. E. 654; *Hoose v. Ins. Co.*, 84 Mich. 309; 11 L. R. A. 340; 47 N. W. 587; *Mathews v. Phelps*, 61 Mich.

327; 1 Am. St. Rep. 581; 28 N. W. 108; *Lovelace v. Protective Association*, 126 Mo. 104; 47 Am. St. Rep. 638; 30 L. R. A. 209; 28 S. W. 877; *Mastin v. Stoller*, 107 Mo. 317; 17 S. W. 1011; *McCormick Harvesting Machine Co. v. Brown*, (Neb.), 98 N. W. 697; *Jackson v. Phillips*, 57 Neb. 189; 77 N. W. 683; *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316; *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540; 46 N. E. 952; *Schoonmaker v. Hoyt*, 148 N. Y. 425; 42 N. E. 1059; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; 15 N. E. 70; *Travelers' Ins. Co. v. Myers*, 62 O. S. 529; 49 L. R. A. 760; 57 N. E. 458; *McFarland v. R. R., etc., Association*, 5 Wyom. 126; 63 Am. St. Rep. 29; 27 L. R. A. 48; 38 Pac. 347, 677.

³ *Ins. Co. v. Crane*, 134 Mass. 56; 45 Am. Rep. 282.

⁴ *Atchison, etc., R. R. v. R. R.*, 162 Ill. 632; 35 L. R. A. 167; 44 N. E. 823.

as to construction of a given form are of value in contracts of similar form, their value rapidly lessening as the form to be considered departs from that considered in the precedent. Other contracts are rarely drawn in set forms, and in their construction precedents are of value chiefly as illustrating the general principles by which the contract in question must be construed.

§1105. Ordinary meaning of word *prima facie* correct.

The ordinary meaning of a word is *prima facie* that employed,¹ and will be used in construction unless the context,² or admissible evidence shows that another meaning was intended, even if it may not be the accurate meaning,³ or even if the ordinary meaning is so colloquial as not to appear in the dictionary.⁴

§1106. Context and subject-matter control meaning of word.

The context and subject-matter may affect the meaning to be given to the words of a contract,¹ especially if in connection with the subject-matter the ordinary meaning of the term would give an absurd result.² The subject-matter of a contract to lay pipe for gas may be invoked to aid in determining the meaning of "light" pipe.³ So under a contract for the sale of a coal business in a certain township, a covenant not to en-

¹ *Fitzgerald v. Bank*, 114 Fed. 474; 52 C. C. A. 276; *Francis Bros. v. Boiler Co.*, 112 Fed. 899; *Missouri, etc., Co. v. Bry*, 88 Mo. App. 135; *Moore v. Ins. Co.*, 62 N. H. 240; 13 Am. St. Rep. 556; *Methodist, etc., Society v. Water Co.*, 20 Ohio C. C. 578; 10 Ohio C. D. 648.

² *Brush, etc., Co. v. Montgomery*, 114 Ala. 433; 21 So. 960.

³ *Kohl v. Frederick*, 115 Ia. 517; 88 N. W. 1055.

⁴ *Ullman v. Ry.*, 112 Wis. 150; 88 Am. St. Rep. 949; 56 L. R. A. 246; 88 N. W. 41; (construction of "accident").

¹ *Hull, etc., Co. v. Coke Co.*, 113 Fed. 256; 51 C. C. A. 213; *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769; 28 So. 136; *Lehigh, etc., Coal Co. v. Wright*, 177 Pa. St. 387; 35 Atl. 919; *Ullman v. Ry.*, 112 Wis. 150; 88 Am. St. Rep. 949; 56 L. R. A. 246; 88 N. W. 41.

² *Pendleton v. Saunders*, 19 Or. 9; 24 Pac. 506; *Kentzler v. Accident Association*, 88 Wis. 589; 43 Am. St. Rep. 934; 60 N. W. 1002.

³ *Columbus Construction Co. v. Crane Co.*, 98 Fed. 946; 40 C. C. A. 35.

gage in such business for five years, will be construed to mean to engage in such business in such township.⁴

§1107. Technical meaning.

Words of technical meaning will be given that meaning,¹ unless the context shows that the ordinary meaning was intended.² Thus "horse-power" in a contract for the sale of water power has been held to mean the efficient, and not the theoretical horse-power.³ It is accordingly proper to introduce evidence to show that certain words in a written contract have a technical meaning, and what that meaning is.⁴ Thus evidence is admissible to show the meaning of "watch makers' material,"⁵ "dry goods,"⁶ "artesian well,"⁷ to "reduce" fire insurance,⁸ "order" in a contract of agency for the sale of books,⁹ "merchantable timber,"¹⁰ or in the sale of horses, the meaning of "good condition,"¹¹ or "safe property,"¹² or in contracts for the management of railroads, the meaning of "necessary signals and switchmen,"¹³ or "other similar appliances,"¹⁴ or "transportation," "switching," and "transfer."¹⁵

⁴ Melick v. Foster, 64 N. J. L. 394; 45 Atl. 911.

¹ Seymour v. Armstrong, 62 Kan. 720; 64 Pac. 612; affirming 10 Kan. App. 10; 61 Pac. 675.

² Atkinson v. Sinnott, 67 Miss. 502; 7 So. 289.

³ Lloyd v. Kehl, 132 Cal. 107; 64 Pac. 125.

⁴ Grasmier v. Wolf (Ia.), 90 N. W. 813; Cambers v. Lowry, 21 Mont. 478; 54 Pac. 816.

⁵ Maril v. Ins. Co., 95 Ga. 604; 51 Am. St. Rep. 102; 30 L. R. A. 835; 23 S. E. 463.

⁶ Wood v. Allen, 111 Ia. 97; 82 N. W. 451.

⁷ Hattiesburg Plumbing Co. v. Carmichael, 80 Miss. 66; 31 So. 536; (whether this implied that the water must rise to the top)

⁸ Halsey v. Adams, 63 N. J. L. 330; 43 Atl. 708; (equivalent to "cancel").

⁹ Newhall v. Appleton, 114 N. Y. 140; 3 L. R. A. 859; 21 N. E. 105. (The agent was to receive fifteen dollars for each "order" taken. It was held proper to show that "order" meant at least five volumes of the encyclopædia taken and paid for.)

¹⁰ Dorris v. King (Tenn. Ch. App.), 54 S. W. 683.

¹¹ Elwood v. McDill, 105 Ia. 437; 75 N. W. 340.

¹² Thompson v. Pruden, 18 Ohio C. C. 886.

¹³ Louisville, etc., Ry. v. Ry., 174 Ill. 448; 51 N. E. 824.

¹⁴ Chicago, etc., Ry. v. Ry., 115 Wis. 161; 89 N. W. 180; (whether in view of the context, it included a system of interlocking switches).

¹⁵ Dixon v. Ry., 110 Ga. 173; 35 S. E. 369.

§1108. Meaning of word controlled by usage.

Usages,¹ such as those of a trade,² may be resorted to to show the special meanings of words. Thus evidence of local usage as to the meaning of "cord" in a sale of cedar posts, or of a trade usage as to "subject to strikes" in a contract for the sale of coal,³ is admissible, or as to "on approval" in the diamond trade.⁴ If the meaning of a written contract is clear, a trade usage cannot change the meaning of the words, or add incidents so as to contradict the meaning.⁵ Thus a contract with a broker for the sale of certain articles, "seller paying brokerage at ten cents per ton," cannot be contradicted to cut down the broker's recovery by showing a usage to pay commissions only on the amount delivered.⁶ No usage can be invoked to change rules of law. Thus a usage among brokers that stock certificates are negotiable is invalid.⁷

§1109. Cipher.

If a contract consists in part or all of cipher, extrinsic evidence is admissible to show the meaning of the terms written in cipher contracts by telegraph.¹ Thus the meaning of "Buy three May," may be so explained.² Without such evidence a contract in cipher could have no validity.

¹ Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198; 7 L. R. A. 381.

² Seymour v. Armstrong, 62 Kan. 720; 64 Pac. 612; affirming 10 Kan. App. 10; 61 Pac. 675; Smith v. Clews, 114 N. Y. 190; 11 Am. St. Rep. 627; 4 L. R. A. 392; 21 N. E. 160.

³ Hesser, etc., Co. v. Fuel Co., 114 Wis. 654; 90 N. W. 1094; (that is, whether local or general strikes were intended).

⁴ Smith v. Clews, 114 N. Y. 190; 11 Am. St. Rep. 627; 4 L. R. A. 392; 21 N. E. 160.

⁵ Deacon v. Mattison, 11 N. D. 190; 91 N. W. 35.

⁶ Fairly v. Wappoo Mills, 44 S. C. 227; 29 L. R. A. 215; 22 S. E. 108.

⁷ East Birmingham Land Co. v. Dennis, 85 Ala. 565; 7 Am. St. Rep. 73; 2 L. R. A. 836; 5 So. 317.

¹ Western Union Telegraph Co. v. Collins, 45 Kan. 88; 10 L. R. A. 515; 25 Pac. 187.

² Carland v. Telegraph Co., 118 Mich. 369; 74 Am. St. Rep. 394; 43 L. R. A. 280; 76 N. W. 762.

§1110. Abbreviations.

If abbreviations are used in a written contract, extrinsic evidence is admissible to show that they have a meaning in the trade or business to which the subject of the contract relates which is generally recognized and understood among those familiar with such trade or business.¹ Thus extrinsic evidence is admissible to show the meaning of "S/S7 wheat,"² "C. L. R. P. oats,"³ "stripped and sample warranted # 208,"⁴ "O. K.,"⁵ "K. D. and released,"⁶ "Care R. R. agt. Callahan."⁷ The meaning of the abbreviation must be understood by both parties, however, if the court is to adopt such meaning as that intended by the parties. Thus, "L & O Ex. \$20 R. R. val." cannot be shown to mean "Leaks and outs excepted \$20 railroad valuation," unless such meaning was known to the shipper as well as to the railroad.⁸ Even if the contract is one which by the statute of frauds must be proved by writing, extrinsic evidence is admissible to show the meaning of abbreviations.⁹

¹ *McChesney v. Chicago*, 173 Ill. 75; 50 N. E. 191; *Western Union Telegraph Co. v. Collins*, 45 Kan. 88; 10 L. R. A. 515; 25 Pac. 187; *Maurin v. Lyon*, 69 Minn. 257; 65 Am. St. Rep. 568; 72 N. W. 72; *Springfield First National Bank v. Fricks*, 75 Mo. 178; 42 Am. Rep. 397.

² *Berry v. Kowalsky*, 95 Cal. 134; 29 Am. St. Rep. 101; 27 Pac. 286; 30 Pac. 202.

³ *Wilson v. Coleman*, 81 Ga. 297; 6 S. E. 693; ("Car Loads Rust Proof Oats").

⁴ *Conestoga Cigar Co. v. Finke*, 144 Pa. St. 159; 13 L. R. A. 438; 22 Atl. 868; (in a sale of tobacco).

⁵ *Penn Tobacco Co. v. Leeman*, 109 Ga. 428; 34 S. E. 679; (to show it amounts to a guaranty).

⁶ *Mouton v. Ry.*, 128 Ala. 537; 29 So. 602.

⁷ *Savannah, etc., R. R. v. Collins*, 77 Ga. 376; 4 Am. St. Rep. 87; 3 S. E. 416. (To show that the railroad was to deliver the goods to the agent of another company at Callahan.)

⁸ *Rosenfeld v. Ry.*, 103 Ind. 121; 53 Am. Rep. 500; 2 N. E. 344.

⁹ Contract for the sale of realty: *Melone v. Ruffino*, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93. Contract for the sale of personalty: *New England, etc., Co. v. Worsted Co.*, 165 Mass. 328; 52 Am. St. Rep. 516; 43 N. E. 112. ("F. C. Wool.") *Maurin v. Lyon*, 69 Minn. 257; 65 Am. St. Rep. 568; 72 N. W. 72. (In this case the written memorandum was as follows: "St. Cloud, 7-6-96, sold Maurin Bros., Cold Springs, 5000, 1-0 Jul. Del. 99 C. Duluth" and signed.)

§1111. Intention of parties direct as affecting meaning of term.

If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of such evidence would be to contradict the legal effect of the language which the parties themselves have used.¹ Thus evidence is not admissible to show the meaning of "to be advertised till sold,"² "delivered East St. Louis,"³ "wholesale prices,"⁴ or to mine ore at a certain price as long "as we can make it pay."⁵ Under a contract for drilling for gas or oil a provision to pay for "gas" cannot be shown to mean only gas from a gas well and not gas from a well producing oil chiefly.⁶ So under a contract concerning "bales" of cotton, it was held that the parties could show what meaning "bales" had by usage; but that they could not show an oral contract between the parties fixing a weight for a "bale."⁷ So under a contract which refers to the "amount" of grading it cannot be shown that "amount" means cost and not quantity.⁸ If, on the other hand, the term used is one which has two or more meanings, evidence of the intention of the parties direct is admissible to show in which sense it was used.⁹ So if a written receipt refers to a "due bill" evidence is admissible to show that by such expression the parties intended a certain

¹ Adams v. Turner, 73 Conn. 38; 46 Atl. 247; Chase v. Ainsworth, — Mich. —; 97 N. W. 404.

² Wikle v. Johnson Laboratories, 132 Ala. 268; 31 So. 715.

³ Lippert v. Milling Co., 108 Wis. 512; 84 N. W. 831.

⁴ Fawkner v. Wall Paper Co., 88 Ia. 169; 45 Am. St. Rep. 230; 55 N. W. 200.

⁵ Davie v. Mining Co., 93 Mich. 491; 24 L. R. A. 357; 53 N. W. 625. (Oral evidence is inadmissible to show that this means "as long as we can make company wages.")

⁶ Burton v. Oil Co., 204 Pa. St. 349; 54 Atl. 266.

⁷ Stewart v. Cook, 118 Ga. 541; 45 S. E. 398.

⁸ Ryan v. Dubuque, 112 Ia. 284; 83 N. W. 1073.

⁹ Bank of New Zealand v. Simpson (1900), App. Cas. 182; Kelly v. Fejervary, 111 Ia. 693; 83 N. W. 791; Streeter v. Seigman (N. J. Eq.), 48 Atl. 907; Phetteplace v. Ins. Co., 23 R. I. 26; 49 Atl. 33; Andrews v. Robertson, 111 Wis. 334; 87 Am. St. Rep. 870; 54 L. R. A. 673; 87 N. W. 190.

promissory note.¹⁰ So the meaning which the parties give to "outstanding accounts" may be shown.¹¹ So if the term "perch" is shown to have two meanings when used as a measure of stone, the direct intention of the parties may be considered in ascertaining which meaning of the term was intended.¹² So under a contract providing for "wholesale factory prices" it was held proper to show that the parties intended a scale differing from actual wholesale prices.¹³ It will be seen that some of the cases cited under the second branch of the rule are really contrary to those cited under the first branch. The cases under the second branch are some of them cases where, in spite of the general rule,¹⁴ the courts have really given reformation in an action at law under cover of construction.

§1112. Contract construed as a whole.

Since the object of construction is to ascertain the intention of the parties, the contract must be considered as an entirety. The problem is not what the separate parts of the contract mean, but what the contract means when considered as a whole.¹

¹⁰ *Andrews v. Robertson*, 111 Wis. 334; 87 Am. St. Rep. 870; 54 L. R. A. 673; 87 N. W. 190.

¹¹ *McCutsky v. Klosterman*, 20 Or. 108; 10 L. R. A. 785; 25 Pac. 366. (To show that it meant accounts outstanding after charging the bad accounts to profit and loss.)

¹² *Quarry Co. v. Clements*, 38 O. S. 587; 43 Am. Rep. 442. (In this case evidence was admitted to show that the parties had agreed that stone should be furnished at eighteen cents per cubic foot, and that the scrivener who drew the contract of his own motion, stated this rate by the perch and assumed that twenty-five cubic feet made a perch. Accordingly he stated the rate at four dollars and fifty cents a perch. The evidence showed that in cellar walls and foundations by the local usage

the term "perch" meant sixteen and a half feet; in railroad masonry it meant twenty-five feet; and in bridge masonry, which was the subject of the contract, the term was ambiguous.)

¹³ *Barrett v. Allen*, 10 Ohio 426.

¹⁴ See § 1131.

¹ *O'Brien v. Miller*, 168 U. S. 287; *Brush, etc., Co. v. Montgomery*, 114 Ala. 433; 21 So. 960; *Siegel, etc., Co. v. Colby*, 176 Ill. 210; 52 N. E. 917; affirming, 61 Ill. App. 315; *St. Landry State Bank v. Meyer*, 52 La. Ann. 1769; 28 So. 136; *Tete v. Lan- aux*, 45 La. Ann. 1343; 14 So. 241; *Jackson v. Phillips*, 57 Neb. 189; 77 N. W. 683; *Ballou v. Sherwood*, 32 Neb. 666; 49 N. W. 790; 50 N. W. 1131; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R.

A contract must be thus construed even if the separate parts are clear and free from ambiguity.² Thus the name given by the parties to the contract is not conclusive, and if, considering it as a whole, it is evidently an instrument of a sort different from that which the parties have called it, it must be treated as what it is and not what it is called.³ Thus an instrument called a "special selling factor appointment" may be construed as a contract of sale,⁴ or an instrument called a lease may be construed as a conditional sale, the title being reserved for security.⁵ So money paid by an insurer to an insured equal in amount to the loss under the policy may be construed as payment; though it was called a "loan" by the contract under which it was paid, which provided that so much thereof as might be recovered from the carrier, whose liability for the loss was then under investigation should be repaid by the insured to the insurer.⁶ So the fact that the language used in the instrument under consideration is in part appropriate and peculiar to a certain kind of instrument is not of itself conclusive that the instrument is of that kind.⁷

A. 456; 26 Atl. 140; *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316; *Sattler v. Hallock*, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667; *German Fire Ins. Co. v. Roost*, 55 O. S. 581; 60 Am. St. Rep. 711; 36 L. R. A. 236; 45 N. E. 1097; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; 60 Am. St. Rep. 854; 36 L. R. A. 285; 39 S. W. 3; *McKay v. Barnett*, 21 Utah 239; 50 L. R. A. 371; 60 Pac. 1100; *Kentzler v. Accident Association*, 88 Wis. 589; 43 Am. St. Rep. 934; 60 N. W. 1002.

² *O'Brien v. Miller*, 168 U. S. 287.

³ *Herryford v. Davis*, 102 U. S. 235, 244; *Hervey v. Locomotive Works*, 93 U. S. 664; *Stockton Savings Society v. Purvis*, 112 Cal. 236; 53 Am. St. Rep. 210; 44 Pac. 561;

Dederick v. Wolfe, 68 Miss. 500; 24 Am. St. Rep. 283; 9 So. 350; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; 60 Am. St. Rep. 854; 36 L. R. A. 285; 39 S. W. 3; *Cowan v. Mfg. Co.*, 92 Tenn. 376; 21 S. W. 663; *Singer Mfg. Co. v. Cole*, 4 Lea (Tenn.) 439; 40 Am. Rep. 20.

⁴ *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; 60 Am. St. Rep. 854; 36 L. R. A. 285; 39 S. W. 3.

⁵ *Fidelity, etc., Co. v. R. R.*, 86 Va. 1; 19 Am. St. Rep. 858; 9 S. E. 759.

⁶ *Lancaster Mills v. Cotton Press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; 14 S. W. 317.

⁷ *Burlington University v. Barrett*, 22 Ia. 60; 92 Am. Dec. 376; *Lauck v. Logan*, 45 W. Va. 251; 31 S. E. 986.

§1113. General paramount intent controls special intent.

The contract being construed as a whole, it follows that one part of it may affect the construction of a different part.¹ An illustration of this is found where the contract as a whole shows a given intention, but certain words or phrases if taken literally will defeat such intention. In such case the particular words or phrases will, if possible, be construed in such a way as to be consistent with the general intention.²

§1114. Every part of contract given effect if practicable.

The parties have inserted each provision in the contract, and accordingly, if possible, a contract should be so construed as to give effect to each provision inserted therein.¹ Thus a clause in a building contract providing that no lien should be taken thereunder is not repugnant to a subsequent provision requiring the contractor to show by sufficient evidence that the premises

¹ *Pensacola Gas Co. v. Lotze*, 23 Fla. 368; 2 So. 609; *Lindley v. Groff*, 37 Minn. 338; 34 N. W. 26; *Ballou v. Sherwood*, 32 Neb. 666; 49 N. W. 790; 50 N. W. 1131; *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St. Rep. 668; 2 L. R. A. 544; 16 Atl. 316.

² *Erickson v. United States*, 107 Fed. 204; *Speed v. Ry.*, 86 Fed. 235; 30 C. C. A. 1; *Rockefeller v. Merritt*, 76 Fed. 909; 35 L. R. A. 633; 22 C. C. A. 608; *Stockton Savings Society v. Purvis*, 112 Cal. 236; 53 Am. St. Rep. 210; 41 Pac. 561; *Whalen v. Stephens*, 193 Ill. 121; 61 N. E. 921; affirming, 92 Ill. App. 235; *Seaver v. Thompson*, 189 Ill. 158; 59 N. E. 553; *Kennedy v. Kennedy*, 150 Ind. 636; 50 N. E. 756; *City of Garden City v. Heller*, 61 Kan. 767; 60 Pac. 1060; *Sprague Electric Co. v. Hennepin County*, 83 Minn. 262; 86 N. W. 332; *Chism v. Schipper*, 51 N. J. L. 1; 14 Am. St.

Rep. 668; 2 L. R. A. 544; 16 Atl. 316; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221; 60 Am. St. Rep. 854; 36 L. R. A. 285; 39 S. W. 3; *Collins v. Lavelle*, 44 Vt. 230.

¹ *First National Bank v. Ry.*, 36 Fla. 183; 18 So. 345; *Snoqualmi Realty Co. v. Moynihan*, — Mo. —; 78 S. W. 1014; *Ricketts v. Buckstaff*, 64 Neb. 851; 90 N. W. 915; *McGavock v. Bank*, 64 Neb. 440; 90 N. W. 230; *Lawton v. Fonner*, 59 Neb. 214; 80 N. W. 808; *Chrisman v. Ins. Co.*, 16 Or. 283; 18 Pac. 466; *German Fire Ins. Co. v. Roost*, 55 O. S. 581; 60 Am. St. Rep. 711; 36 L. R. A. 236; 45 N. E. 1097; *Commonwealth, etc., Co. v. Ellis*, 192 Pa. St. 321; 73 Am. St. Rep. 816; 43 Atl. 1034; *Philadelphia v. River Front R. Co.*, 133 Pa. St. 134; 19 Atl. 356; *Smith v. Smith*, 33 S. C. 210; 11 S. E. 761; *McKay v. Barnett*, 21 Utah 239; 50 L. R. A. 371; 60 Pac. 1100.

are free of liens.² Whether in this sense a printed heading is a part of the contract written thereunder is a question on which there seems to be some conflict. It has been held that a printed heading on an order blank may be looked to to show that the order was taken as a publisher and not as an engraver;³ while a notice on a letter head that all orders were subject to delays arising from strikes was held not a part of a contract written thereunder,⁴ and terms printed at the head of a bill cannot be considered as a waiver of express provisions of the written contract for the sale of such goods, which contract is contained in a letter mailed on the same day as that on which the goods are shipped.⁵ The rule that every part of the contract must be given effect applies to a contract that is partly written and partly oral.⁶

§1115. Incorporation of writing by reference.

Since a contract must be construed as a whole, effect must be given to writings incorporated in the contract by reference.¹ Thus the agent of an insurance company agreed to issue a standard policy. Such policy was not issued. In an action by the insured after loss for damages caused by breach of such contract it was held that the standard form of policy was a part of such contract, and hence the insured was bound to show that the same proof of loss had been made as if the policy had issued.² However, a contract to give a mortgage "in your usual form" does not give the right to insert "unusual terms and conditions" different from those used before.³ It is not neces-

² Commonwealth, etc., Co. v. Ellis, 192 Pa. St. 321; 73 Am. St. Rep. 816; 43 Atl. 1034.

³ Yorston v. Brown, 178 Mass. 103; 59 N. E. 654.

⁴ Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899.

⁵ Millhiser v. Erdmann, 103 N. C. 27; 9 S. E. 582; see § 600.

⁶ Wood v. Perkins, 57 Fed. 258.

¹ Piedmont, etc., Co. v. Motor Co.

(Ala.), 12 So. 768; Chicago, etc., Bank v. Trust Co., 190 Ill. 404; 83 Am. St. Rep. 138; 60 N. E. 586; affirming, 92 Ill. App. 366; Hicks v. Assurance Co., 162 N. Y. 284; 48 L. R. A. 424; 56 N. E. 743.

² Hicks v. Assurance Co., 162 N. Y. 284; 48 L. R. A. 424; 56 N. E. 743.

³ Peabody v. Dewey, 153 Ill. 657; 27 L. R. A. 322; 39 N. E. 977 (such as a provision for payment in gold).

sary that the writing thus incorporated should be signed.⁴ Thus a reference to specifications may incorporate them.⁵ So in a contract to paint certain houses "according to the annexed specifications" a letter showing the kind of paint, the quality, and the manner of its application may be "specifications."⁶ However, a reference to plans incorporates them only as plans, and does not incorporate a provision inserted by the city engineer forbidding assignment of the contract and providing for deduction for delay.⁷ So a reference to an unsigned bill of sale,⁸ or to a blank unsigned warranty on the back of the contract,⁹ or a provision that the contract is to be performed according to the city ordinances,¹⁰ in each case incorporates such unsigned instrument into the contract. So an ambiguous reference in a later contract to an earlier one may be explained by the contents of such earlier one.¹¹ In accordance with the doctrine of offer and acceptance¹² such writing can be considered a part of the contract only if communicated to the adversary party.¹³

§1116. Different writings construed together.

To have two or more writings construed together it is not necessary that one of them should refer to the other in express terms. If two or more writings are executed at the same time, between the same parties and concerning the same subject-matter, they may be construed together as a part of the same

⁴ *White v. McLaren*, 151 Mass. 553; 24 N. E. 911; *Coe v. Tough*, 116 N. Y. 273; 22 N. E. 550.

⁵ *Lake View v. MacRitchie*, 134 Ill. 203; 25 N. E. 663; *White v. McLaren*, 151 Mass. 553; 24 N. E. 911; *Watson v. O'Neill*, 14 Mont. 197; 35 Pac. 1064.

⁶ *McGeragle v. Broemel*, 53 N. J. L. 59; 20 Atl. 857.

⁷ *Young v. Borzone*, 26 Wash. 4, 23; 66 Pac. 135, 121.

⁸ *Coe v. Tough*, 116 N. Y. 273; 22 N. E. 550.

⁹ *Grieb v. Cole*, 60 Mich. 397; 1 Am. St. Rep. 533; 27 N. W. 579.

¹⁰ *Philadelphia v. Jewell*, 135 Pa. St. 329; 19 Atl. 947; 20 Atl. 281. (Hence it incorporates an ordinance requiring the work to be finished in two years.)

¹¹ *Mjones v. Bank*, 45 Minn. 335; 47 N. W. 1072.

¹² See § 30 *et seq.*

¹³ *Tichnor v. Hart*, 52 Minn. 407; 54 N. W. 369.

contract,¹ at least in the absence of evidence to the contrary.² Thus a note and the contract under which it was made,³ especially if the note refers to the contract,⁴ a deed, mortgage and note,⁵ a building and loan association note, mortgage and contract,⁶ a deed and a chattel mortgage,⁷ a contract and a chattel mortgage,⁸ a land contract and a bond,⁹ a deed and a lease,¹⁰ a lease and a contract,¹¹ a will, deed, and contract,¹² and a deed and an acknowledgment of trust by the grantee¹³ may in each

¹ *Joy v. St. Louis*, 138 U. S. 1; *Prichard v. Miller*, 86 Ala. 500; 5 So. 784; *Meyer v. Weber*, 133 Cal. 681; 65 Pac. 1110; *Flinn v. Mowry*, 131 Cal. 481; 63 Pac. 724; modified, 63 Pac. 1006; *Weston v. Estey*, 22 Colo. 334; 45 Pac. 367; *Howard v. Ry.*, 24 Fla. 560; 5 So. 356; *Chicago, etc., Bank v. Trust Co.*, 190 Ill. 404; 83 Am. St. Rep. 138; 60 N. E. 586; affirming, 92 Ill. App. 366; *Hunter v. Clarke*, 184 Ill. 158; 75 Am. St. Rep. 160; 56 N. E. 297; affirming, 83 Ill. App. 100; *Wichita University v. Schweiter*, 50 Kan. 672; 32 Pac. 352; *Phelps-Bigelow Windmill Co. v. Piercy*, 41 Kan. 763; 21 Pac. 793; *Shuttleworth v. Development Co. (Ky.)*, 60 S. W. 534; *Smith v. Theobald*, 86 Ky. 141; 5 S. W. 394; *Washburn, etc., Mfg. Co. v. Salisbury*, 152 Mass. 346; 25 N. E. 724; *Makepeace v. College*, 10 Pick. (Mass.) 298; *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; 36 N. W. 218; *Sutton v. Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344; 36 N. W. 79; *Eberts v. Selover*, 44 Mich. 519; 38 Am. Rep. 278; 7 N. W. 225; *Jennings v. Todd*, 118 Mo. 296; 40 Am. St. Rep. 373; 24 S. W. 148; *Gwin v. Waggoner*, 98 Mo. 315; 11 S. W. 227; *Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653; 44 N. E. 966; *Mott v. Richtmeyer*, 57 N. Y. 49; *Hills v. Miller*, 3 Paige (N. Y.) 254; 24 Am. Dec. 218; *Bradtfeldt v. Cooke*, 27 Or.

194; 50 Am. St. Rep. 701; 40 Pac. 1; *Dallas National Bank v. Davis*, 78 Tex. 362; 14 S. W. 706; *Rhoades v. R. R.*, 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170; 39 S. E. 209; *Hannig v. Mueller*, 82 Wis. 235; 52 N. W. 98.

² *Weber v. Rothchild*, 15 Or. 385; 3 Am. St. Rep. 162; 15 Pac. 650.

³ *Beach's Appeal*, 58 Conn. 464; 20 Atl. 475; *Seieroe v. Bank*, 50 Neb. 612; 70 N. W. 220.

⁴ *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419; 49 Pac. 524.

⁵ *Bradtfeldt v. Cooke*, 27 Or. 194; 50 Am. St. Rep. 701; 40 Pac. 1.

⁶ *Interstate, etc., Association v. Knapp*, 20 Wash. 225; 55 Pac. 48; rehearing denied, 20 Wash. 230; 55 Pac. 931.

⁷ *Stapleton v. Brannon*, 102 Wis. 26; 78 N. W. 181.

⁸ *Edling v. Bradford*, 30 Neb. 593; 46 N. W. 836.

⁹ *Coughran v. Bigelow*, 9 Utah 260; 34 Pac. 51.

¹⁰ *St. Paul, etc., Ry. v. Depot Co.*, 44 Minn. 325; 46 N. W. 566.

¹¹ *Clark v. Needham*, 125 Mich. 84; 84 Am. St. Rep. 559; 51 L. R. A. 785; 83 N. W. 1027. (To show that the lease was intended to create a monopoly. See § 434.)

¹² *Copeland v. Summers*, 138 Ind. 219; 35 N. E. 514; rehearing denied, 138 Ind. 226; 37 N. E. 971.

¹³ *Chute v. Washburn*, 44 Minn. 312; 46 N. W. 555.

case be construed together. So a term inserted in one letter need not be repeated in subsequent letters on the same subject, not inconsistent with such term in order to preserve its force.¹⁴ While a note may be construed in connection with a contemporaneous contract, such construction cannot be invoked to modify its legal effect if it is in the hands of a *bona fide* holder for value.¹⁵ If the two contracts are not executed at the same time but refer to the same subject-matter and on their face show that they were executed each as a means of carrying out the same intent as the other, they may be construed together.¹⁶ Thus a note and the contract, executed a few days before the note, in consideration of which it was executed,¹⁷ a transfer of stock and the contract under which it was transferred,¹⁸ and a trust deed and a deed thereunder¹⁹ are to be construed together. Even if two writings are executed on different dates and between different parties, they may from their subject-matter be so connected that even without express reference the later contract is to be so construed as to be read in connection with the earlier.²⁰ Thus the contract of a sub-contractor with the chief contractor must be construed with that between the chief contractor and the owner,²¹ a contract of sale and an authority to sell must be construed together,²² and a prospectus and a land contract must be construed together.²³ If two contracts between the same parties dealing with the same subject-

Georgia, etc., Co. v. Smith, 83 Ga. 626; 10 S. E. 235.

¹⁵ Jennings v. Todd, 118 Mo. 296; 40 Am. St. Rep. 373; 21 S. W. 148.

¹⁶ Drennen v. Satterfield, 119 Ala. 84; 24 So. 723; Melone v. Ruffino, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93; Chicago, etc., Bank v. Trust Co., 190 Ill. 404; 83 Am. St. Rep. 138; 60 N. E. 586; affirming, 92 Ill. App. 366; Delogny v. Mercer, 43 La. Ann. 205; 8 So. 903; Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624; Mt. Morris v. Thomas, 158 N. Y. 450; 53 N. E. 214.

¹⁷ Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624.

¹⁸ Mt. Morris v. Thomas, 158 N. Y. 450; 53 N. E. 214.

¹⁹ Leach v. Rains, 149 Ind. 152; 48 N. E. 858.

²⁰ Drennen v. Satterfield, 119 Ala. 84; 24 So. 723; Melone v. Ruffino, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93; Delogny v. Mercer, 43 La. Ann. 205; 8 So. 903; Shaw v. Church, 44 Minn. 22; 46 N. W. 146.

²¹ Shaw v. Church, 44 Minn. 22; 46 N. W. 146.

²² Melone v. Ruffino, 129 Cal. 514; 79 Am. St. Rep. 127; 62 Pac. 93.

²³ Delogny v. Mercer, 43 La. Ann. 205; 8 So. 903.

matter are executed on different dates and cannot be construed together, the latter of course abrogates the earlier.²⁴ On the other hand, if the two instruments are not connected in intention, especially where they are executed on different dates, as two deeds executed a week apart,²⁵ or if they deal with different subject-matters, even if executed on the same date, as independent contracts for the sale of different lots,²⁶ they cannot be construed together.

§1117. Law part of contract.

The law in force when a contract is made is a part of such contract as fully as if its provisions had been incorporated into such contract.¹ Thus a contract between heirs with reference to property descending to them is governed by the law of descent as then interpreted by the court, and a subsequent change of judicial decision will not change the legal effect of such contract.² An unconstitutional statute does not become a part of a contract made after such statute is passed and before it is declared unconstitutional, where the contract does not expressly incorporate the provisions of such statute.³ Even if the provisions of the unconstitutional statute are carried into the contract in compliance with the peremptory requirements of such statute, they do not thereby in legal effect become a part of such contract.⁴ "It is not in the power of the legislature to

²⁴ *Heine Safety-Boiler Co. v. Francis Brothers*, 105 Fed. 413.

²⁵ *Nye v. Lovitt*, 92 Va. 710; 24 S. E. 345.

²⁶ *Clark v. Neumann*, 56 Neb. 374; 76 N. W. 892.

¹ *Bank v. Eaton*, 95 Fed. 355; *Ede v. Knight*, 93 Cal. 159; 28 Pac. 860; *Kendall v. Fader*, 199 Ill. 294; 65 N. E. 318; affirming, 99 Ill. App. 104; *Andrews, etc., Co. v. Atwood*, 167 Ill. 249; 47 N. E. 387; affirming, 67 Ill. App. 303; *Barrett v. Boddie*, 158 Ill. 479; 49 Am. St. Rep. 172; 42 N. E. 143; 43 N. E.

367; *Haskett v. Maxey*, 134 Ind. 182; 19 L. R. A. 379; 33 N. E. 358; *Graves County Water Co. v. Ligon*, 112 Ky. 775; 66 S. W. 725; *Phinney v. Phinney*, 81 Me. 450; 10 Am. St. Rep. 266; 4 L. R. A. 348; 17 Atl. 405; *Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21; 65 N. W. 863.

² *Haskett v. Maxey*, 134 Ind. 182; 19 L. R. A. 379; 33 N. E. 358.

³ *Palmer v. Tingle*, 55 O. S. 423; 45 N. E. 313.

⁴ *People v. Coler*, 166 N. Y. 1; 82 Am. St. Rep. 605; 59 N. E. 716;

protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates.”⁵

§1118. Covenant implied from writing equivalent to written promise.

Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein.¹ Thus a provision requiring notice may be equivalent to a covenant to give notice.² So the “assumption” of debts includes a promise to pay them,³ and a provision that “bills bear interest after maturity” includes a contract to pay interest.⁴ This principle is often invoked where questions of mutuality are concerned. If the consideration relied upon for one executory promise is another, such other must itself be binding to constitute a legal obligation and a valuable consideration. Although the promise relied upon as a consideration may not be expressly stated in any clause of the contract, still if it appears from the entire contract that such promise is intended, it will be as binding and as much a valuable consideration as though it were expressly stated.⁵ Thus a promise to pay for realty agreed to be conveyed,⁶ or to permit the use of certain realty in consideration of the lease of other realty⁷ may be implied

Cleveland v. Construction Co., 67 O. S. 197; 93 Am. St. Rep. 670; 59 L. R. A. 775; 65 N. E. 885.

⁵ People v. Coler, 166 N. Y. 1, 9; 82 Am. St. Rep. 605; 59 N. E. 716; quoted in Cleveland v. Construction Co., 67 O. S. 197; 93 Am. St. Rep. 670; 59 L. R. A. 775; 65 N. E. 885.

¹ Lawler v. Murphy, 58 Conn. 294; 8 L. R. A. 113; 20 Atl. 457; Grimley v. Davidson, 133 Ill. 116; 24 N. E. 439; Nicoll v. Sands, 131 N. Y. 19; 29 N. E. 818; Jugla v. Trouttet, 120 N. Y. 21; 23 N. E. 1066; New England, etc., Co. v. R. R. Co., 91 N. Y. 153.

² Wells v. Alexandre, 130 N. Y. 642; 15 L. R. A. 218; 29 N. E. 142.

³ Lenz v. Ry., 111 Wis. 198; 86 N. W. 607.

⁴ Braun v. Hess, 187 Ill. 283; 79 Am. St. Rep. 221; 58 N. E. 371.

⁵ Lawler v. Murphy, 58 Conn. 294; 8 L. R. A. 113; 20 Atl. 457; Haines v. Dearborn, 199 Pa. St. 474; 49 Atl. 319.

⁶ Haines v. Dearborn, 199 Pa. St. 474; 49 Atl. 319.

⁷ Stubblefield v. Imbler, 33 Or. 446; 54 Pac. 198.

from the entire contract. So a clause "machines to be returned by B to A at the termination of the contract on her repayment of their original cost" binds A to accept such machines and to repay their original cost.⁸

§1119. Written and printed provisions.

If the contract is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly if the written provisions cannot be reconciled with the printed the written provisions control.¹ The written parts are "the immediate language and terms selected by the parties themselves for the expression of their meaning,"² and accordingly must control in case of conflict. Thus where in a land contract the written and printed portions are at variance as to the character of deed to be given the written controls.³

The same principle applies where a contract has been filled in in writing upon the blanks in a type-written form.⁴ The written part will, however, prevail only in so far as the inten-

⁸ Norfolk, etc., Co. v. Arnold, 64 N. J. 254; 45 Atl. 608; reversing, 44 Atl. 192.

¹ Alsager v. Dock Co., 14 M. & W. 794; Robertson v. French, 4 East 130; Hagan v. Ins. Co., 186 U. S. 423; Thornton v. R. R., 84 Ala. 109; 5 Am. St. Rep. 337; 4 So. 197; Chicago v. Weir, 165 Ill. 582; 46 N. E. 725; affirming, 67 Ill. App. 247; Summers v. Hibbard, 153 Ill. 102; 46 Am. St. Rep. 872; 38 N. E. 899; Holmes v. Parker, 125 Ill. 478; 17 N. E. 759; affirming, 25 Ill. App. 225; People v. Dulaney, 96 Ill. 503; Adams Express Co. v. Pinckney, 29 Ill. 392; Mansfield Machine Works v. Lowell, 62 Mich. 546; 29 N. W. 105; Murray v. Pillsbury, 59 Minn. 85; 60 N. W. 844; Frost's, etc., Co. v. Ins. Co., 37 Minn. 300; 5 Am. St.

Rep. 846; 34 N. W. 35; Davis v. Creamery Co., 48 Neb. 471; 67 N. W. 436; Union Pacific Ry. v. Graddy, 25 Neb. 849; 41 N. W. 809; Eager v. Mathewson, — Nev. —; 74 Pac. 404; Commonwealth, etc., Co. v. Ellis, 192 Pa. St. 321; 73 Am. St. Rep. 816; 43 Atl. 1034; Dick v. Ireland, 130 Pa. St. 299; 18 Atl. 735; Duffield v. Hue, 129 Pa. St. 94; 18 Atl. 566; Gilbert v. Stockman, 76 Wis. 62; 20 Am. St. Rep. 23; 44 N. W. 845.

² Summers v. Hibbard, 153 Ill. 102, 109; 46 Am. St. Rep. 872; 38 N. E. 899.

³ Gilbert v. Stockman, 76 Wis. 62; 20 Am. St. Rep. 23; 44 N. W. 845.

⁴ Sprague Electric Co. v. Hennepin County, 83 Minn. 262; 86 N. W. 332.

tion of the parties to modify the printed portion by the written can fairly be inferred,⁵ and the two provisions will be construed together if possible.⁶

§1120. Contract to be upheld by construction if possible.

As between two constructions, each reasonable, one of which will make the contract enforceable, and the other of which will make it unenforceable, that construction which makes the contract enforceable will be preferred.¹ Thus if a contract is fairly open to two constructions, one of which will accomplish the intention of the parties and the other of which will defeat such intention² or will make the contract meaningless,³ the former construction is to be preferred. So if one construction will make a contract legal and another will make it illegal the former is to be preferred.⁴ So a construction which will accord with public policy is to be preferred to one contrary thereto.⁵ If the interest of the public is affected by a contract, it should be construed so as to protect such interest.⁶

§1121. Contract construed to be fair and reasonable.

As between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which

⁵ Frost, etc., Co. v. Ins. Co., 37 Minn. 300; 5 Am. St. Rep. 846; 34 N. W. 35.

⁶ Hardie, etc., Co. v. Oil Mill, — Miss. —; 36 So. 262.

¹ Shreffler v. Nadelhoffer, 133 Ill. 536; 23 Am. St. Rep. 626; 25 N. E. 630; New Memphis Gaslight Co. Cases, 105 Tenn. 268; 80 Am. St. Rep. 880; 60 S. W. 206; Morley v. Power, 10 Lea (Tenn.) 219.

² Cravens v. Cotton Mills, 120 Ind. 6; 16 Am. St. Rep. 298; 21 N. E. 981; Powers v. Clarke, 127 N. Y. 417; 28 N. E. 402; New Memphis Gaslight Co. Cases, 105 Tenn. 268; 80 Am. St. Rep. 880; 60 S. W. 206; Frierson v. Blanton, 1 Baxt. (Tenn.)

272; Atlanta Guano Co. v. Phipps (Tenn. Ch. App.), 41 S. W. 1087.

³ Shreffler v. Nadelhoffer, 133 Ill. 536; 23 Am. St. Rep. 626; 25 N. E. 630.

⁴ South Carolina, etc., Ry. v. Ry., 93 Fed. 543; 35 C. C. A. 423; Wyatt v. Irrigation Co., 18 Colo. 298; 36 Am. St. Rep. 280; 33 Pac. 144; Al-free v. Gates, 82 Ia. 19; 47 N. W. 993; Pitney v. Bolton, 45 N. J. Eq. 639; 18 Atl. 211; North Pacific Lumber Co. v. Spore, — Or. —; 75 Pac. 890.

⁵ Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990.

⁶ Joy v. St. Louis, 138 U. S. 1.

makes it unfair and unreasonable, the former should always be preferred.¹ Thus a contract by a principal to furnish his agent samples and advertising matter means a reasonable amount, and not whatever the agent may demand.² So a contract to furnish machinery to be set up in "good working order" means not at the very moment of completing the work, but after giving the vendee a reasonable opportunity for testing it.³ A contract by A to construct a heater to B's satisfaction means, if B dies before the heater is finished, to the satisfaction of B's executor and devisee, and not to B's satisfaction.⁴ Where A agreed to pay B for certain advertising by deducting the amount of such bill from the price of any launch that B might buy of A, it was held that such launch was to be sold on "exactly the same terms as it offered other customers."⁵ So under a contract for the sale of sugar "for shipment within thirty days by sail or steam at seller's option," "shipment" means placing the sugar within such time on board of a vessel which is honestly endeavoring to secure a full cargo, and which is bound for the proper port, and does not mean that such vessel must clear within such time.⁶ So contracts in restraint of trade will be construed to impose reasonable limitations as to time⁷

¹ *Ingersoll v. Coram*, 127 Fed. 418; *McElroy v. Swope*, 47 Fed. 380; *Wyatt v. Irrigation Co.*, 18 Colo. 298; 36 Am. St. Rep. 280; 33 Pac. 144; *Bartlett v. Wheeler*, 195 Ill. 445; 63 N. E. 169; affirming, 96 Ill. App. 342; *Dederick v. Wolfe*, 68 Miss. 500; 24 Am. St. Rep. 283; 9 So. 350; *Lovelace v. Travelers', etc., Association*, 126 Mo. 104; 47 Am. St. Rep. 638; 30 L. R. A. 209; 28 S. W. 877; *Gillett v. Bank*, 160 N. Y. 549; 55 N. E. 292; *Wright v. Reusens*, 133 N. Y. 298, 305; 31 N. E. 215; *Travelers' Ins. Co. v. Myers*, 62 O. S. 529; 49 L. R. A. 760; 57 N. E. 458; *Kentzler v. Accident Association*, 88 Wis. 589; 43 Am. St. Rep. 934; 60 N. W. 1002.

² *Jensen v. Perry*, 126 Pa. St. 495;

12 Am. St. Rep. 888; 17 Atl. 665.

³ *Edison, etc., Co. v. Navigation Co.*, 8 Wash. 370; 40 Am. St. Rep. 910; 24 L. R. A. 315; 36 Pac. 260.

⁴ *Adams Radiator Co. v. Schnader*, 155 Pa. St. 394; 35 Am. St. Rep. 893; 26 Atl. 745.

⁵ *Hand v. Power Co.*, 167 N. Y. 142; 60 N. E. 425.

⁶ *Ledon v. Havermeier*, 121 N. Y. 179; 8 L. R. A. 245; 24 N. E. 297.

⁷ *Saddlery Hardware Mfg. Co. v. Hillsborough Mills*, 68 N. H. 216; 73 Am. St. Rep. 569; 44 Atl. 300. (Here a contract by a vendor of goods not to sell like goods to anyone else in that locality was construed to mean until vendee had a reasonable opportunity to resell such goods.)

or place,⁸ if it does not appear to be the intention of the parties to impose an unreasonable limitation. So a contract not to sell certain realty for less than a certain price will be construed to restrict it for a reasonable time only.⁹

§1122. The rule contra proferentem.

If terms of a contract appear on their face to be inserted for the benefit of one of the parties, he will be considered as having inserted such terms and as having chosen the language thereof. Any ambiguity in such language is therefore to be construed more strongly against the party making use of such language.¹ This rule is summarized in the maxim "*Fortius contra proferentem*." Thus a contract of sale has been construed more strictly against the vendor;² a contract to repair more strictly against the builder who drew it;³ restrictions on a carrier's Common Law liability more strictly against the carrier;⁴ conditions in an insurance policy more strictly against the insurer.⁵ This rule, if rightly applied, has especial force with reference to such contracts as are not favored by the law.

⁸ Dethlefs v. Tamsen, 7 Daly (N. Y.) 354.

⁹ Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990.

¹ Davis, etc., Co. v. Jones, 66 Fed. 124; Supreme Council, etc., v. Casualty Co., 63 Fed. 48; 11 C. C. A. 96; Simpson v. United States, 31 Ct. Cl. 217; Chambers v. United States, 24 Ct. Cl. 387; Wyatt v. Irrigation Co., 18 Colo. 298; 36 Am. St. Rep. 280; 33 Pac. 144; Hill v. Mfg. Co., 79 Ga. 105; 3 S. E. 445; Mueller v. University, 195 Ill. 236; 88 Am. St. Rep. 194; 63 N. E. 110; affirming, 95 Ill. App. 258; Rogers v. Ins. Co., 121 Ind. 570; 23 N. E. 498; Bowser v. Patrick (Ky.), 65 S. W. 824; St. Landry State Bank v. Meyers, 52 La. Ann. 1769; 28 So. 136; Gillett v. Bank, 160 N. Y. 549; 55 N. E. 292; Rickerson v. Ins. Co.,

149 N. Y. 307, 313; 43 N. E. 856; Paul v. Ins. Co., 112 N. Y. 472; 8 Am. St. Rep. 758; 3 L. R. A. 443; 20 N. E. 347; Kendrick v. Ins. Co., 124 N. C. 315; 70 Am. St. Rep. 592; 32 S. E. 728; Webster v. Ins. Co., 53 O. S. 558; 53 Am. St. Rep. 658; 30 L. R. A. 719; 42 N. E. 546; D. M. Osborne & Co. v. Stringham, 4 S. D. 593; 57 N. W. 776.

² Delogny v. Mercer, 43 La. Ann. 205; 8 So. 903.

³ Laidlaw v. Marye, 133 Cal. 170; 65 Pac. 391.

⁴ Texas, etc., Ry. v. Reiss, 183 U. S. 621; Hinkle v. Ry., 126 N. C. 932; 78 Am. St. Rep. 685; 36 S. E. 348; Amory Mfg. Co. v. Ry., 89 Tex. 419; 59 Am. St. Rep. 65; 37 S. W. 856.

⁵ London Assurance Co. v. Companhia de Moagens, 167 U. S. 149; First National Bank v. Ins. Co., 95

Thus covenants for forfeitures,⁶ such as covenants inserted in insurance policies,⁷ are construed strictly against the party for whose benefit they are exacted. Thus under an insurance policy containing a provision that the policy should be incontestable after three years, and another provision avoiding the policy "if the insured die in consequence of his own criminal action," the latter clause was held not to apply after the expiration of three years.⁸ To have this rule apply, the contract must, on its face, show which party makes use of the language. Oral evidence is inadmissible to show which party stipulated for certain terms.⁹ The rule *contra proferentem* is not one of the favored rules of construction. Indeed, it is said that it is to be resorted to only when the other rules fail.¹⁰

§1123. Surrounding circumstances.

The parties to a contract choose words to express their intention in view of all the surrounding circumstances. It is practically impossible to state these facts in the contract, and is rarely if ever attempted. The court which construes the contract must therefore either disregard all the material facts which led the parties to express their intention as they did, or else admit extrinsic evidence of the surrounding facts and circumstances. In this dilemma the courts have chosen the latter alternative. It is a recognized rule of construction that the court will place itself in the position of the parties who made

U. S. 673; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39; 74 Am. St. Rep. 161; 55 N. E. 139; *Paul v. Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758; 3 L. R. A. 443; 20 N. E. 347; *Webster v. Ins. Co.*, 53 O. S. 558; 53 Am. St. Rep. 658; 30 L. R. A. 719; 42 N. E. 546.

⁶ *Jacobs v. Spalding*, 71 Wis. 177; 36 N. W. 608.

⁷ *Thornton v. Ins. Co.*, 116 Ga. 121; 94 Am. St. Rep. 99; 42 S. E. 287; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39; 74 Am. St. Rep. 161; 55 N. E. 139; *Ætna Ins. Co. v.*

Deming, 123 Ind. 384; 24 N. E. 86, 375; *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; 51 L. R. A. 698; 83 N. W. 78; *Webster v. Ins. Co.*, 53 O. S. 558; 53 Am. St. Rep. 658; 30 L. R. A. 719; 42 N. E. 546; *McNamara v. Ins. Co.*, 1 S. D. 342; 47 N. W. 288.

⁸ *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408; 94 Am. St. Rep. 383; 56 S. W. 668.

⁹ *Hull, etc., Co. v. Coke Co.*, 113 Fed. 256; 51 C. C. A. 213.

¹⁰ *Patterson v. Gage*, 11 Colo. 50; 16 Pac. 560.

the contract as nearly as can be done, by admitting evidence of the surrounding facts and circumstances,¹ the nature of the subject-matter,² the relation of the parties to the contract,³ and the objects sought to be accomplished by the contract.⁴

¹ Chicago, etc., Ry. v. Ry., 143 U. S. 596; Reid v. Insurance Co., 95 U. S. 23; Nash v. Towne, 5 Wall. (U. S.) 689; Hull, etc., Co. v. Coke Co., 113 Fed. 256; 51 C. C. A. 213; Fox v. Tyler, 109 Fed. 258; 48 C. C. A. 356; Kauffman v. Raeder, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; Campbell v. Moran Bros. Co., 97 Fed. 477; 38 C. C. A. 293; Speed v. Ry., 86 Fed. 235; 30 C. C. A. 1; Mississippi River Logging Co. v. Robson, 69 Fed. 773; 16 C. C. A. 400; Crass v. Scruggs, 115 Ala. 258; 22 So. 81; Remy v. Olds (Cal.), 21 L. R. A. 645; 34 Pac. 216; Union Pacific Ry. v. Anderson, 11 Colo. 293; 18 Pac. 24; Illges v. Dexter, 77 Ga. 36; Burke, etc., Co. v. Wells, etc., Co., 7 Ida. 42; 60 Pac. 87; Givens v. Keeney, 7 Ida. 335; 63 Pac. 110; Illinois Terra Cotta Lumber Co. v. Owen, 167 Ill. 360; 47 N. E. 722; reversing, 64 Ill. App. 632; Street v. Storage Co., 157 Ill. 605; 41 N. E. 1108; Torrence v. Shedd, 156 Ill. 194; 41 N. E. 95; 42 N. E. 171; Dougherty v. Rogers, 119 Ind. 254; 3 L. R. A. 847; 20 N. E. 779; New York, etc., Ry. v. Ry., 116 Ind. 60; 18 N. E. 182; Ketcham v. Coal Co., 88 Ind. 515; Crane v. Williamson, 111 Ky. 271; 63 S. W. 610, 975; Watson v. Succession of Barber, 105 La. 456; 29 So. 949; Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990; Hoose v. Ins. Co., 84 Mich. 309; 11 L. R. A. 340; 47 N. W. 587; Mathews v. Phelps, 61 Mich. 327; 1 Am. St. Rep. 581; 28 N. W. 108; Nordyke & Marmon Co. v. Kehlror, 155 Mo. 643; 78 Am. St. Rep. 600;

56 S. W. 287; Rice v. McCague, 61 Neb. 861; 86 N. W. 486; Saddlery Hardware Mfg. Co. v. Hillsborough Mills, 68 N. H. 216; 73 Am. St. Rep. 569; 44 Atl. 300; Cohen v. Envelope Co., 166 N. Y. 292; 59 N. E. 906; Gillet v. Bank, 160 N. Y. 549; 55 N. E. 292; Sattler v. Hallock, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667; Berry Harvester Co. v. Machine Co., 152 N. Y. 540; 46 N. E. 952; Smith v. Kerr, 108 N. Y. 31; 2 Am. St. Rep. 362; 15 N. E. 70; Reynolds v. Ins. Co., 47 N. Y. 597; Mosier v. Parry, 60 O. S. 388; 54 N. E. 364; Sheldon's Estate, — Wis. —; 97 N. W. 524.

² Pensacola Gas Co. v. Lotze, 23 Fla. 368; 2 So. 609; Mathews v. Phelps, 61 Mich. 327; 1 Am. St. Rep. 581; 28 N. W. 108; Crocker v. Hill, 61 N. H. 345; 60 Am. Rep. 322.

³ Hall v. Bank, 133 Ill. 234; 24 N. E. 546; Holmes v. Parker, 125 Ill. 478; 17 N. E. 759; affirming, 25 Ill. App. 225; Holmes v. Bemis, 124 Ill. 453; 17 N. E. 42; affirming, 25 Ill. App. 232; H. G. Olds Wagon Works v. Combs, 124 Ind. 62; 24 N. E. 589; Darrah v. Gow, 77 Mich. 16; 43 N. W. 851; Morgan v. Ry., 57 Mich. 430; 25 N. W. 161; 26 N. W. 865; Farr v. Nichols, 132 N. Y. 327; 30 N. E. 834; Blood v. Elevator Co., 1 S. D. 71; 45 N. W. 200; Heatherly v. Bank, 31 W. Va. 70; 5 S. E. 754.

⁴ Kauffman v. Raeder, 108 Fed. 171; 54 L. R. A. 247; 47 C. C. A. 278; Rockefeller v. Merritt, 76 Fed. 969; 35 L. R. A. 633; 22 C. C. A. 608; Davis v. Robert, 89 Ala. 402;

Thus in contracts of guaranty,⁵ contracts between promoters of a corporation,⁶ and contracts of bailment⁷ the surrounding facts, the relations of the parties and the object of the contract may all be looked to. Even though the contract is in writing extrinsic evidence of the surrounding facts and circumstances is admissible to aid the court to determine the intention of the parties.⁸ Thus extrinsic evidence of the surrounding facts is admissible to show want of consideration,⁹ whether a contract is severable or not¹⁰ or the mode of performance.¹¹ Where one tenant in common agreed to sell realty to another, it was permitted to show that they were partners and that the balance due one of them from the firm was to be applied on the price of the land.¹² Thus in a contract to release dower in consideration of one fourth of the proceeds of the property extrinsic evidence is admissible to show that the proceeds are the rents, and that an expensive building was erected upon the property after this contract was made.¹³ So where a note was given for \$240, payable in case certain taxes were not rebated, "or such part of the above sum as may not be rebated," extrinsic evidence was admissible to show that

18 Am. St. Rep. 126; 8 So. 114; Construction Information Co. v. Cass, 74 Conn. 213; 50 Atl. 563; Cravens v. Cotton Mills, 120 Ind. 6; 16 Am. St. Rep. 298; 21 N. E. 981; Rackemann v. Improvement Co., 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990; Nordyke & Marmon Co. v. Kehlror, 155 Mo. 643; 78 Am. St. Rep. 600; 56 S. W. 287; Mosier v. Parry, 60 O. S. 388; 54 N. E. 364; Lancaster Mills v. Cotton-press Co., 89 Tenn. 1; 24 Am. St. Rep. 586; 14 S. W. 317.

⁵ Cambria Iron Co. v. Keynes, 56 O. S. 501; 47 N. E. 548.

⁶ Mosier v. Parry, 60 O. S. 388; 54 N. E. 364.

⁷ Lancaster Mills v. Cotton-press Co., 89 Tenn. 1; 24 Am. St. Rep. 586; 14 S. W. 317.

⁸ Western Union Telegraph Co. v. Telephone Co., 105 Fed. 684; Bank v. Brigham, 61 Kan. 727; 60 Pac. 754; reversing, 58 Pac. 1117; Alvord v. Cook, 174 Mass. 120; 54 N. E. 499; White v. Rice, 112 Mich. 403; 70 N. W. 1024; Douthett v. Gas Co., 202 Pa. St. 416; 51 Atl. 981; Uhl v. Ry., 51 W. Va. 106; 41 S. E. 340.

⁹ Spies v. Rosenstock, 87 Md. 14; 39 Atl. 268.

¹⁰ Morrison v. Baechtold, 93 Md. 319; 48 Atl. 926.

¹¹ Yorston v. Brown, 178 Mass. 103; 59 N. E. 654.

¹² Redfield v. Gleason, 61 Vt. 220; 15 Am. St. Rep. 889; 17 Atl. 1075.

¹³ Irwin v. Powell, 188 Ill. 107; 58 N. E. 941.

the taxes amounted to \$842, and that the note was not to be paid if \$240 or more of such taxes were rebated.¹⁴ So where a village made a contract to take the water it might "need or desire for any and all purposes," extrinsic evidence is admissible to show that when the contract was made the village had a partial supply of water.¹⁵ If the meaning of a written contract is clear, evidence of the surrounding facts is inadmissible to contradict its terms.¹⁶ Thus where in return for money put into his business by his wife a husband gives her a note, promising to pay her son \$800 after her death, evidence of his means and the amount expended by him for her in her last illness is inadmissible to show that he is not liable on the note.¹⁷

§1124. Grammatical accuracy and punctuation.

Grammatical accuracy is preferred and presumed. However, a construction fair, reasonable and consistent, but involving grammatical inaccuracy, will not yield to a construction more accurately grammatical, but less fair and reasonable.¹ On the same principle punctuation may be ignored in order to adopt the more reasonable of two constructions.² Thus of the words "lien operation and effect," lien is not supposed to be an adjective because no comma follows.³ Still if two constructions are equally probable,⁴ or other means of ascertaining which meaning was intended are lacking⁵ punctuation may be resorted to.

¹⁴ Carr v. Jones, 29 Wash. 78; 69 Pac. 646.

¹⁵ Gregory v. Village of Lake Linden, 136 Mich. 368; 90 N. W. 29.

¹⁶ Moody v. Ry., 124 Ala. 195; 26 So. 952; Moore v. Terry, 66 Ark. 393; 50 S. W. 998; Camden v. McCoy, 48 W. Va. 377; 37 S. E. 637; Johnson v. Pugh, 110 Wis. 167; 85 N. W. 641.

¹⁷ Baxter v. Camp, 71 Conn. 245; 71 Am. St. Rep. 169; 42 L. R. A. 514; 41 Atl. 803. (Though in a suit by her administrator it might be available as a set off.)

¹ Ketchum v. Spurlock, 34 W. Va. 597; 12 S. E. 832.

² Holmes v. Ins. Co., 98 Fed. 240; 47 L. R. A. 308; 39 C. C. A. 45; Ketchum v. Spurlock, 34 W. Va. 597; 12 S. E. 832.

³ Abbott's Estate, 198 Pa. St. 493; 48 Atl. 435.

⁴ Joy v. St. Louis, 138 U. S. 1.

⁵ Ewing v. Burnet, 11 Pet. (U. S.) 41; Armory Mfg. Co. v. Ry., 89 Tex. 419; 59 Am. St. Rep. 65; 37 S. W. 856.

§1125. Omissions, errors and surplusage.

Words which are omitted by inadvertance from a written contract may be supplied by construction at law, without resort to reformation if the context shows what words are omitted.¹ Thus the omission of a dollar sign may be supplied from a context which shows that money was contracted for, as the number given will be assumed to refer to dollars as units of value.² So in a promise to pay "twenty-five after date" the surrounding facts may be looked to to show that "days" was the omitted word.³ So figures showing numbers may be used to supply the numbers omitted from the words in the body of the instrument.⁴ So in a provision, "In case the said party of the first part shall to fully and entirely,"⁵ the word "fail" may be supplied from a corresponding provision containing the phrase, "to be in default." Errors apparent on the face of the instrument may be corrected at law by construction without resort to equity.⁶ Thus the context may show that "or" means "and."⁷ If words or phrases in a contract are without meaning, they may be rejected as surplusage without defeating the contract. Thus abbreviations⁸ or the sign "etc." may be ignored in construction if without meaning.

§1126. Practical construction by parties.

If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight,

¹ *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234; 29 N. E. 1044; *Gran v. Spangenberg*, 53 Minn. 42; 54 N. W. 933; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R. A. 456; 26 Atl. 140; *Sisson v. Donnelly*, 36 N. J. L. 432.

² *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234; 29 N. E. 1044.

³ *Boykin v. Bank*, 72 Ala. 262; 47 Am. Rep. 408.

⁴ *Gran v. Spangenberg*, 53 Minn. 42; 54 N. W. 933.

⁵ *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R. A. 456; 26 Atl. 140.

⁶ *Siegel, etc., Co. v. Colby*, 176 Ill. 210; 52 N. E. 917; affirming, 61 Ill. App. 315.

⁷ *Bettman v. Harness*, 42 W. Va. 433; 36 L. R. A. 566.

⁸ *Berry v. Kowalsky*, 95 Cal. 134; 29 Am. St. Rep. 101; 30 Pac. 202.

⁹ *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830.

even though the contract is in writing,¹ and, ordinarily, is controlling.² Thus the practical construction by the parties may determine whether an ambiguous instrument is a partnership

¹ *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 54; *Fitzgerald v. Bank*, 114 Fed. 474; 52 C. C. A. 276; *Interstate Land Co. v. Land Grant Co.*, 41 Fed. 275; *Pacific, etc., Co. v. Leete*, 94 Fed. 968; 36 C. C. A. 587; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82; *Robbins v. Kimball*, 55 Ark. 414; 29 Am. St. Rep. 45; 18 S. W. 457; *Hill v. McKay*, 94 Cal. 5; 29 Pac. 406; *Wyatt v. Irrigation Co.*, 18 Colo. 298; 36 Am. St. Rep. 280; 33 Pac. 144; *Board of Commissioners v. Gibson*, 158 Ind. 471; 63 N. E. 982; *Smith v. Miami County*, 6 Ind. App. 153; 33 N. E. 243; *Pratt v. Prouty*, 104 Ia. 419; 65 Am. St. Rep. 472; 73 N. W. 1035; *City of Baxter Springs v. Power Co.*, 64 Kan. 591; 68 Pac. 63; *McVickar v. Denison*, 81 Mich. 348; 45 N. W. 659; *Switzer v. Mfg. Co.*, 59 Mich. 488; 26 N. W. 762; *Lateneser v. Misner*, 56 Neb. 340; 76 N. W. 897; *Rathbun v. McConnell*, 27 Neb. 239; 42 N. W. 1042; *Sattler v. Hallock*, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667; *Williamson v. Loan Association*, 54 S. C. 582; 71 Am. St. Rep. 822; 32 S. E. 765; *Murray v. Mfg. Co.*, 37 S. C. 468; 16 S. E. 143; *Blood v. Elevator Co.*, 1 S. D. 71; 45 N. W. 200; *Clark v. Lambert*, — W. Va. —; 47 S. E. 312; *Heatherly v. Bank*, 31 W. Va. 70; 5 S. E. 754; *Wussow v. Hase*, 108 Wis. 382; 84 N. W. 433; *Janesville Cotton Mills v. Ford*, 82 Wis. 416; 17 L. R. A. 564; 52 N. W. 764.

² *Topliff v. Topliff*, 122 U. S. 121; *Philadelphia, etc., Ry. v. Trimble*, 10 Wall. (U. S.) 367; *State Trust Co. v. Duluth*, 104 Fed. 632; *Ly-*

man v. Ry., 101 Fed. 636; *Housekeeper Publishing Co. v. Swift*, 97 Fed. 290; 38 C. C. A. 187; *Russell v. Young*, 94 Fed. 45; 36 C. C. A. 71; *Robbins v. Kimball*, 55 Ark. 414; 29 Am. St. Rep. 45; 18 S. W. 457; *Wyatt v. Irrigation Co.*, 18 Colo. 298; 36 Am. St. Rep. 280; 33 Pac. 144; *Buckeye, etc., Co. v. Carlson*, — Colo. App. —; 66 Pac. 168; *Shouse v. Doane*, 39 Fla. 95; 21 So. 807; *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217; 27 L. R. A. 126; 16 So. 601; *Mueller v. University*, 195 Ill. 236; 88 Am. St. Rep. 194; 63 N. E. 110; *affirming*, 95 Ill. App. 258; *Work v. Welsh*, 160 Ill. 468; 43 N. E. 719; *Street v. Storage Co.*, 157 Ill. 605; 41 N. E. 1108; *Hall v. Bank*, 133 Ill. 234; 24 N. E. 546; *Cambria Iron Co. v. Trust Co.*, 154 Ind. 291; *sub nomine Union Trust Co. v. Ry.*, 48 L. R. A. 41; 55 N. E. 745; 56 N. E. 665; *Vincennes v. Gas Light Co.*, 132 Ind. 114; 16 L. R. A. 485; 31 N. E. 573; *Ingle v. Norrington*, 126 Ind. 174; 25 N. E. 900; *Pate v. French*, 122 Ind. 10; 23 N. E. 673; *Smith v. Miami Co.*, 6 Ind. App. 153; 33 N. E. 243; *Pratt v. Prouty*, 104 Ia. 419; 65 Am. St. Rep. 472; 73 N. W. 1035; *Enterprise Carriage Mfg. Co. v. Cruzan*, 63 Kan. 411; 65 Pac. 647; *Citizens', etc., Co. v. Doll*, 35 Md. 89; 6 Am. Rep. 360; *Fogg v. Ins. Co.*, 10 Cush. (Mass.) 337; *Burtis v. Munising Co.*, 126 Mich. 685; 86 N. W. 124; *Luverne First National Bank v. Jagger*, 41 Minn. 308; 43 N. W. 70; *Ellis v. Harrison*, 104 Mo. 270; 16 S. W. 198; *Williamson v. Ry.*, 85 Mo. App. 103; *Lawton v. Fonner*, 59 Neb. 214; 80

contract or not;³ whether the vendee of stock has an equal interest therein with the other parties;⁴ what constitutes a "first class place of amusement;"⁵ what is "any extension of time;"⁶ whether the instrument in question abrogates a pre-existing contract or not;⁷ and whether the instrument in question is a binding contract or not.⁸ So in some states, where it is doubtful whether a signature was intended to bind the agent or the principal, the subsequent conduct of the parties may be relied upon to show that it was intended to bind the principal and not the agent.⁹ So a city ordinance, if a contract, may be construed in the light of the practical construction placed thereon by the parties.¹⁰ The practical interpretation of the parties is to be regarded, however, only when the contract is ambiguous. If clear and free from ambiguity, the intention shown upon its face if written must be followed, though contrary to the practical interpretation by the parties,¹¹ and even

N. W. 808; *Hale v. Sheehan*, 52 Neb. 184; 71 N. W. 1019; *Davis v. Creamery Co.*, 48 Neb. 471; 67 N. W. 436; *Paxton v. Smith*, 41 Neb. 56; 59 N. W. 690; *Dwyer v. Bonitz* (N. J. Eq.), 31 Atl. 172; *Helme v. Strater*, 52 N. J. Eq. 591; 30 Atl. 333; *Sattler v. Hallock*, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667; *Woolsey v. Funk*, 121 N. Y. 87; 24 N. E. 191; *Methodist, etc., Society v. Water Co.*, 20 Ohio C. C. 578; 10 Ohio C. D. 648; *Williamson v. Loan Association*, 54 S. C. 582; 71 Am. St. Rep. 822; 32 S. E. 765; *Murray v. Mfg. Co.*, 37 S. C. 468; 16 S. E. 143; *Heidenheimer v. Cleveland* (Tex.), 17 S. W. 524; *Woodward v. Edmunds*, 20 Utah 118; 57 Pac. 848; *Mutual, etc., Association v. Taylor*, 99 Va. 208; 37 S. E. 854; *Hosmer v. McDonald*, 80 Wis. 54; 49 N. W. 112. "There is no surer way to find out what the parties meant than to see what they have done." *Brooklyn Life Ins. Co. v.*

Dutcher, 95 U. S. 269, 273; quoted in *Sattler v. Hallock*, 160 N. Y. 291, 301; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667.

³ *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217; 27 L. R. A. 126; 16 So. 601.

⁴ *Stewart v. Pierce*, 116 Ia. 733; 89 N. W. 234.

⁵ *Leavitt v. Improvement Co.*, 54 Fed. 439.

⁶ *Borden v. Fletcher's Estate*, 131 Mich. 220; 91 N. W. 145.

⁷ *Jenkins v. Jensen*, 24 Utah 108; 91 Am. St. Rep. 783; 66 Pac. 773.

⁸ *Kling v. Bordner*, 65 O. S. 86; 61 N. E. 148.

⁹ *State v. Cass County*, 60 Neb. 566; 83 N. W. 733.

¹⁰ *Vincennes v. Gas Light Co.*, 132 Ind. 114; 16 L. R. A. 485; 31 N. E. 573.

¹¹ *Philadelphia, etc., Ry. v. Trimble*, 10 Wall. (U. S.) 367; *Davis v. Shafer*, 50 Fed. 764; *Cold Blast Transportation Co. v. Nut Co.*, 114 Fed. 77; 57 L. R. A. 696; 52 C. C.

if such practical construction has been acquiesced in for a long period of time.¹² The conduct of the parties relied upon as construction must itself be free from ambiguity. Thus vague and general conversations¹³ are of little weight. So the conduct relied upon must be that of parties personally interested or cognizant of the actual intention of the parties. Thus little if any weight can be given to a practical construction adopted by the successors in office of the public officers who made the contract on behalf of the city.¹⁴

§1127. Ambiguous contract.

If a promise is so ambiguous as to be susceptible of more than one interpretation and the promisor knows which of these possible meanings the promisee attaches to the promise, that meaning will be adopted by the court in construing the contract.¹ The same rule applies where the promisor has reason to suppose that the promisee understands the ambiguous promise in a particular sense.² This rule applies to ex-

A. 25; *Gadsden, etc., Ry. v. Improvement Co.*, 128 Ala. 510; 29 So. 549; *Pierce v. Merrill*, 128 Cal. 464; 79 Am. St. Rep. 56; 61 Pac. 64; *Ingraham v. Mariner*, 194 Ill. 269; 62 N. E. 609; *Western Railway Equipment Co. v. Iron Co.*, 91 Ill. App. 28; *Diamond Plate-Glass Co. v. Tennell*, 22 Ind. App. 132; 52 N. E. 168; *Menage v. Rosenthal*, 175 Mass. 358; 56 N. E. 579; *St. Paul, etc., Ry. v. Blackmar*, 41 Minn. 514; 47 N. W. 172; *C. D. Smith Drug Co. v. Saunders*, 70 Mo. App. 221; *Howell v. Johnson*, 38 Or. 571; 64 Pac. 659; *Arnold v. Farr*, 61 Vt. 444; 17 Atl. 1004.

¹² *Northeastern Ry. v. Hastings* (1900), App. Cas. 260; 69 L. J. Ch. N. S. 516; 82 L. T. 429. (Here a construction placed upon a continuous contract for forty years was disregarded.)

¹³ *Ingraham v. Mariner*, 194 Ill. 269; 62 N. E. 609.

¹⁴ *Cincinnati v. Coke Co.*, 53 O. S. 278; 41 N. E. 239; reversing, 8 Ohio C. C. 429; 6 Ohio C. D. 278.

¹ *Allen-West Commission Co. v. Patillo*, 90 Fed. 628; 33 C. C. A. 194; *American Loan & Trust Co. v. Ry.*, 47 Fed. 343; *Chicago Lumber Co. v. Mfg. Co.*, 80 Ia. 369; 45 N. W. 893; *Wood v. Allen*, 111 Ia. 97; 82 N. W. 451; *Schroeder v. Nielson*, 39 Neb. 335; 57 N. W. 993; *Hoffman v. Ins. Co.*, 32 N. Y. 405, 413; 88 Am. Dec. 337; *Barlow v. Scott*, 24 N. Y. 40; *Kendrick v. Ins. Co.*, 124 N. C. 315; 70 Am. St. Rep. 592; 32 S. E. 728. In some states as in Iowa this rule has been enacted as a statute.

² *Kendrick v. Ins. Co.*, 124 N. C. 315; 70 Am. St. Rep. 592; 32 S. E. 728.

press contracts as well as to implied ones,³ and to written contracts as well as to oral ones.⁴ It does not apply to mere negotiations as distinguished from offers, intended on acceptance, to become contracts.⁵ If the other party does not know of the construction placed upon the contract, the understanding of the one party has no legal effect.⁶ Thus where A's attorney drew the contract and A directed its phraseology, but by inadvertence of counsel it was so worded that B's understanding was *prima facie* expressed, though it might possibly have been consistent with A's meaning, A's intention cannot control.⁷ If the meaning of the contract is clear, the understanding of one party as to its meaning does not affect its construction⁸ unless it operates as estoppel by inducing the other party to act.⁹

§1128. First clause governs.

A rule sometimes laid down, though rarely observed, is that in case of conflict between two clauses that first in place is to control.¹ This rule has little to recommend, as a contract is entered upon as an entirety and not word by word. It is used to justify meanings reached by the application of other principles of construction, and its practical value is slight.

§1129. Function of court and jury in construction.

The construction of a contract is a question for the court if the terms of the contract and the extrinsic facts which may affect construction are free from dispute.¹ This rule applies

³ Lull v. Bank, 110 Ia. 537; 81 N. W. 784.

⁴ Cobb v. McElroy, 79 Ia. 603; 44 N. W. 824.

⁵ Patton v. Arney, 95 Ia. 664; 64 N. W. 635.

⁶ Dobbins v. Cragin, 50 N. J. Eq. 640; 23 Atl. 172.

⁷ Dobbins v. Cragin, 50 N. J. Eq. 640; 23 Atl. 172.

⁸ Crass v. Scruggs, 115 Ala. 258; 22 So. 81; Rouss v. Creglow, 103 Ia. 60; 72 N. W. 429.

⁹ Crass v. Scruggs, 115 Ala. 258; 22 So. 81.

¹ Vickers v. Commercial Co., 67 N. J. L. 665; 52 Atl. 467; Wisconsin, etc., Bank v. Wilkin, 95 Wis. 111; 60 Am. St. Rep. 86; 69 N. W. 354.

¹ McFadden v. Henderson, 128 Ala. 221; 29 So. 640; Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553; 77 Am. St. Rep. 129; 48 L. R. A. 510; 55 S. W. 933; McLelland v. Singleary, 113 Ga. 601; 38 S. E. 942;

where the written contract consists of several writings, as where it consists of letters exchanged between the parties,² or of a circular issued by a building and loan association in reliance on which stock has been taken.³ It applies where the written contract has been lost and its contents are proved by secondary evidence.⁴ It applies to contracts part oral and part written⁵ or to contracts entirely oral,⁶ if the facts from which the terms of the contract are to be ascertained are undisputed and only one inference is possible therefrom. The construction of a contract is for the court even if the jury is to pass on the question of its discharge by a later contract.⁷ Thus the court must in such cases decide by what law the contract is governed in case of a so-called conflict of law;⁸ whether a contract is illegal;⁹ whether a written instrument purports on its face to be a complete contract.¹⁰ If, on the other hand, the terms of the

Traders', etc., Ins. Co. v. Humphrey, 207 Ill. 540; 69 N. E. 875; affirming, 109 Ill. App. 246; Foster v. Chicago, 197 Ill. 261; 64 N. E. 322; affirming, 96 Ill. App. 4; Illinois Central Ry. Co. v. Foulks, 191 Ill. 57; 60 N. E. 890; affirming, 92 Ill. App. 391; Ault Wooden-Ware Co. v. Baker, 26 Ind. App. 374; 58 N. E. 265; Grasmier v. Wolf (Ia.), 90 N. W. 813; Sherk v. Holmes, 125 Mich. 118; 83 N. W. 1016; McClurg v. Whitney, 82 Mo. App. 625; Hinman v. Mfg. Co., 65 Neb. 187; 90 N. W. 934; McCormick, etc., Co. v. Davis, 61 Neb. 406; 85 N. W. 390; Sattler v. Hallock, 160 N. Y. 291; 73 Am. St. Rep. 686; 46 L. R. A. 679; 54 N. E. 667; Brite v. Mfg. Co., 129 N. C. 34; 39 S. E. 631; Keefer v. School District, 203 Pa. St. 334; 52 Atl. 245; Leaphart v. Bank, 45 S. C. 563; 75 Am. St. Rep. 800; 33 L. R. A. 700; 23 N. E. 939; Hughes v. Rudy, 15 S. D. 460; 90 N. W. 136; Amory Mfg. Co. v. Gulf, etc., R. R. Co., 89 Tex. 419; 59 Am. St. Rep. 45; 37 S. W. 856.

² Scanlan v. Hodges, 52 Fed. 354; 3 C. C. A. 113; Lindsay v. Ins. Co., 115 N. C. 212; 20 S. E. 370; De Camps v. Carpin, 19 S. C. 121; Teasdale v. Manchester, 104 Tenn. 267; 56 S. W. 853; Ranney v. Higby, 5 Wis. 62.

³ Williamson v. Loan Association, 51 S. C. 582; 71 Am. St. Rep. 822; 32 S. E. 765.

⁴ Wellman v. Jones, 124 Ala. 580; 27 So. 416.

⁵ Sea Insurance Co. v. Johnston, 105 Fed. 286; 44 C. C. A. 477.

⁶ The "construction of an oral as well as of a written contract is for the court." Penn, etc., Insurance Co. v. Crane, 131 Mass. 56, 58; 45 Am. Rep. 282.

⁷ Danziger v. Shoe Co., 204 Ill. 145; 68 N. E. 534; affirming, 107 Ill. App. 47.

⁸ Demland v. Loan Co., 20 Ohio C. C. 223; 11 Ohio C. D. 249.

⁹ Carpenter v. Taylor, 164 N. Y. 171; 58 N. E. 53.

¹⁰ Harrison v. McCormick, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830.

contract are in dispute, or it is possible to draw more than one inference from the established facts which are relied on to show the intention of the parties, the jury must determine such facts or decide which of such inferences is the correct one. The court should in such cases submit the question of fact to the jury under proper alternative instructions as to the construction to be given in the event of each possible finding of fact by the jury.¹¹ This rule applies in written contracts where the admissible extrinsic evidence is conflicting or admits of different inferences.¹² Thus where the evidence is conflicting as to the meaning of a technical term in dispute,¹³ or where questions as to what are "traveling expenses,"¹⁴ or what is a reasonable amount of "printed matter and samples,"¹⁵ depend on conflicting extrinsic evidence, the jury must determine the intention of the parties. So if the question is which of two unidentified plans is referred to in a written contract, this should be submitted to the jury.¹⁶ This rule applies where the terms of a contract partly written and partly oral¹⁷ or entirely oral are in dispute.

§1130. Construction cannot extend to reformation.

Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof.¹ Thus a clause fixing a price per car, "excepting only empty freight cars and such loaded freight cars as are destined to or originate

¹¹ *Boykin v. Bank*, 72 Ala. 262; 47 Am. Rep. 408; *Martin v. Dowd*, — Ida. —; 69 Pac. 276; *Alworth v. Gordon*, 81 Minn. 445; 84 N. W. 454; *Coquillard v. Hovey*, 23 Neb. 622; 8 Am. St. Rep. 134; 37 N. W. 479; *Blaisdell v. Davis*, 72 Vt. 295; 48 Atl. 14.

¹² *Durand v. Heney*, 33 Wash. 38; 73 Pac. 775.

¹³ *Schneider Granite Co. v. Milling Co.*, 78 Mo. App. 622.

¹⁴ *Wilcox v. Baer*, 85 Mo. App. 587.

¹⁵ *Jensen v. Perry*, 126 Pa. St. 495; 12 Am. St. Rep. 888; 17 Atl. 665.

¹⁶ *Cook v. Littlefield*, 98 Me. 299; 56 Atl. 899.

¹⁷ *City of Philadelphia v. Stewart*, 201 Pa. St. 526; 51 Atl. 348.

¹ *Robbins v. Rollins*, 127 U. S. 622; *Te Poel v. Shutt*, 57 Neb. 592; 78 N. W. 288; *Sinclair v. Hicks*, 116 N. C. 606; 21 S. E. 395.

at points outside the city, on or beyond the first party's line," cannot be restricted to such empty cars as originate outside the city, but applies to all empty cars.²

² Louisville, etc., Ry. v. Ry., 100
Ky. 690; 39 S. W. 42.

CHAPTER LII.

JOINT AND SEVERAL LIABILITY.

§1131. Nature of liability of two or more promisors.

If two or more persons constitute one party to a **contract**, the question as to the nature of their rights and liabilities presents itself. If two or more persons are promisors in a **contract**, their liability may be joint, or several, or joint and several. If their liability is joint, each of the promisors is liable, and may be held for the entire liability arising under the **contract**.¹ A several contract is one in which each of the promisors undertakes only a limited amount of the entire liability,² or which in each severally undertakes the entire liability.³ A joint and several contract is one which at the election of the promisee he may treat either as a joint contract or as a several contract. In Louisiana, by statute, different terms are employed. "A joint obligation" is used to express substantially the idea which at Common Law is expressed by "several contract," while the term "solidary obligation" is used to express the idea which the Common Law expresses by "joint contract." "A joint obligation under the laws of Louisiana binds the parties thereto only for their proportion of the debt, whilst a solidary obligation, on the contrary, binds each of the obligors for the whole debt."⁴

§1132. Intention controls.— Words importing joint liability.

Whether the liability of the promisors is joint, or several, or joint and several, depends upon the intention of the parties as

¹ *Mason v. Eldred*, 6 Wall. (U. S.) 231.

Am. Dec. 430; *Payne v. Jelleff*, 67 Wis. 246; 30 N. W. 526.

² *Evands v. Sanders*, 10 B. Mon. (Ky.) 291.

⁴ *Groves v. Sentell*, 153 U. S. 465, 476.

³ *Lurton v. Gilliam*, 2 Ill. 577; 33

ascertained from the contract by the ordinary rules of construction. *Prima facie* in the absence of statute the liability of two or more persons on the same contract is a joint liability.¹ Words which indicate the common assumption of an obligation strengthen this inference. Thus the use of such words as "we promise,"² "we will undertake,"³ "the plaintiffs are to pay,"⁴ "the directors promise,"⁵ followed by the signature of the promisors, imports a joint liability. However, the context may show that such a promise is several and not joint. Thus a promise to pay a certain sum for one road grader, "to be paid by us in proportion to road tax in above-mentioned districts on lands and property which we now own" in such districts,⁶ or to "pay to the city the cost of the curbstone so placed opposite our land" signed by owners in severalty⁷ is several. The use of words such as "we agree,"⁸ may show an intention to assume a joint and several liability. A contract contained the words, "We the undersigned do business under the name of Oliphant & Co." . . . "We also agree." This was signed by the firm name only. A renewal of this option made a part of the original was signed by all the members of the firm. This was held as to the covenant not to engage in business to be joint and several.⁹ A contract between two railroad companies, as

¹ *White v. Tyndall*, 13 App. Cas. 263; *Noyes v. Barnard*, 63 Fed. 782; 11 C. C. A. 424; *Eller v. Lacy*, 137 Ind. 436; 36 N. E. 1088; *Eveloth v. Sawyer*, 96 Me. 227; 52 Atl. 639; *Hill v. Combs*, 92 Mo. App. 242; *Alpaugh v. Wood*, 53 N. J. L. 638; 23 Atl. 261; *Elliott v. Bell*, 37 W. Va. 834; 17 S. E. 399.

² *Barnett v. Juday*, 38 Ind. 86; *Taylor v. Reger*, 18 Ind. App. 466; 63 Am. St. Rep. 352; 48 N. E. 262; *Albany, etc., Co. v. Bank*, 17 Ind. App. 531; 60 Am. St. Rep. 178; 47 N. E. 227.

³ *New Haven, etc., Ry. v. Hayden*, 119 Mass. 361.

⁴ *Eller v. Lacy*, 137 Ind. 436; 36 N. E. 1088.

⁵ *McKenssey v. Edwards*, 88 Ky. 272; 21 Am. St. Rep. 339; 3 L. R. A. 397; 10 S. W. 815.

⁶ *Western Wheel Scraper Co. v. Locklin*, 100 Mich. 339; 58 N. W. 1117.

⁷ *Springfield v. Harris*, 107 Mass. 532.

⁸ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723.

⁹ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 78 Am. St. Rep. 612; 46 L. R. A. 255; 43 Atl. 723; affirming in part and reversing in part, 56 N. J. Eq. 680; 39 Atl. 923.

one party, and a sleeping-car company as the other, whereby certain sleeping-cars were to be run "over the line of said roads between" two cities "in connection with the night passenger express through trains between said cities," was held to be a joint contract.¹⁰ By statute in some jurisdictions contracts joint in form are in effect turned into joint and several contracts.¹¹ By statute in Louisiana a note containing the words "we promise" is a several note, binding each maker only for his proportionate share.¹²

§1133. Words importing several liability.

Language which shows an intention on the part of each promisor to assume only a part of the entire liability imports a several contract.¹ Thus such language as "we promise each to pay" a certain proportion of the debt, as a pro rata share of the purchase price,² or of the expenses of litigation in which the same question is presented, involving the separate interests of the promisors,³ or "we promise to pay the amount set opposite our respective names," as in contracts for subscriptions,⁴ or "we, the undersigned, promise to pay the following subscriptions," with an amount opposite the name of each subscriber,⁵ imports a several contract. Hence one subscriber cannot use as a defense the fact that some of the other subscribers are

¹⁰ Stanley v. R. R., 18 O. S. 552. (Hence construed so as to apply only to through trains running on both roads as a continuous line.)

¹¹ Sawin v. Kenney, 93 U. S. 289 (Ark.); Gummer v. Mairs, 140 Cal. 535; 74 Pac. 26; Farmers' Exchange Bank v. Morse, 129 Cal. 239; 61 Pac. 1088; Jarnagin v. Stratton, 95 Tenn. 619; 30 L. R. A. 495; 32 S. W. 625. So where the payee signs as an apparent joint maker. Fisher v. Diehl, 94 Md. 112; 50 Atl. 432.

¹² Groves v. Sentell, 153 U. S. 465.

¹ Moss v. Wilson, 40 Cal. 159; Colt v. Learned, 118 Mass. 380.

² McArthur v. Board, 119 Ia. 562; 93 N. W. 580; Fuselier v. Lacour,

3 La. Ann. 162; Larkin v. Butterfield, 29 Mich. 254.

³ Adriatic Fire Ins. Co. v. Treadwell, 108 U. S. 361.

⁴ O'Conner v. Hooper, 102 Cal. 528; 36 Pac. 939; Moss v. Wilson, 40 Cal. 159; Robertson v. March, 4 Ill. 198; Davis, etc., Co. v. Murray, 102 Mich. 217; 60 N. W. 437; Davis v. Creamery Co., 48 Neb. 471; 67 N. W. 436; Darnall v. Lyon (Tex. Civ. App.), 19 S. W. 506; Connecticut, etc., Ry. v. Bailey, 24 Vt. 465; 58 Am. Dec. 181; Hodges v. Nalty, 104 Wis. 464; 80 N. W. 726; Davis, etc., Co. v. Cupp, 89 Wis. 673; 62 N. W. 520.

⁵ Landwerlen v. Wheeler, 106 Ind. 523; 5 N. E. 888.

minors or insolvent, since such fact does not increase his liability.⁶ The presumption in contracts of subscription is that a several liability is intended.⁷ Hence a promise "to pay the above amount"⁸ has been held to import a several liability. However, if the language used shows a clear intent to incur a joint liability there is nothing in the nature of a contract of subscription that makes this impossible. Thus the words "we, the subscribers, agree to pay" a gross sum⁹ are held to impose a joint liability. A contract of subscription to carry out certain purposes whereby the subscribers undertake each to pay a certain sum is several as to such payments, but is joint as to the covenants to devote the fund thus raised to certain specified purposes.¹⁰ Hence a repudiation by a part only of the subscribers does not end the contract. The adversary party may perform and recover the several subscriptions from the subscribers.¹¹ Hence, though no joint recovery can be had on the subscriptions, the subscribers should be joined as defendants in an action involving the common fund.¹²

§1134. Words importing joint and several liability.

If the language used shows an intention to assume a liability, either joint or several in its nature, at the option of the promisee, this imports a joint and several obligation.¹ Thus the use of such language as "we, or either of us,"² "we jointly and severally promise,"³ or the use of the singular number, such as "I promise,"⁴ followed by the signature of two or more prom-

⁶ Chicago, etc., Co. v. Higginbotham (Miss.), 29 So. 79.

⁷ Hall v. Thayer, 12 Met. (Mass.) 130; Davis v. Belford, 70 Mich. 120; 37 N. W. 919.

⁸ Davis v. Belford, 70 Mich. 120; 37 N. W. 919.

⁹ Davis v. Shafer, 50 Fed. 764.

¹⁰ Current v. Fulton, 10 Ind. App. 617; 38 N. E. 419; Gibbons v. Bente, 51 Minn. 499; 22 L. R. A. 80; 53 N. W. 756.

¹¹ Gibbons v. Bente, 51 Minn. 499;

22 L. R. A. 80; 53 N. W. 756; and see to the same effect Current v. Fulton, 10 Ind. App. 617; 38 N. E. 419.

¹² Cornish v. West, 82 Minn. 107; 52 L. R. A. 353; 84 N. W. 750.

¹ Salomon v. Hopkins, 61 Conn. 47; 23 Atl. 716; Maiden v. Webster, 30 Ind. 317; Hemmenway v. Stone, 7 Mass. 58; 5 Am. Dec. 27.

² Pogue v. Clark, 25 Ill. 333.

³ Rees v. Abbott, Cowp. 832.

⁴ Salomon v. Hopkins, 61 Conn.

isors, imports a joint and several liability. So a note containing the words "I promise to pay," signed at the bottom by A and on the back before delivery by B, was held to be a joint and several note.⁵ In New York, however, it has been held that a note in the form "I promise" is necessarily a several note only.⁶ The liability of partners is a joint and several liability.⁷

§1135. Liability of sole promisor.

While the intention of the parties is paramount in determining the nature of the liability of two or more promisors, it is impossible, no matter how clear the intention of the parties, to impose a joint liability upon a sole promisor. A contract made with one person alone is necessarily a several contract, even if words which are appropriate to joint contracts, such as "we promise,"¹ are employed.

§1136. Effect of joint liability.—Parties to actions.

The adjective law is so closely connected with the substantive law that a statement of the effect of these different types of contract is in outward form almost exclusively a matter of procedure, though it affects the substantive rights of the parties. All the joint promisors are liable upon the joint contract,¹ so

47; 23 Atl. 716; *Monson v. Drakeley*, 40 Conn. 552; 16 Am. Rep. 74; *Maiden v. Webster*, 30 Ind. 317; *Walford v. Bowen*, 57 Minn. 267; 59 N. W. 195; *Ladd v. Baker*, 26 N. H. 76; 57 Am. Dec. 355; *Wallace v. Jewell*, 21 O. S. 163; 8 Am. Rep. 48; *Arbuckle v. Templeton*, 65 Vt. 205; 25 Atl. 1095; *Keller v. McHuffman*, 15 W. Va. 64; *Dill v. White*, 52 Wis. 456; 9 N. W. 404; *Dart v. Sherwood*, 7 Wis. 523; 76 Am. Dec. 228.

⁵ *Booth v. Huff*, 116 Ga. 8; 94 Am. St. Rep. 98; 42 S. E. 381; *Dow Law Bank v. Godfrey*, 126 Mich.

521; 86 Am. St. Rep. 559; 85 N. W. 1075.

⁶ *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314.

⁷ *Wood v. Carter*, — Neb. —; 93 N. W. 158.

¹ *Hoimes v. Sinclair*, 19 Ill. 71; *Whitmore v. Nickerson*, 125 Mass. 496; 28 Am. Rep. 257.

¹ *Allin v. Shadburne*, 1 Dana (Ky.) 68; 25 Am. Dec. 121; *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 670; 2 L. R. A. 48; 15 Atl. 497; *Sully v. Campbell*, 99 Tenn. 434; 43 L. R. A. 161; 42 S. W. 15; *Camp v. Simon*, 23 Utah 56; 63 Pac. 332.

that it has been held that a promise to release one on his paying his proportionate share of the debt is without consideration;² all should be made defendants, and a judgment rendered against all,³ except such as cannot be served with process,⁴ and after such judgment has been obtained the plaintiff may issue execution against any of the defendants he chooses. If some of the joint obligors are insolvent the payee can enforce payment of the entire debt against those who are solvent.⁵ Secret arrangements made between the joint contractors cannot affect their liability to the promisee. Thus A, B and C signed a note and mortgage, joint in form, with the understanding that A should take and pay for two thirds of the property and B and C together the remaining one third. B and C were liable to the promisee for the entire debt.⁶

§1137. Death of joint promisor.

The death of a joint promisor discharges his estate and leaves the survivors liable for the entire amount of the debt.¹ In equity relief against the estate of the deceased promisor could be given if the survivors were insolvent.² The survivor could have contribution from the estate of the deceased promisor.³ By statute in many states the death of a joint promisor leaves

² Davidson v. Burke, 143 Ill. 139; 36 Am. St. Rep. 367; 32 N. E. 514.

³ Gilman v. Rives, 10 Pet. (U. S.) 298; Bragg v. Wetzel, 5 Blackf. (Ind.) 95; 18 Am. Dec. 131; Meyer v. Estes, 164 Mass. 457; 32 L. R. A. 283; 41 N. E. 683; Dumanoise v. Townsend, 80 Mich. 302; 45 N. W. 179; Lemon v. Wheeler, 96 Mo. App. 651; 70 S. W. 924; Pollard v. Collier, 8 Ohio 43; Lucas v. Sanders, 1 McMul. (S. C.) 311.

⁴ Perkins County v. Miller, 55 Neb. 141; 75 N. W. 577.

⁵ Camp v. Simon, 23 Utah 56; 63 Pac. 332.

⁶ Sully v. Campbell, 99 Tenn. 434; 43 L. R. A. 161; 42 S. W. 15.

¹ Ashby v. Ashby, 7 B. & C. 444; Burgoyne v. Trust Co., 5 O. S. 586; Murphey v. Weil, 92 Wis. 467; 66 N. W. 532.

² Moore v. Rogers, 19 Ill. 347; New Haven, etc., Co. v. Hayden, 119 Mass. 361; Hamersley v. Lambert, 2 Johns. Ch. 508; Burgoyne v. Trust Co., 5 O. S. 586; Ayer v. Wilson, 2 Mill (S. C.) 319; 12 Am. Dec. 677.

³ Erwin v. Dundas, 4 How. (U. S.) 58.

his estate liable,⁴ or turns the contract into a joint and several one.⁵

§1138. Judgment against one joint promisor.

A judgment rendered against one joint promisor in an action in which the remaining joint promisors could have been made parties is a bar to a subsequent action against such other joint promisors.¹ So if an action is brought against two or more joint promisors, the promisee cannot dismiss the action against some and have judgment against others.² If all the promisors are within the jurisdiction of the court and served with summons, it is error to render judgment against one as on default, and enter judgment on the merits in favor of the other joint promisors.³ If an action is brought on a joint contract, no recovery can be had against one promisor on his several contract in jurisdiction where the Common Law rule has not been modified by statute so as to permit of greater freedom of amendment.⁴ An action was brought against a county treasurer and his bondsmen on a joint bond covering his first term. The evidence showed a defalcation during his second term. It was held that as no judgment could be rendered against the bondsmen on such joint bond, no several judgment could be rendered against the treasurer.⁵ By statute in some states the promisee may sue less than all the promisors.⁶ Such statutes in effect make a joint contract joint and several.

¹ *Potts v. Dounce*, 173 N. Y. 335; 66 N. E. 4; *Eckert v. Myers*, 45 O. S. 525; 15 N. E. 862; *Taylor v. Taylor*, 5 *Humph. (Tenn.)* 110; *Chadwick v. Hopkins*, 4 *Wyom.* 379; 62 *Am. St. Rep.* 38; 34 *Pac.* 899.

² *Philadelphia, etc., Co. v. Butler*, 181 *Mass.* 468; 63 N. E. 949; *Weil v. Guerin*, 42 O. S. 299; *Burgoyne v. Trust Co.*, 5 O. S. 586.

³ *Sloo v. Lea*, 18 *Ohio* 279. *Contra* by statute in some states. *Mason v. Eldred*, 6 *Wall. (U. S.)* 231 (*Mich.*).

⁴ *Van Leyen v. Wreford*, 81 *Mich.* 606; 45 N. W. 1116.

⁵ *Kingsland v. Koeppe*, 137 *Ill.* 344; 13 *L. R. A.* 649; 28 N. E. 48.

⁶ *Gleason v. Milk Supply Co.*, 93 *Me.* 544; 74 *Am. St. Rep.* 370; 45 *Atl.* 825; *Atkins v. Brown*, 59 *Me.* 90.

⁷ *King County v. Ferry*, 5 *Wash.* 536; 34 *Am. St. Rep.* 880; 19 *L. R. A.* 500; 32 *Pac.* 538.

⁸ *Miller v. Sullivan*, 89 *Tex.* 480; 35 *S. W.* 362.

§1139. Release of one joint promisor.

A technical release under seal, given to one joint promisor, will inure to the benefit of all,¹ unless the promisee expressly reserves his right to proceed against the remaining promisors. This rule applies to the technical release under seal only.³ An oral release does not have this effect;⁴ nor does a release for a valuable consideration discharge even the promisor to whom it is given, unless by statute.⁵ A covenant not to sue made with one joint promisor does not discharge the others.⁶

§1140. Effect of several contract.

If the promisors are severally liable, the promisee must sue each for his proportion of the indebtedness. He cannot join two or more several promisors in an action upon the contract if they object thereto.¹ The death of one of promisors severally liable does not discharge his estate.²

§1141. Effect of joint and several contract.

If the promisors are jointly and severally liable upon their promise, the promisee may at his option sue all within the jurisdiction of the court jointly, or he may sue each of them separately.¹ The promisee's election of either of these reme-

¹ *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 1; *Hale v. Spaulding*, 145 Mass. 482; 1 Am. St. Rep. 475; 14 N. E. 534; *Randahl v. Lindholm*, 86 Minn. 16; 89 N. W. 1129; *Scotfield v. Clark*, 48 Neb. 711; 67 N. W. 754; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207; *Crawford v. Roberts*, 8 Or. 324; *Maslin v. Hiett*, 37 W. Va. 15; 16 S. E. 437.

² *Merriman v. Barker*, 121 Ind. 74; 22 N. E. 992; *Whittemore v. Oil Co.*, 124 N. Y. 565; 21 Am. St. Rep. 708; 27 N. E. 244.

³ *Haney, etc., Co. v. Creamery Co.*, 108 Ia. 313; 79 N. W. 79; *Williamson v. McGinnis*, 11 B. Mon. (Ky.)

74; 52 Am. Dec. 561; *Shaw v. Pratt*, 22 Pick. (Mass.) 305.

⁴ *Valley Savings Bank v. Mercer*, — Md. —; 55 Atl. 435.

⁵ *Hatzel v. Moore*, 120 Fed. 1015.

⁶ *Harrison v. Close*, 2 Johns. (N. Y.) 448; 3 Am. Dec. 444.

¹ *Price v. Ry.*, 18 Ind. 137; *Perry v. Turner*, 55 Mo. 418.

² *McCready v. Freedly*, 3 Rawle (Pa.) 251.

¹ *Minor v. Bank*, 1 Pet. (U. S.) 46; *Coburn v. Goodall*, 72 Cal. 498; 1 Am. St. Rep. 75; 14 Pac. 190; *Olmstead v. Bailey*, 35 Conn. 584; *Peckham v. North Parish*, 16 Pick. (Mass.) 274.

dies bars the other.² Bringing suit is held in some jurisdictions to be such election,³ while in others only satisfaction is a final election.⁴ A several judgment rendered against one joint and several promisor in an action in which another promisor is not served with process does not bar the right of action against such other promisor.⁵ He cannot, however, join in one action any number less than all.⁶ This objection must, however, be interposed before going to trial on the merits or it will be waived.⁷ If, however, in such an action judgment is rendered against one promisor by confession, the action may be continued against the others.⁸ A discharge of one joint and several promisor under seal inures to the benefit of all,⁹ unless the right to proceed against the remaining promisors is expressly reserved in the release.

§1142. Rights of joint or several promisees.

If two or more persons are promisees in a contract their rights arising thereunder may be either joint or several. Whether their rights are joint or several depends upon the nature of their interest and the intention of the parties as it appears from the face of the contract. If the consideration moves from the promisees together a promise to them is *prima facie* joint.¹ However the fact that a promisee has, by a separate contract with a third person, given the latter an

² *Ex parte* Rowlandson, 3 P. Wms. 405; *Ex parte* Brown, 1 Ves. & B. 60; *United States v. Price*, 9 How. (U. S.) 83; *Weil v. Guerin*, 42 O. S. 299.

³ *Weil v. Guerin*, 42 O. S. 299.

⁴ *Prosser v. Evans* (1895), 1 Q. B. 108; *People v. Harrison*, 82 Ill. 84.

⁵ *Clinton Bank v. Hart*, 5 O. S. 33.

⁶ *Cummings v. People*, 50 Ill. 132; *Fay v. Jenks*, 78 Mich. 312; 44 N. W. 380. *Contra*, by statute, *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753; 70 N. W. 376.

⁷ *Barry v. Foyles*, 1 Pet. (U. S.) 311; *Minor v. Bank*, 1 Pet. (U. S.) 46.

⁸ *United States v. Leffler*, 11 Pet. (U. S.) 86.

⁹ *Hochmark v. Richler*, 16 Colo. 265; 26 Pac. 818; *Benjamin v. McConnell*, 9 Ill. 536; 46 Am. Dec. 474; *American Bank v. Doolittle*, 14 Pick. (Mass.) 123; *Crane v. Alling*, 15 N. J. L. 423.

¹ *Eveleth v. Sawyer*, 96 Me. 227; 52 Atl. 639; *Robbips v. Ayres*, 10 Mo. 538; 47 Am. Dec. 125; *Slaughter v. Davenport*, 151 Mo. 26; 51 S. W. 471.

interest in the contract does not make the latter a joint promisee.² If the consideration moves from the promisees separately, a promise to them is *prima facie* several.³ A contract between four producers of coal, whereby one "agrees to represent the entire interests and sales of the coal of the other three parties," is a several contract as to such promisees.⁴ So if a member of a partnership buys out the interests of his co-partners and agrees to hold them harmless from liabilities owing by the firm, such contract is several as to the promisees.⁵ In either case this presumption may be rebutted by clear and unequivocal language which shows that the promise is made to them either jointly or severally.⁶ The interest of the promisees cannot by any form of words be made joint and several.⁷ While the mere form of the promise cannot make the interest of the promisees joint and several it has been held that the nature of the transaction may in some exceptional instances have this effect. This security was given jointly to several creditors to protect their several claims; it was held that they could enforce the application of such security to their claims either jointly or severally.⁸

§1143. Effect of joint interest.—Promisees must join in action.

The joint promisees must all, if living, join in the action.¹ Even the name of a joint promisee who does not, in fact, wish

² Brown v. Salisbury, 123 Fed. 203.

³ Hall v. Leigh, 8 Cranch (U. S.) 50; Burton v. Henry, 90 Ala. 281; 7 So. 925.

⁴ Shipman v. Mining Co., 158 U. S. 256.

⁵ Morgan v. Wardell, 178 Mass. 350; 55 L. R. A. 33; 59 N. E. 1037.

⁶ Hall v. Leigh, 8 Cranch (U. S.) 50; Schultz v. Howard, 63 Minn. 196; 56 Am. St. Rep. 470; 65 N. W. 363.

⁷ Slingsby's Case, Coke, Part V., 18b; Bradburne v. Botfield, 14 M. & W. 559; Starret v. Gault, 165 Ill.

99; 46 N. E. 220; Eveleth v. Sawyer, 96 Me. 227; 52 Atl. 639; Capen v. Barrows, 1 Gray (Mass.) 376.

⁸ Lyon v. Ballentine, 63 Mich. 97; 6 Am. St. Rep. 284; 29 N. W. 837.

¹ Painter v. Munn, 117 Ala. 322; 67 Am. St. Rep. 170; 23 So. 83; Magruder v. Belt, 7 App. D. C. 303; Chamberlain v. Lesley, 39 Fla. 452; 22 So. 736; Archer v. Bogue, 4 Ill. 526; Quisenberry v. Artis, 1 Duv. (Ky.) 30; Hewes v. Bayley, 20 Pick. (Mass.) 96; Slaughter v. Davenport, 151 Mo. 26; 51 S. W. 471; Dob & Dob v. Halsey, 16 Johns. (N. Y.) 34; 8 Am. Dec. 293; Tapscott v.

to sue must be included² if he is indemnified against liability for costs. Some statutes now provide for including an unwilling joint-promisee among the defendants, stating the reason therefor.³ Under the doctrine that the action must be in the name of the real party in interest, some exceptions to the rule that joint promisees must join are recognized at Modern Law. A bond given in accordance with statute to obtain an attachment, though joint in form may be sued upon by such of the obligees as are injured by the issuance of such attachment.⁴ However, an opposite view has been taken of an injunction bond, where all the obligees have been required to join, even if one only is injured.⁵

§1144. Death of joint promisee.

At Common Law on the death of a joint promisee his interest passed to the surviving promisees.¹ Equity would compel the survivors to account to the personal representative of the deceased co-promisee for the latter's interest in the contract.² In many jurisdictions these rules have been modified by statute, and the administrator of the deceased joint promisee is allowed to join with the surviving promisees.

§1145. Release by joint promisee.

At law a release given by a joint promisee discharged the debt as to all the promisees.¹ Thus a release given by one part-

Williams, 10 Ohio 442; Sweigart v. Berk, 8 S. & R. (Pa.) 308; Clapp v. Pawtucket Institution, 15 R. I. 489; 2 Am. St. Rep. 915; 8 Atl. 697; Davis v. Ins. Co., 70 Vt. 217; 39 Atl. 1095; Angus v. Robinson, 59 Vt. 585; 59 Am. Rep. 758; 8 Atl. 497.

² Wright v. McLemore, 10 Yerg. (Tenn.) 235.

³ Cullen v. Knowles (1898), 2 Q. B. 380.

⁴ Alexander v. Jacoby, 23 O. S. 358.

⁵ Montana Mining Co. v. Milling

Co., 19 Mont. 313; 48 Pac. 305.

¹ Martin v. Crump, 2 Salk. 444; Comb. 474; *sub nomine*, Martin v. Crompe, 1 Ld. Raym. 340; McCalla v. Rigg, 3 A. K. Mar. (Ky.) 259; Donnell v. Manson, 109 Mass. 576; Hedderly v. Downs, 31 Minn. 183; 17 N. W. 274; Kinsler v. McCants, 4 Rich. L. (S. C.) 46; 53 Am. Dec. 711.

² Martin v. Crump, 2 Salk. 444; Comb. 474; *sub nom.*, Martin v. Crompe, 1 Ld. Raym. 340.

³ Rawstorne v. Gandell, 15 M. & W. 304; Clark v. Patton, 4 J. J.

ner binds his co-partners.² It has been held that a release by one of two or more joint promisees does not necessarily bar the rights of the other promisees in equity,³ and if the release has been given by a joint promisee in fraud of the rights of his co-promisees and in collusion with the promisor, equity will grant affirmative relief, and set such release aside.⁴

§1146. Effect of several interest.

Several promisees must each maintain his own action; and cannot join in a common action.¹ On the death of one of two or more several promisees, his rights pass to his legal representatives and not to the remaining promisees.²

Mar. (Ky.) 33; 20 Am. Dec. 203; Wiggin v. Tudor, 23 Pick. (Mass.) 434; Eastman v. Wright, 6 Pick. (Mass.) 316.

² Phillips v. Clagett, 11 M. & W. 84; Piersons v. Hooker, 3 Johns. (N. Y.) 68; 3 Am. Dec. 467.

³ Upjohn v. Ewing, 2 O. S. 13.

⁴ Piercy v. Fynney, L. R. 12 Eq.

69; Skaife v. Jackson, 3 Barn. & C. 421.

¹ Hall v. Leigh, 8 Cranch (U. S.) 50; Curry v. Ry., 58 Kan. 6; 48 Pac. 579; Rorabacher v. Lee, 16 Mich. 169; Geer v. School District, 6 Vt. 76.

² Carthrae v. Brown, 3 Leigh (Va.) 98.

CHAPTER LIII.

NATURE OF LIABILITY ASSUMED.

§1147. Form of signature not creating personal liability.

The nature of the liability created by signing a written instrument is a question of construction. The general rule undoubtedly is that the entire contract must be taken into consideration and from the whole of it the intention of the parties must be ascertained. The liability which it appears he intended to assume must be enforced against the party who has assumed it.¹ This rule, however, like other broad and safe rules, is too vague to guide us in determining the meaning of specific forms of contracts. When we attempt to deduce more specific statements of the law we are met with the fact that the courts are very far from harmonious on the question of what intention they will deduce from given phraseology. If an agent wishes to execute a contract in such form as to bind his principal and not himself, the safest form of signature is "X (principal) by A (agent)." This form of signature shows clearly that the agent does not intend to assume any personal liability.² Thus a note beginning "I or we promise" and signed "C. & A. Co., per A, Sec., B, Gen. Mangr.," is the note of the corporation only. The word "per" refers to both A and B.³ The signature "A (agent) for X (principal)," while not technically so correct, is also sufficient to show that A does not intend to assume any personal liability.⁴ Thus a note beginning "I promise" and

¹ *Whitney v. Wyman*, 101 U. S. 392.

² *Williams v. Harris*, 198 Ill. 501; 64 N. E. 988; reversing, 98 Ill. App. 27; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Emerson v. Mfg. Co.*, 12 Mass. 237; 7 Am. Dec. 66; *Sparks v. Transfer Co.*, 104 Mo.

531; 24 Am. St. Rep. 351; 12 L. R. A. 714; 15 S. W. 417.

³ *Williams v. Harris*, 198 Ill. 501; 64 N. E. 988; reversing, 98 Ill. App. 27.

⁴ *Rawlings v. Robson*, 70 Ga. 595; *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240.

signed "Pro X, A," was held to be the note of X only.⁵ So a note beginning "we jointly and severally promise" and signed "A & B for X," was held to bind X only.⁶ Some authorities, however, treat such form of signature as imposing a personal liability.⁷ Thus a signature "Robert Early (for Sam'l Early)," was held by reason of the brackets to bind Robert Early personally.⁸ So a note beginning "I promise" and signed "For the M. H. & F. S. Co., W. Macbean, President," was held to impose personal liability on Macbean.⁹ So a note signed "A, agent for the Churchman," imposes an individual liability on A.¹⁰ The addition of the word "as" before the designation of the official capacity is often held to show an intention not to assume a personal liability. Thus a note beginning "The trustees" of a certain church "as such trustees, promise to pay," and signed "A, as trustee" of such church, does not impose any personal liability.¹¹ As is indicated elsewhere,¹² the addition of a designation which is not that of an agent does not in law show an intention not to assume personal liability, whatever the parties may have believed. Thus a note beginning "we promise to pay" and signed by certain persons with the addition of the words "as stockholders" imposes personal liability.¹³

§1148. Signature by one person with addition of personal description.

If the form of a signature is "A, agent," or some equivalent expression, the word "as" being omitted before "agent," the weight of authority is that in the absence of statute A incurs

⁵ Long v. Colburn, 11 Mass. 97;
6 Am. Dec. 160.

⁶ Rice v. Gove, 22 Pick. (Mass.)
158; 33 Am. Dec. 724.

⁷ Offutt v. Ayers, 7 T. B. Mon.
(Ky.) 356.

⁸ Early v. Wilkinson, 9 Gratt.
(Va.) 68.

⁹ Macbean v. Morrison, 1 A. K.
Mar. (Ky.) 545.

¹⁰ DeWitt v. Walton, 9 N. Y. 571.

¹¹ Little v. Bailey, 87 Ill. 239.

¹² See §§ 990, 995, 997, 1001, 1004.

¹³ Savings Bank v. Market Co.,
122 Cal. 28; 54 Pac. 273. (Extrinsic evidence is not admissible to show that such note was given only to ratify certain acts of the directors.)

a personal liability.¹ This rule is of old Common Law origin. At a time when it was customary for every person, on signing an instrument, to add his station and rank in life or occupation, as a *descriptio personæ*, the word "agent," like any other word showing occupation, might well serve to describe the person rather than to show in what capacity he was contracting. The rule thus established has survived to a day when the use of a designation of an occupation as a description of the person is almost unknown in written contracts; and when it is undoubtedly the popular belief that the addition of the word agent to a signature prevents personal liability. Thus a signature "A, trustee," is held to impose personal liability.² Even where great liberality in admitting extrinsic evidence to show the intention of the parties is displayed, it is held that the signature "A, administratrix," while a fact to be considered in discovering the intention of the parties is no more conclusive that no personal liability was intended than would be "A, widow," or "A, native of Oregon."³ A distinction, according to some authorities, must be made between "agent for" and "agent of": the former showing an intention not to assume a personal liability, while the latter is treated in law as a mere *descriptio personæ*.⁴ A note signed by an individual name with the addition of "Mfg. Agt. & Supt. of contracts" imposes a personal liability.⁵ So a note signed "A, trustee," imposes a personal liability.⁶ So to hold an

¹Macdonald v. Bond, 195 Ill. 122; 62 N. E. 881; affirming 96 Ill. App. 116; Braun v. Hess, 187 Ill. 283; 79 Am. St. Rep. 221; 58 N. E. 371; Keidan v. Winegar, 95 Mich. 430; 20 L. R. A. 705; 54 N. W. 901; Stinson v. Lee, 68 Miss. 113; 24 Am. St. Rep. 257; 9 L. R. A. 830; 8 So. 272; Sparks v. Transfer Co., 104 Mo. 531; 24 Am. St. Rep. 351; 12 L. R. A. 714; 15 S. W. 417; Exchange Bank v. Lewis County, 28 W. Va. 273.

²Duvall v. Craig, 2 Wheat. (U. S.) 45; Powers v. Briggs, 79 Ill.

493; 22 Am. Rep. 175; McKenney v. Bowie, 94 Me. 397; 47 Atl. 918; Farrell v. Reed, 46 Neb. 258; 64 N. W. 959.

³Kitchen v. Holmes, 42 Or. 252; 70 Pac. 830.

⁴Tannatt v. Bank, 1 Colo. 278; 9 Am. Rep. 156; Burlingame v. Brewster, 79 Ill. 515; 22 Am. Rep. 177; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

⁵Keeley Brewing Co. v. Decorating Co., 194 Ill. 580; 62 N. E. 923.

⁶Fargason v. Ford, 119 Ga. 343; 46 S. E. 431; McClellan v. Robe, 93

indorser liable on a note signed "A, agent," demand must be made on A and not on the undisclosed principal.⁷ If a church is not named in the body of a note, and the trustees sign individually, the addition of the words "Trustees of" the church in question is not sufficient to show that no personal liability was intended.⁸ So a signature "A, vestryman," "Grace Church" imposes a personal liability upon A.⁹

Even on this point the courts are by no means unanimous. Some authorities hold that a designation of agency may, in connection with the wording of the instrument, show that no personal liability is intended.¹⁰ So a note signed "A, B, C, vestrymen of the Episcopal Society," was held not to impose personal liability on A, B and C.¹¹ Thus a note signed "James R. Wilson, Pres't. T. N. Co.," was held to be the obligation of the corporation.¹² So a note beginning "we promise" and signed "A, treasurer," and stamped with a seal bearing the corporate name was held to be the note of the corporation and not of A.¹³ Under the negotiable instruments act, no personal liability is imposed on one who signs in a representative capacity. Accordingly a note signed by "A, trustee,"¹⁴ imposes no personal liability.

§1149. Signature by two or more persons with addition of personal description.

If two or more persons sign, and the question of the existence of personal liability is presented, there is as much of a conflict

Ind. 298; *Fiske v. Eldridge*, 12 Gray (Mass.) 474; *Farrell v. Reed*, 46 Neb. 258; 64 N. W. 959.

⁷ *Stinson v. Lee*, 68 Miss. 113; 24 Am. St. Rep. 257; 9 L. R. A. 830; 8 So. 272.

⁸ *Burlingame v. Brewster*, 79 Ill. 515; 22 Am. Rep. 177; *Hayes v. Brubaker*, 65 Ind. 27; *Hays v. Crutcher*, 54 Ind. 260.

⁹ *Tilden v. Barnard*, 43 Mich. 376; 38 Am. Rep. 197; 5 N. W. 420.

¹⁰ *Fuller v. Hooper*, 3 Gray (Mass.) 334; *Ballou v. Talbot*, 16

Mass. 461; 8 Am. Dec. 146; *Dispatch Line v. Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Safford v. Wyckoff*, 1 Hill (N. Y.) 11; 4 Hill (N. Y.) 442.

¹¹ *Johnson v. Smith*, 21 Conn. 627.

¹² *Olcott v. Ry.*, 27 N. Y. 546; 84 Am. Dec. 298.

¹³ *Miller v. Roach*, 150 Mass. 140; 6 L. R. A. 71; 22 N. E. 634.

¹⁴ *Megowan v. Peterson*, 173 N. Y. 1; 65 N. E. 738.

as where one only signs, but the states are divided on different lines. Thus, if a note is signed by two or more persons with an official designation, such as "president" or "secretary" opposite the name of each, we find a conflict of authority. Some courts hold that such a form of signature imposes no individual liability.¹ Thus a note beginning "the president and directors will pay" and signed "A, President," "B," and so forth, was held to be the obligation of the company and not to impose a personal liability.² Other authorities hold that such a form of execution creates a personal liability.³ Thus a note beginning "we promise" and signed "J. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," was held to impose joint individual liability.⁴ If a note is signed with the name of a corporation, followed by the names of two or more officers, with the name of the office opposite the name of each person, another conflict of authority exists. Some jurisdictions hold that such a note is the note of the corporation only.⁵ Thus a note signed "A, Secretary," "B, President," payable to "ourselves," and indorsed "Worcester Brewing Co., B, President, A, Secretary," was held to be the note of the corporation.⁶ Other courts hold that such a contract creates an individual liability. Thus a note beginning "we promise," and signed "The Pendleton Glass Company, by B. F. Aiman, President; C. B. Orvis, Vice President; Charles H. Roach, Secretary; A. B. Taylor, Benj. Rogers, J. R. Boston, directors," was held to impose individual liability on the directors.⁷ A note beginning "we promise to pay" and signed "Belle Plaine

¹ Farmers', etc., Bank v. Colby, 64 Cal. 352; 28 Pac. 118; Armstrong v. Canal Co., 14 Utah 450; 48 Pac. 690.

² Yowell v. Dodd, 3 Bush. (Ky.) 581; 96 Am. Dec. 256.

³ Albany, etc., Co. v. Bank, 17 Ind. App. 531; 60 Am. St. Rep. 178; 47 N. E. 227; Whitney v. Suduth, 4 Met. (Ky.) 296; Titus v. Kyle, 10 O. S. 444; Scott v. Baker, 3 W. Va. 285.

⁴ Albany, etc., Co. v. Bank, 17 Ind. App. 531; 60 Am. St. Rep. 178; 47 N. E. 227.

⁵ American National Bank v. Mfg. Co., 1 Neb. Unofficial 322; 95 N. W. 672.

⁶ Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577; 58 N. E. 162.

⁷ Taylor v. Reger, 18 Ind. App. 466; 63 Am. St. Rep. 352; 48 N. E. 262.

Canning Co., H. Wessel, Sec'y., A. J. Hartman, Pres.," imposes individual liability upon the officers.⁸

§1150. Signature by names of principal and agent.

If the note is signed by the name of the principal, with the name of the agent subscribed below that of the principal, without the use of the word "by" to show agency, a question is presented on which there is a division of authority. A question of this sort usually arises on a note of a corporation which must be executed by some one of its agents, and which is signed by the name of the corporation followed by the name of one of its agents, with the addition of "President," "Secretary," or some such official designation. The weight of authority is that such a note is the note of the corporation exclusively, and that no personal liability attaches to the agent whose name is thus signed.¹ There is some authority for holding that the agent who signs in such a form incurs a personal liability.²

§1151. Body of instrument indicating nature of liability.

The wording of the clause in which the promise is made must be considered in determining the nature of the liability imposed. A note beginning "We, the trustees of Musconetcong Grange, No. 114, known as W. Fleming & Co.," promise, and signed with the word "Trustees" and the individual names of the trustees, imposes a personal liability on the trustees.¹

⁸ McCandless v. Canning Co., 78 Ia. 161; 16 Am. St. Rep. 429; 4 L. R. A. 396; 42 N. W. 635.

¹ Falk v. Moebs, 127 U. S. 597; Bean v. Pioneer Mining Co., 66 Cal. 451; 56 Am. Rep. 106; 6 Pac. 86; Scanlon v. Keith, 102 Ill. 634; 40 Am. Rep. 624; Gillet v. Bank, 7 Ill. App. 499; Gleason v. Milk Supply Co., 93 Me. 544; 74 Am. St. Rep. 370; 45 Atl. 825; Castle v. Foundry Co., 72 Me. 167; Atkins v. Brown, 59 Me. 90; Draper v. Heating Co., 5 All. (Mass.) 338; Reeve v. Bank, 54 N. J. L. 208; 33 Am. St. Rep.

675; 16 L. R. A. 143; 23 Atl. 853; Latham v. Flour Mills, 68 Tex. 127; 3 S. W. 462; Leibscher v. Kraus, 74 Wis. 387; 17 Am. St. Rep. 171; 5 L. R. A. 496; 43 N. W. 166.

² Mathews v. Mattress Co., 87 Ia. 246; 19 L. R. A. 676; 54 N. W. 225; Heffner v. Brownell, 70 Ia. 591; 31 N. W. 947; 75 Ia. 341; 39 N. W. 640. The earlier case of Wheelock v. Wilson, 15 Ia. 464, is overruled.

¹ Vliet v. Simanton, 63 N. J. L. 458; 43 Atl. 738; and see Hypes v. Griffin, 89 Ill. 134; 31 Am. Rep. 71;

So a note beginning "The directors promise" and signed by the directors, imposes personal liability.² A note beginning "we promise" "for the Boston Glass Manufactory" and signed by A, B, and C, individually, was held to be the individual note of A, B, and C.³ So an instrument which, in the body thereof purports to be executed by A "for the National Umbrella Company,"⁴ or by A "of the X Company,"⁵ imposes in each case a personal liability on A. Similar phraseology is held in other cases not to impose personal liability. Thus a note beginning "The Howard County Agricultural Association who execute this note by her directors" "do promise" and signed "A, Secretary; B, C, directors Howard County Agricultural Association," does not impose personal liability.⁶ Under the Maine statute a note beginning "We, the subscribers for" a certain corporation, signed by the individual names of the makers, imposes liability in the corporation, and not on the individuals signing.⁷ An acceptance, written on a letter bearing the corporation letter head, and signed by an agent individually, written in reply to a proposition addressed to the corporation, binds the corporation.⁸

§1152. Liability assumed by public officers.

An important difference between contracts of public agents and contracts of private agents is in the construction of liability intended to be assumed. We have seen that in contracts of private agents the mere addition of the official capacity to the

Powers v. Briggs, 79 Ill. 493; 22 Am. Rep. 175.

² McKenney v. Edwards, 88 Ky. 272; 21 Am. St. Rep. 339; 3 L. R. A. 397; 10 S. W. 815. (However in such a case it is said that the question of the nature of liability imposed must be determined on answer and not on demurrer. McKenney v. Edwards, 88 Ky. 272; 21 Am. St. Rep. 339; 3 L. R. A. 397; 10 S. W. 815; citing Pack v. White, 78 Ky. 243.)

³ Bradlee v. Glass Manufactory, 16 Pick. (Mass.) 347.

⁴ General Electric Co. v. Gill, 127 Fed. 241.

⁵ Railway Speed Recorder Co. v. Tool Co., 126 Fed. 223.

⁶ Armstrong v. Kirkpatrick, 79 Ind. 527.

⁷ Simpson v. Garland, 72 Me. 40; 39 Am. Rep. 297.

⁸ Towers v. Cattle Co., 83 Minn. 243; 86 N. W. 88.

signature does not prevent personal liability from being imposed on the agent; and it does not prevent the contract from being treated as his personally.¹ In contracts of public agents, there is, unfortunately, a lack of harmony on this question, as there is in contracts of private agents. There may be said, however, to be a strong tendency in contracts of public agents, to hold that the public corporation is bound and the agent is not in many cases where the opposite result would be reached in contracts of private agents. Thus a lease made to a city, signed by the mayor individually and sealed with his seal is the contract of the city and not of the mayor personally.² So an appeal bond purporting to be the obligation of the city, but signed by the mayor and the clerk with their official titles added to their names is valid as the obligation of the city.³ An order directed to a township clerk, directing him to make a specified payment out of township funds and signed "A, B, C, Trustees," does not impose personal liability on A, B and C.⁴ So a contract beginning "We, trustees," and promising to repay "money borrowed to build" a certain school house, signed individually, imposes no personal liability.⁵ A reward offered by "A, B, C, Selectment of Milton," imposes personal liability on such signers.⁶ A contract signed by the individual names of public officers, and not showing on its face any intention to make a contract on behalf of the public is the individual contract of such officers.⁷

¹ See § 1148 *et seq.*

² *Chicago v. Peck*, 196 Ill. 260; 63 N. E. 711; affirming 98 Ill. App. 434.

³ (*City of*) *Fon du Lac v. Atto*, 113 Wis. 39; 90 Am. St. Rep. 830; 88 N. W. 917.

⁴ *Willett v. Young*, 82 Ia. 292; 11 L. R. A. 115; 47 N. W. 990.

⁵ *Warford v. Temple* (Ky.), 73 S. W. 1023.

⁶ *Brown v. Bradlee*, 156 Mass. 28; 32 Am. St. Rep. 430; 15 L. R. A. 509; 30 N. E. 85.

⁷ *Western Publishing House v. Murdick*, 4 S. D. 207; 21 L. R. A. 671; 56 N. W. 120.

CHAPTER LIV.

TIME.

§1153. Construction of terms concerning time of performance.

The intention of the parties controls in questions of time of performance. Accordingly it is dangerous to attempt to lay down arbitrary rules for ascertaining such intention. A few illustrations of the results reached by the courts in specific cases may be given, however. A contract to pay or deliver "by" a certain day gives the whole of such day for performance.¹ Thus a subscription conditioned on raising a certain sum "by" a certain day is enforceable where the requisite amount is subscribed at a meeting held on the night of such day.² A promise to pay "on or before" a certain day is treated as a promise to pay on that day, with an option to pay before the time designated.³ A contract to reimburse one for loss sustained by reason of his purchase of stock "at or before the expiration of five years," means five years from the date of the contract, and not five years from the loss.⁴ A promise to perform within a certain time from a given event is to be construed by counting from the completion of the event. Thus a provision for furnishing proofs of loss sixty days after the fire causing loss means sixty days after the fire has ended, if it lasts for more than one day.⁵ A provision for delivering certain bonds within six months after a foreclosure sale means within

¹ *Preston v. Dunham*, 52 Ala. 217; *Massie v. Belford*, 68 Ill. 290; *Stevens v. Blunt*, 7 Mass. 240; *Coonley v. Anderson*, 1 Hill (N. Y.) 519.

² *Elizabeth City Cotton Mills v. Dunstan*, 121 N. C. 12; 61 Am. St. Rep. 654; 27 S. E. 1001.

³ *Wilson v. Bicknell*, 170 Mass.

259; 49 N. E. 113; *Helmer v. Krock*, 36 Mich. 371; *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197.

⁴ *Wilson v. Bicknell*, 170 Mass. 259; 49 N. E. 113.

⁵ *National Wall Paper Co. v. Ins. Corporation*, 175 N. Y. 226; 67 N. E. 440.

six months after the sale is consummated by the delivery of the deed.⁶ A contract to exchange realty when a certain loan is procured, or "within forty days at the most," means forty days from the time that the loan is procured.⁷ A contract giving the purchaser of standing timber, until the first day of June, 1898, to remove it, "with the privilege of another year if needed to remove" it, means a year from the first of June, 1898.⁸ If the last day of performance falls on Sunday, performance on Monday is a sufficient compliance with the contract.⁹ A promise to pay or perform in a certain number of months *prima facie* means calendar months.¹⁰ Under a contract for performance in a certain time the day of the date is excluded from the computation, and the last day of performance is included.¹¹ A contract which does not expressly state within what time it is to be performed may refer to another contract in such a way as to show that the time fixed in such other contract is the time intended by the parties.¹² Thus a contract to give employment or to pay royalties during the "term" of a prior contract for the use of a patent for five years, with the option of five more, has been held to mean the ten-year term, even though the option as to the second period of five years was not in fact taken advantage of.¹³

§1154. Reasonable time intended if time not fixed.

If no time for performance is fixed by the contract, the implication is that a reasonable time for performance is intended.¹

⁶ Houston, etc., Ry. v. Keller, 90 Tex. 214; 37 S. W. 1062.

⁷ Te Poel v. Shutt, 57 Neb. 592; 78 N. W. 288.

⁸ Oconto Co. v. Lundquist, 119 Mich. 264; 77 N. W. 950.

⁹ The Harbinger, 50 Fed. 941; Ingram v. Wackernagel, 83 Ia. 82; 48 N. W. 998.

¹⁰ Doyle v. Bank, 131 Ala. 294; 90 Am. St. Rep. 41; 30 So. 880.

¹¹ Doyle v. Bank, 131 Ala. 294; 90 Am. St. Rep. 41; 30 So. 880.

¹² Poole v. Plush Co., 171 Mass. 49; 50 N. E. 451; Ryberg v. Goodnow, 59 Minn. 413; 61 N. W. 455.

¹³ Poole v. Plush Co., 171 Mass. 49; 50 N. E. 451.

¹ McFadden v. Henderson, 128 Ala. 221; 29 So. 640; Griffin v. Ogletree, 114 Ala. 343; 21 So. 488; Comer v. Way, 107 Ala. 300; 54 Am. St. Rep. 93; 19 So. 966; Bryant v. Ry., 119 Ga. 607; 46 S. E. 829; Atchison, etc., R. R. v. Burlingame Township, 36 Kan. 628; 59

If performance is made within such reasonable time, no default exists; nor can default exist until a reasonable time has elapsed.² Refusal to perform for such time in the future as is not reasonable prevents the objection that the time within which performance was requested was not reasonable.³ On the other hand, failure to perform within a reasonable time constitutes a breach.⁴ Performance of such a contract after a reasonable time is unavailing if the adversary party has not consented to an extension of time.⁵ The principle that a reasonable time is implied if no time is fixed applies to contracts for the sale of land,⁶ or of personalty,⁷ as a contract to assign a patent,⁸ to building contracts,⁹ to contracts for work and labor, hauling logs,¹⁰ or driving logs,¹¹ or procuring a loan,¹² or effecting a sale of real estate,¹³ or to furnish a vessel and deliver lumber,¹⁴

Am. Rep. 578; 14 Pac. 271; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320; 24 Am. Rep. 593; *Van Arsdale v. Brown*, 18 Ohio C. C. 52; 9 Ohio C. D. 488; *Gammon v. Bunnell*, 22 Utah 421; 64 Pac. 958; *Dennis v. Stoughton*, 55 Vt. 376; *Poling v. Lumber Co.*, — W. Va. —; 47 S. E. 279.

² *Bell v. Mendenhall*, 78 Minn. 57; 80 N. W. 843.

³ *Reynolds v. Reynolds*, 74 Vt. 463; 52 Atl. 1036.

⁴ *Hume v. Mullins (Ky.)*, 35 S. W. 551; *Gainor v. Boom Co.*, 86 Mich. 112; 48 N. W. 787; *Lynd v. Printing Co.*, 20 R. I. 344; 39 Atl. 188.

⁵ *Meador v. Allen*, 110 Ia. 588; 81 N. W. 799.

⁶ *Noyes v. Barnard*, 63 Fed. 782; *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; 6 S. E. 264; *Williamson v. Neeves*, 94 Wis. 656; 69 N. W. 806.

⁷ *Watkins v. Morris*, 16 Mont. 309; 40 Pac. 600; *Smith v. Machine Co.*, 46 S. C. 511; 24 S. E. 376; *Boyce v. Timpe (Ia.)*, 89 N. W. 83.

⁸ *Niles v. Graham*, 181 Mass. 41; 62 N. E. 986.

⁹ *House. Lane v. Hardware Co.*, 121 Ala. 296; 25 So. 809; *Brodek v. Farnum*, 11 Wash. 565; 40 Pac. 189. *Steam plant. North v. Mallory*, 94 Md. 305; 51 Atl. 89; *Electric-lighting plant. Florence, etc., Co. v. Hanby*, 101 Ala. 15; 13 So. 343. *Flouring-mill. Van Stone v. Mfg. Co.*, 142 U. S. 128.

¹⁰ *Griffin v. Ogletree*, 114 Ala. 343; 21 So. 488; *Greenwood v. Davis*, 106 Mich. 230; 64 N. W. 26.

¹¹ *Bonifay v. Hassell*, 100 Ala. 269; 14 So. 46; *Gainor v. Boom Co.*, 86 Mich. 112; 48 N. W. 787; *Day v. Gravel*, 72 Minn. 159; 75 N. W. 1.

¹² *Collier v. Weyman*, 114 Ga. 944; 41 S. E. 50.

¹³ *Boyd v. Watson*, 101 Ia. 214; 70 N. W. 120. *Contra*, that such a contract is revocable at the will of the owner of the realty. *Woods v. Hart*, 50 Neb. 497; 70 N. W. 53.

¹⁴ *Whiting v. Gray*, 27 Fla. 482; 11 L. R. A. 526; 8 So. 726.

or to cut and remove timber,¹⁵ or to forbear a legal right,¹⁶ as enforcing a lien.¹⁷ So an option, the time for the exercise of which is not fixed, must be exercised in a reasonable time.¹⁸ So a contract to repurchase stock at the end of a given time if the vendee holds it then and wishes to sell it, has been held to give the vendee a reasonable time after the end of such period to make his election.¹⁹ The purchaser of realty has ordinarily a reasonable time to examine the abstract of title before paying the purchase price.²⁰ So a contract to furnish capital as needed gives a reasonable time after notice that it is needed to furnish it.²¹ So a contract to submit a cause to the judge at the next term of court, a jury to be waived and no appeal or error to be taken, requires that the complaint should be filed in time to allow a reasonable time to file an answer.²² A contract which provides for a test after delivery of the article sold, and before final acceptance, gives a reasonable time for making such test.²³ In some cases a time other than merely a reasonable time is implied from the terms of the contract. A contract for the loan of money without provision for the time of repayment implies repayment on demand.²⁴ A continuous contract of employment, no time of duration being fixed, is terminable at the will of either party.²⁵ This principle applies

¹⁵ *Ferguson v. Arthur*, 128 Mich. 297; 87 N. W. 259.

¹⁶ *Moore v. McKenney*, 83 Me. 80; 21 Atl. 749.

¹⁷ *Anderson v. Wainwright*, 67 Ark. 62; 53 S. W. 566. (An agreement to refrain from sale, and collect the debt out of the rents.)

¹⁸ *Catlin v. Green*, 120 N. Y. 441; 24 N. E. 941.

¹⁹ *Maurer v. King*, 127 Cal. 114; 59 Pac. 290; *La Dow v. Bement*, 119 Mich. 685; 45 L. R. A. 479; 79 N. W. 1048.

²⁰ *Pennsylvania Mining Co. v. Thomas*, 204 Pa. St. 325; 54 Atl. 101.

²¹ *Niles v. Graham*, 181 Mass. 41; 62 N. E. 986.

²² *Pendleton v. Light Co.*, 121 N. C. 20; 27 S. E. 1003. (The complaint was offered for filing in this case on the last day of the term when the judge was about to leave the bench.)

²³ *Edison, etc., Co. v. Navigation Co.*, 8 Wash. 370; 40 Am. St. Rep. 910; 24 L. R. A. 315; 36 Pac. 269; see also *Turner v. Foundry Co.*, 9 Mich. 166, 634; 56 N. W. 356; 57 N. W. 192.

²⁴ *Jacoby v. Jacoby*, 103 Fed. 473.

²⁵ *De Briar v. Minturn*, 1 Cal. 450; *Greer v. Mfg. Co.*, 1 Penn (Del.) 581; 43 Atl. 609; *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427; 59 Am. St. Rep. 467; 36 S. W. 181; *McCullough Iron Co. v. Carpenter*.

even if the compensation is fixed at a certain sum per year.²⁶ However, a contract by A to employ B as long as A is engaged in the saw-mill business on the Ohio River does not give to A the right to discharge B at will.²⁷

§1155. Reasonable time.—Whether question of law or fact.

What is a reasonable time for performance is a question of fact to be determined as a fact, in view of the circumstances of the case.¹ Accordingly if an action is brought on an agreement to accept a conveyance and in consideration thereof to execute a written contract to pay a certain mortgage, and to reconvey on payment of the amount of such mortgage, and the defense is that plaintiff delayed an unreasonable time before performing the conditions precedent on his part to be performed, it is not error for the court to refuse to charge that a delay of four months would be unreasonable.² On the other hand, a notice for performance in eighty days, given to the vendor, followed by demand for performance in five days, followed by a delay of six weeks before bringing a suit for specific performance, has been held as a fact to give to the vendor a reasonable time for performance.³ In many cases it has been said that this question

67 Md. 554; 11 Atl. 176; *Edwards v. Seaboard R. Co.*, 121 N. C. 490; 28 S. E. 137; *Martin v. New York L. Ins. Co.*, 148 N. Y. 117; 42 N. E. 416; *Copp v. Colorado Coal & I. Co.*, 46 N. Y. Supp. 542; 20 Misc. 702; *Christensen v. Borax Co.*, 26 Or. 302; 38 Pac. 127; *Kirk v. Hartman*, 63 Pa. St. 97; *Booth v. National India-Rubber Co.*, 19 R. I. 696; 36 Atl. 714; *Prentiss v. Ledyard*, 23 Wis. 131.

²⁶ *Greer v. Mfg. Co.*, 1 Penn. (Del.) 581; 43 Atl. 609.

²⁷ *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455; 50 S. W. 685. So under a contract whereby A agrees to employ B as long as A

shall make use of B's patents. *Raymond v. White*, 119 Mich. 438; 78 N. W. 469.

¹ *Drake v. Goree*, 22 Ala. 409; *Watts v. Sheppard*, 2 Ala. 425; *Campbell v. Heney*, 128 Cal. 109; 60 Pac. 532; *Jenkins v. Lykes*, 19 Fla. 148; 45 Am. Rep. 19; *Morrison v. Wells*, 48 Kan. 494; 29 Pac. 601; *Elder v. Rourke*, 27 Or. 363; 41 Pac. 6; *Hays v. Hays*, 10 Rich. L. (S. C.) 419; *Boyington v. Sweeney*, 77 Wis. 55; 45 N. W. 938.

² *Peabody v. Fellows*, 181 Mass. 26; 62 N. E. 1053.

³ *Harding v. Olson*, 177 Ill. 298; 52 N. E. 482; affirming 76 Ill. App. 475.

is one of law,⁴ where the essential facts are not in dispute.⁵ This, however, means nothing more than that if this fact, like any other fact, is either conceded by the parties to exist or is established by uncontradicted evidence, it cannot be said to be a fact in issue, to be decided as the facts in issue are decided.

§1156. Time fixed by extrinsic act.

The time of performance may be fixed with reference to the doing of some specified act.¹ This is usually held to be a provision inserted to fix the time of performance, but not to make the doing of such other act a condition precedent. Hence if such other act is never done, the act contracted for must be done in at least a reasonable time. This principle has been applied to a promise to pay when the maker has finished a church then building,² or "as soon as the crop can be sold or the money raised from any other source,"³ or when the promisor shall sell the place he lives in,⁴ or to pay in twelve months "or as soon as I can sell the above amount of Allen's Vegetable Tonic,"⁵ or to credit the amount of the debtor's cigars sold by the creditor, upon the debt and thus extinguish it,⁶ or when other specified property is sold at a specified price;⁷ or to pay in four months or as soon as the promisor shall collect a certain note;⁸ or to pay by a certain date "on the condition that the banks of Tennessee have resumed specie payment at that time; if not, as soon thereafter as they do resume specie payment";⁹ or to

⁴ Luckhart v. Ogden, 30 Cal. 547; Attwood v. Clark, 2 Me. 249; Echols v. Railroad Co., 52 Miss. 610.

⁵ Cotton v. Cotton, 75 Ala. 345; Hill v. Hobart, 16 Me. 164; Hedges v. R. R., 49 N. Y. 223.

¹ Remy v. Olds, 88 Cal. 537; 26 Pac. 355; Collins v. Park, 93 Ky. 6; 18 S. W. 1013; McKinnon Mfg. Co. v. Fish Co., 102 Mich. 221; 60 N. W. 472.

² Eaton v. Yarborough, 19 Ga. 82.

³ Nunez v. Dautel, 19 Wall. (U. S.) 560.

⁴ Crooker v. Holmes, 65 Me. 195; 20 Am. Rep. 687. (Hence judgment and levy on such property does not relieve the promisor from liability to pay in a reasonable time.)

⁵ Harlow v. Boswell, 15 Ill. 56.

⁶ Jacoby v. Jacoby, 103 Fed. 473.

⁷ Noland v. Bull, 24 Or. 479; 33 Pac. 983. As to pay a commission by conveying realty when other realty is exchanged. Alvord v. Cook, 174 Mass. 120; 75 Am. St. Rep. 288; 54 N. E. 499.

⁸ McCarty v. Howell, 24 Ill. 341.

⁹ Walters v. McBee, 1 Lea (Tenn.) 564.

pay by a certain day "or as soon thereafter as said railroad company" shall make certain payments to the promisor;¹⁰ and to a contract to deliver lumber at a certain time "or as soon thereafter as vessel can be got ready."¹¹ A note, payable ninety days after the return of a specified ship, is payable in case such ship is lost, ninety days after the time usually required for such a trip.¹² Thus if a promise is made to pay a certain sum when it is realized from the sale of the products of certain lands, such sum is due at once as soon as the promisor has made literal performance impossible by selling such land.¹³ An agreement to pay the consideration for a conveyance to the grantor's grandson when he reaches the age of twenty-one is not discharged by his death before reaching such age, but his legal representatives may recover the amount when such grandson would have been twenty-one had he lived.¹⁴ An express provision that payment shall not be made until a certain event occurs, leaves no room for construction, and is given full force and effect. Thus if a provision is inserted in a contract that a party who saws logs into lumber is not to be paid until the adversary party has sold the lumber, payment is not due until such sale.¹⁵ A promise to pay when able is held in some jurisdictions to imply a promise to pay in at least a reasonable time. This principle has been applied to contracts to pay "when I can make it convenient,"¹⁶ "as fast as I can spare the same from my salary,"¹⁷ as fast as the promisor was financially able without sacrificing his interests in a given corporation, for stock in which the contract in question was made,¹⁸ or "when payor and payee mutually agree."¹⁹ In other jurisdictions a

¹⁰ Crass v. Scruggs, 115 Ala. 258; 22 So. 81.

¹¹ Whiting v. Gray, 27 Fla. 482; 11 L. R. A. 526; 8 So. 726.

¹² Randall v. Johnson, 59 Miss. 317; 42 Am. Rep. 365.

¹³ Poirier v. Gravel, 88 Cal. 79; 25 Pac. 962.

¹⁴ Haines v. Weirick, 155 Ind. 548; 58 N. E. 712.

¹⁵ Gardner v. Edwards, 119 N. C. 566; 26 S. E. 155.

¹⁶ Lewis v. Tipton, 10 O. S. 88; 75 Am. Dec. 498.

¹⁷ Culver v. Caldwell, 137 Ala. 125; 34 So. 13.

¹⁸ Chadwick v. Hopkins, 4 Wyom. 379; 62 Am. St. Rep. 38; 34 Pac. 899. (A delay of four years was held more than a reasonable time.)

¹⁹ Page v. Cook, 164 Mass. 116; 49 Am. St. Rep. 449; 28 L. R. A. 759; 41 N. E. 115.

promise to pay as the debtor "might feel able to pay," is held to leave the time of payment in the *bona fide* and honest judgment of the debtor, though a legal liability is created by such contract.²⁰ If the debtor is in fact financially able to pay, he is bound to make the payment stipulated under such contract.²¹

§1157. Performance not due till end of stipulated time.

If a certain time is fixed within which performance may be made, the party owing performance has the entire time thus fixed, within which to perform. Thus under an option to be exercised within a certain time, by which the vendor is required to convey land on seven days' notice, such notice may be given at any time before the expiration of the option, irrespective of whether the period of seven days will end after such time or not.¹ If A agrees to secure a certain bid for B's stock within a year, A has the whole of such year, and an offer mailed so as to reach B on the last day of such year is held to be sufficient.² So a contract of subscription conditioned on raising a certain sum by a certain day is binding if the sum is raised at a meeting held on the night of such day.³ So a contract to complete a boat by a certain time is not broken until such time has elapsed.⁴ So a contract to remove timber in certain designated years gives the whole of such years in which to remove it.⁵ Performance of a contract to sell land during A's life-time cannot be compelled in any shorter time.⁶ So in a contract of sale, if the vendor has the whole of a season in which to deliver, the vendee cannot fix a time within the season for delivery.⁷ If a son agrees to pay interest to his father during the latter's life,

²⁰ *Pistel v. Ins. Co.*, 88 Md. 552; 45 L. R. A. 219; 42 Atl. 210.

²¹ *Flather v. Machine Co.*, 71 N. H. 398; 52 Atl. 454.

¹ *Guyer v. Warren*, 175 Ill. 328; 51 N. E. 580.

² *Duchemin v. Kendall*, 149 Mass. 171; 3 L. R. A. 784; 21 N. E. 242.

³ *Elizabeth City Cotton Mills v.*

Dunstan, 121 N. C. 12; 61 Am. St. Rep. 654; 27 S. E. 1001.

⁴ *Vandegrift v. Engineering Co.*, 161 N. Y. 435; 55 N. E. 941; 48 L. R. A. 685.

⁵ *Larson v. Cook*, 85 Wis. 564; 55 N. W. 703.

⁶ *Michael v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; 6 S. E. 264.

⁷ *Dingley v. Oler*, 117 U. S. 490.

on an amount advanced, and to settle with the father's estate, such amount, even if a debt, is not due before the father's death.⁸

§1158. Premature tender.

If the contract fixes a certain time for performance, the party from whom performance is due has no right to perform before that time. Hence, premature tender is ineffectual.¹ It does not discharge a mortgage given to secure the debt, payment whereof is thus tendered.² So if payment is to be made in part in money and in part in an interest-bearing note, premature tender of the entire debt in money is ineffectual.³ So it has been held that if a vendee of stock has the right to rescind at the end of one year, tender of the stock before the end of the year is premature and ineffectual.⁴

§1159. Time of essence of contract.—Meaning of term.

The statement that time is of the essence of a contract, means that the provision fixing the time of performance is looked upon as a vital term of the contract, the breach of which may operate as a discharge of the entire contract. Accordingly, if time is of the essence of the contract, failure to perform at the time specified gives to the adversary party the right of treating the contract as discharged.¹ If time is not of the essence of the contract, failure to perform at the time specified does not justify the adversary party in treating the contract as discharged.² It is

⁸ Hammett v. Brown, 44 S. C. 397; 22 S. E. 482.

¹ Bowen v. Julius, 141 Ind. 310; 40 N. E. 700.

² Bowen v. Julius, 141 Ind. 310; 40 N. E. 700; Moore v. Kime, 43 Neb. 517; 61 N. W. 736.

³ Barbour v. Hickey, 2 App. D. C. 207; 24 L. R. A. 763.

⁴ Schultz v. O'Rourke, 18 Mont. 418; 45 Pac. 634.

¹ Slater v. Emerson, 19 How. (U. S.) 224; McFadden v. Henderson, 128 Ala. 221; 29 So. 640; Vorwerk

v. Nolte (Cal.), 24 Pac. 840; Staley v. Thomas, 68 Md. 439; 13 Atl. 53; Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624; Sanborn v. Murphy, 86 Tex. 437; 25 S. W. 610; Jordan v. Coulter, 30 Wash. 116; 70 Pac. 257; Owen v. Henderson, 16 Wash. 39; 58 Am. St. Rep. 17; 47 Pac. 215.

² Armstrong v. Breen, 101 Ia. 9; 69 N. W. 1125; University of Des Moines v. Trust Co., 87 Ia. 36; 53 N. W. 1080; Usher v. Hollister, 58 Kan. 431; 49 Pac. 525.

sufficient if the contract is performed within a reasonable time after that specified in the contract. The question, whether time is not of the essence of the contract, is a question of construction. When this question is determined, the effect of the failure of the party in default to perform at the time stipulated is a question of breach. The question whether time is of the essence of the contract, therefore, might be treated under either or both of the headings of construction or discharge.

§1160. Time of essence at law.

At law the general rule is that time is of the essence of the contract unless a contrary intent appears from the face of the contract.¹ A contract for the sale of chattels, especially those of fluctuating value, is a contract of which time is of the essence. This rule is especially applicable to mercantile contracts,² such as wholesale contracts of sale of clothing,³ uniform-cloth,⁴

¹ *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Slater v. Emerson*, 19 How. (U. S.) 224; *Hull, etc., v. Coke Co.*, 113 Fed. 256; *Savannah Ice-Delivery Co. v. Transit Co.*, 110 Ga. 142; 35 S. E. 280; *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; 23 N. E. 598; *Merritt v. Construction Co.*, 91 Md. 453; 46 Atl. 1013; *McGrath v. Gegner*, 77 Md. 331; 39 Am. St. Rep. 415; 26 Atl. 502; *Garrison v. Cooke*, 96 Tex. 228; 97 Am. St. Rep. 906; 61 L. R. A. 342; 72 S. W. 54; *Bounds v. Hickerson*, 26 Tex. Civ. App. 608; 63 S. W. 887.

² *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213; *Lefferts v. Weld*, 167 Mass. 531; 46 N. E. 107; *Rommel v. Wingate*, 103 Mass. 327; *Pope v. Porter*, 102 N. Y. 366; 7 N. E. 304. "In the contracts of merchants, time is of the essence.

The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 203; quoted in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 261.

³ *White v. Wolf*, 185 Pa. St. 369; 39 Atl. 1011. (Delay would prevent the vendee from cataloguing and advertising the clothing.)

⁴ *Jones v. United States*, 96 U. S. 24.

or iron.⁵ A contract for the sale of a cargo of hemp to be shipped from Manila by a sailing vessel direct to New York, or via Hong Kong during the month of April or May is not performed by shipping it at Manila by a steamer arriving at Hong Kong on the third of June and transshipping it by sailing vessel leaving Hong Kong on June fifth.⁶ Thus contracts to pay insurance premiums at a given time as a condition of keeping the policy alive, must be performed strictly at the time specified.⁷ Time is not, however, of the essence of a contract to surrender a policy within six months after lapse.⁸ A charter-party⁹ which stipulates for performance at a given time, must be performed strictly at the time specified. Thus if a charter-party provides that a vessel shall proceed from Melbourne to Calcutta "with all possible despatch," the fact that the vessel proceeds from Melbourne to Manila and so arrives at Calcutta three months later than she would had she gone direct from Calcutta discharges the contract, even if she arrives at Manila before the charterer has secured another vessel.¹⁰ So time is of the essence of building contracts in which a definite time for completing the work is stipulated for;¹¹ or of a contract to build a gas-holder,¹² or to complete a railroad bridge by a certain day,¹³ or to remove a building by a certain day.¹⁴ Time is of the essence of a contract giving a license to enter and remove timber during a certain time.¹⁵ Contracts to cut timber in a given time other than licenses, such as a contract

⁵ *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Norrington v. Wright*, 115 U. S. 188.

⁶ *Lefferts v. Weld*, 167 Mass. 531; 46 N. E. 107.

⁷ *Klein v. Ins. Co.*, 104 U. S. 88; *New York Life Ins. Co. v. Statham*, 93 U. S. 24.

⁸ *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624; 53 L. R. A. 378; 60 S. W. 383.

⁹ *The Alert*, 61 Fed. 504.

¹⁰ *Lowber v. Bangs*, 2 Wall. (U. S.) 728.

¹¹ *Phillips, etc., Co. v. Seymour*, 91 U. S. 646; *Morrison v. Wells*, 48 Kan. 494; 29 Pac. 601; *Allen v. Cooper*, 22 Me. 133; *Johnson v. Slaymaker*, 18 Ohio C. C. 104; 9 Ohio C. D. 500.

¹² *Wood v. Gaslight Co.*, 111 Fed. 463; 49 C. C. A. 427.

¹³ *Slater v. Emerson*, 19 How. (U. S.) 224.

¹⁴ *Osgood v. Boston*, 165 Mass. 281; 43 N. E. 108.

¹⁵ *Utley v. Lumber Co.*, 59 Mich. 263; 26 N. W. 488.

of employment with the owner, the employee to remove the timber in a certain time,¹⁶ or a contract conveying an interest in standing timber, to be removed in a certain time,¹⁷ are contracts of which time is not of the essence.

§1161. Time not of essence in equity.

In equity, on the other hand, the general rule may be said to be that time is not of the essence of the contract.¹ "It must affirmatively appear that the parties regarded time or place as an essential element in their agreement or a court of equity will not so regard it."² In order to make time of the essence of the contract in equity, there must be either an express provision, making time of the essence,³ or the nature of the subject-matter must be such as to require prompt performance at the time stipulated. The reason for this difference between law and equity is, that in law the promisee acquires, as a rule, no interest in the property under an executory contract until he either performs or tenders performance. In equity, on the other hand, the vendee acquires an interest in the property contracted for when the contract of sale is made, and the assignment of a particular day for the payment of the purchase-money is looked upon as merely formal, to secure payment in a reasonable time.⁴ A contract for the payment of money at a given time is ordinarily a contract of which time is not

¹⁶ Thacker, etc., Co. v. Mallory, 27 Wash. 670; 68 Pac. 199.

¹⁷ Halstead v. Jessup, 150 Ind. 85; 49 N. E. 821.

¹ Brown v. Deposit Co., 128 U. S. 403; Hepburn v. Auld, 5 Cranch (U. S.) 262; Tate v. Development Co., 37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542; Chabot v. Park Co., 34 Fla. 258; 43 Am. St. Rep. 192; 15 So. 756; Reid v. Mix, 63 Kan. 745; 55 L. R. A. 706; 66 Pac. 1021; Kemper v. Walker (Ky.), 32 S. W. 1093; Sanford v. Weeks, 38 Kan. 319; 5 Am. St. Rep. 748; 16 Pac. 465;

Porter v. White, 128 N. C. 42; 38 S. E. 24; Jarvis v. Cowger, 41 W. Va. 268; 23 S. E. 522.

² Secombe v. Steele, 20 How. (U. S.) 94, 104.

³ Brown v. Deposit Co., 128 U. S. 403; Tate v. Development Co., 37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542; Chabot v. Park Co., 34 Fla. 258; 43 Am. St. Rep. 192; 15 So. 756; Frink v. Thomas, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717.

⁴ Secombe v. Steele, 20 How. (U. S.) 94.

of the essence;⁵ and so is a contract to release a mortgage.⁶

§1162. Express provision making time of essence.

If there is an express provision making time of the essence of the contract, full effect must be given to it.¹ Thus a provision and express condition that in case of failure of the vendee to perform, the vendor should have the right to declare the contract void makes time of the essence.² So if time is not originally of the essence of the contract, but after default the promisee gives notice fixing a reasonable time for performance, and insisting upon performance within that time, time may become of the essence of the contract.³ However if time is not originally of the essence of the contract, a notice given by one party before performance is due cannot make it of the essence.⁴

§1163. Nature of property contracted for.

The nature of the property concerning which the contract is made may show that time was of the essence of the contract.

⁵ *Tate v. Development Co.*, 37 Fla. 439; 53 Am. St. Rep. 251; 20 So. 542; *Barnard v. Lee*, 97 Mass. 92; *Allred v. Burns*, 106 N. C. 247; 10 S. E. 1034; *Frink v. Thomas*, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717; *Sylvester v. Born*, 132 Pa. St. 467; 19 Atl. 337; *Jarvis v. Cowger*, 41 W. Va. 268; 23 S. E. 522.

⁶ *Reid v. Mix*, 63 Kan. 745; 55 L. R. A. 706; 66 Pac. 1021.

¹ *Cheney v. Libby*, 134 U. S. 68; *Glock v. Colony Co.*, 123 Cal. 1; 69 Am. St. Rep. 17; 55 Pac. 713; 43 L. R. A. 199; *Martin v. Morgan*, 87 Cal. 203; 22 Am. St. Rep. 240; 25 Pac. 350; *Chabot v. Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192; 15 So. 756; *Miller v. Rice*, 133 Ill. 315; 24 N. E. 543; *Clarno v. Grayson*, 30 Or. 111; 46 Pac. 426; *Axford v. Thomas*, 160 Pa. St. 8; 28 Atl. 443; *Reddish v. Smith*, 10 Wash. 178; 45

Am. St. Rep. 781; 38 Pac. 1003.

² *Stinson v. Dousman*, 20 How. (U. S.) 461. So *Bennett v. Hyde*, 92 Cal. 131; 28 Pac. 104; *Woodruff v. Water Co.*, 87 Cal. 275; 25 Pac. 354; *Martin v. Morgan*, 87 Cal. 203; 22 Am. St. Rep. 240; 25 Pac. 350.

³ *Asia v. Hiser*, 38 Fla. 71; 20 So. 796; *Chabot v. Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192; 15 So. 756; *Burnap v. Sharpsteen*, 149 Ill. 225; 36 N. E. 1008; *Miller v. Rice*, 133 Ill. 315; 24 N. E. 543; *Barnard v. Lee*, 97 Mass. 92; *Foster v. Ley*, 32 Neb. 404; 15 L. R. A. 737; 49 N. W. 450; *King v. Ruckman*, 20 N. J. Eq. 316; *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559; *Kirby v. Harrison*, 2 Ohio St. 326; 59 Am. Dec. 677; *Frink v. Thomas*, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717.

⁴ *The Lucile Manor*, 70 Fed. 233.

If the property is one of fluctuating values, time is ordinarily looked upon as of the essence, such as a contract for the sale of mineral land,¹ or stock in a corporation.² If, on the other hand, the value is not fluctuating, time is ordinarily supposed to be not of the essence of the contract in equity. A contract for the sale of realty is ordinarily a contract of which time is not of the essence,³ such as a contract to take up certain mortgages on realty, sell it and apply the proceeds to a certain debt,⁴ or a contract to release a right of way to a railway company.⁵ A party to a contract who has delayed performance to speculate upon the change in value of the property contracted for, and tenders performance after the value is so changed as to make performance especially advantageous to himself, cannot have specific performance.⁶ Thus delay till the title is cleared and the land has risen in value from twenty-two dollars an acre to eighty dollars an acre prevents specific performance.⁷ Conversely, delay which does not result in a change in value does not of itself defeat specific performance. So if the depreciation in the value of the land occurs before the time fixed for delivering the deed delay does not prevent the vendor from obtaining specific performance.⁸ Time is not of the essence of a contract to print and deliver certain books by a specified time;⁹ nor is it of the essence of the right of the insured under his policy to demand a paid-up policy in case of lapse.¹⁰

¹ *Waterman v. Banks*, 144 U. S. 394.

² *Umfrid v. Brooks*, 14 Wash. 675; 45 Pac. 310.

³ *Secombe v. Steele*, 20 How. (U. S.) 94; *Ahl v. Johnson*, 20 How. (U. S.) 511; *Beverly v. Blackwood*, 102 Cal. 83; 36 Pac. 378; *Frink v. Thomas*, 20 Or. 265; 12 L. R. A. 239; 25 Pac. 717; *Watson v. Coast*, 35 W. Va. 463; 14 S. E. 249.

⁴ *Beverly v. Blackwood*, 102 Cal. 83; 36 Pac. 378.

⁵ *Hoffman v. Ry.*, 157 Pa. St. 174; 27 Atl. 564.

⁶ *Rogers v. Sauders*, 16 Me. 92; 33 Am. Dec. 635.

⁷ *Brashier v. Gratz*, 6 Wheat. (U. S.) 528.

⁸ *Garber v. Sutton*, 96 Va. 469; 31 S. E. 894.

⁹ *Pacific, etc., Co. v. Looffbourov*, 129 Cal. 24; 61 Pac. 944.

¹⁰ *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624; 95 Am. St. Rep. 393; 60 S. W. 383.

§1164. Time of subsidiary provision not of essence.

Time is not regarded as of the essence of a contract where it concerns a provision a breach of which does not constitute a total failure of consideration.¹ Thus where the two upper stories were leased, and were ready for occupancy where agreed upon, the lessee cannot avoid the lease because the rest of the building was not completed at the time agreed upon.² Even under a contract of subscription of which time is usually the essence³ failure of a university to erect a second building at the time agreed upon, after erecting the first building on time and opening for work, is not breach of an essential term.⁴

§1165. Time of essence in subscriptions.

Contracts of subscription, whereby the promisor agrees to pay money if a certain work is completed by a specified time, such as a subscription to aid a railway;¹ or an agreement to grant a right of way;² or a subscription to induce the removal of a factory to a given city by a given time,³ are contracts of which time is of the essence.

§1166. Time of essence in options.

The contract has thus far been considered in determining whether time is of the essence or not. When we turn from contracts to options, we find that both at law and equity an option which is in the nature of an offer outstanding for a certain

¹ *University v. Trust Co.*, 87 Ia. 36; 53 N. W. 1080; *Lynch v. Bechtel*, 19 Mont. 548; 48 Pac. 1112; *Coos Bay, etc., Co. v. Dixon*, 30 Or. 584; 48 Pac. 360.

² *Lynch v. Bechtel*, 19 Mont. 548; 48 Pac. 1112.

³ See § 1165.

⁴ *University v. Trust Co.*, 87 Ia. 36; 53 N. W. 1080.

¹ *Cincinnati, etc., R. R. v. Bensley*, 51 Fed. 738; 19 L. R. A. 796; 2 C. C. A. 480; *Jordan v. Newton*,

116 Mich. 674; 75 N. W. 130; *Port Huron, etc., Ry. v. Richards*, 90 Mich. 577; 51 N. W. 680; *Garrison v. Cooke*, 96 Tex. 228; 97 Am. St. Rep. 906; 61 L. R. A. 342; 72 S. W. 54. *Contra*, *Witmer Bros. Co. v. Weid*, 108 Cal. 569; 41 Pac. 491.

² *Thornton v. Ry.*, 84 Ala. 109; 5 Am. St. Rep. 337; 4 So. 197. (Suit in equity.)

³ *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; 47 N. W. 652.

period of time, must be accepted within the time limited, or it lapses. Accordingly, time is held to be of the essence of options both at law and in equity.¹ "Where, as in this case, the contract invests the one party with no title whatever, imposes no obligation upon him, leaves it optional with him to do a certain thing at a specified time, in such case time in the broadest sense of the rule, is of the essence of the contract, and the failure of such party to comply with its terms deprives him of the right to demand the enforcement of the contract."² This rule applies to options for the sale of realty,³ of a railway,⁴ or of personalty, such as corporate stock;⁵ or a horse,⁶ or to the right given to the maker of a note to have it canceled if he performs a specified act at a given time.⁷ So the right of a debtor to elect to pay a debt in something other than money is a right of which time is of the essence.⁸ The fact that negotiations are prolonged under an option up to the evening of the last day of its duration does not extend it beyond the time fixed by it.⁹ So a contract whereby a mortgagee agrees to accept on foreclosure a sum less than the amount due him, part of the amount bid to go to a junior mortgagee, if payment is made by a specified time, is a contract of which time is of the essence.¹⁰

¹ *Stembridge v. Stembridge*, 87 Ky. 91; 7 S. W. 611; *Dyer v. Duffy*, 39 W. Va., 148; 19 S. E. 540; 24 L. R. A. 339.

² *Stembridge v. Stembridge*, 87 Ky. 91, 94; 7 S. W. 611.

³ *Martin v. Morgan*, 87 Cal. 203; 22 Am. St. Rep. 240; 25 Pac. 350; *Stembridge v. Stembridge*, 87 Ky. 91; 7 S. W. 611; *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417; 11 Atl. 284; *Johnson v. Portwood*, 89 Tex. 235; 34 S. W. 596. 787; *Cummings v. Realty Co.*, 86 Wis. 382; 57 N. W. 43.

⁴ *Columbian Equipment Co. v. Ry.*, 74 Fed. 920.

⁵ *Stevens v. Hertzler*, 109 Ala. 423; 19 So. 838; *Chaffee v. Ry.*, 146 Mass. 224; 16 N. E. 34.

⁶ *Roberts v. Norton*, 66 Conn. 1; 33 Atl. 532.

⁷ *Stout v. Watson*, 45 Minn. 454; 48 N. W. 195.

⁸ See § 1392.

⁹ *Cummings v. Realty Co.*, 86 Wis. 382; 57 N. W. 43.

¹⁰ *Eargle v. Lorick*, 55 S. C. 431; 33 S. E. 490.

CHAPTER LV.

PENALTIES AND LIQUIDATED DAMAGES.

§1167. Nature of penalty and liquidated damages.

A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure payment of the actual damages.¹ A contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom, and agreed upon its payment.² The place of this topic in the law of contracts is open to question. Contracts for penalties, as we shall see later, are unenforceable, and may without any impropriety be said to be void. Such contracts might therefore be discussed under the head of void contracts. On the other hand it is so well settled that if a contract is for a penalty it is void that questions are rarely raised upon this branch of the topic. The question which is commonly presented for decision is whether the contract is one for penalty or liquidated damages; and this is primarily a question of construction. Accordingly, this subject is discussed in connection with construction. This topic might also be considered in connection with breach and damages. Questions thereunder can necessarily arise only when a breach exists or is alleged. The determination of this question is also decisive of the question whether the parties are limited by and entitled to the amount stipulated for by the contract, or whether they are driven to the proof of actual damages and are governed by the rules which control the measure of damages.

¹United States v. Cutajar, 67 Fed. 530; Gillilan v. Rollins, 41 Neb. 540; 59 N. W. 893.

²Monmouth Park Association v.

Iron Works, 55 N. J. L. 132; 39 Am. St. Rep. 626; *sub nomine* Wallis Iron Works v. Park Association, 19 L. R. A. 456; 26 Atl. 140.

§1168. **Alternative contracts.**

An alternative contract is one which gives to one of the parties the choice of doing one of two or more different acts as performance of the contract.¹ If one of the alternatives is the payment of money, a contract of this type has some resemblance to a contract for a penalty or for liquidated damages; but it must be distinguished from both of them. The essential difference is that both penalties and liquidated damages are payable on breach of one or more covenants of a contract, whereas the payment provided for in the alternative contract is a performance of the contract — not a compensation for breach. The alternative contract is enforceable according to its terms; and if the contingencies have occurred on which the money is to be paid, such payment can be enforced.² Thus under a contract for the sale of a medical practice, the vendor to have the right to resume practice after five years, on payment to the vendee of two thousand dollars, such payment was neither a penalty nor liquidated damages, but a covenant giving the vendor the right to make such election; and if he elects to resume the practice, he must pay such sum.³ The question of who can exercise the right of election is discussed elsewhere.⁴ The outward form of the contract is not, of course, decisive of the question, or an easy method of evading the rules as to penalties would be presented. If the whole contract shows that the stipulation for payment is inserted, not to give one party an election, but to coerce performance of the alternative covenant, such stipulation is treated as a penalty.⁵

§1169. **History of penalty in contract law.**

At Common Law, a contract to pay a specified sum of money upon the happening of a certain event, was enforced according

¹ *Smith v. Bergengren*, 153 Mass. 236; 10 L. R. A. 768; 26 N. E. 690.

² *Smith v. Bergengren*, 153 Mass. 236; 10 L. R. A. 768; 26 N. E. 690; *Curnan v. Ry.*, 138 N. Y. 480; 34 N. E. 201.

³ *Smith v. Bergengren*, 153 Mass. 236; 10 L. R. A. 768; 26 N. E. 690.

⁴ See § 1392.

⁵ *Condon v. Kemper*, 47 Kan. 126; 13 L. R. A. 671; 27 Pac. 829.

to its terms. The fact that the sum of money designated was agreed upon to punish breach or to coerce performance, did not have any effect in making such a contract unenforceable. If the contract was a simple one, a valuable consideration was of course necessary; and if the consideration for the promise was itself money, questions of adequacy of consideration might arise. If the contract was under seal, questions of this sort were not presented.¹ Equity, however, looked at the intent and not the outward form of the contract, and relieved against penalties and forfeitures.² The doctrine that equity relieved against forfeitures originally referred to cases of mistake, surprise, imposition, and the like; but this restriction was abandoned at a comparatively early time, and it became settled that equity could relieve against a penalty or a forfeiture for the non-payment of money, since the damages caused by the delay could be estimated exactly in the form of interest.³ It has been said that equity will not relieve against penalty or forfeiture, where the breach is anything other than the non-payment of money.⁴ In the majority of cases this distinction is practically sufficient, and further discussion of the accuracy of this statement will be omitted. The other principle, namely, that equity looked at the intent of the parties rather than the outward form, operated to give relief against penalties in many cases which would fall without the limits of the mere doctrine of relief against penalties as such. If, upon applying the ordinary rules of construction to a given contract, it appeared that the stipulation for the payment of the specified sum of money was intended as a security for the actual damages, caused by the breach, or to coerce performance, equity would relieve against the enforcement of the contract in its outward form and restrict the injured party to the recovery of his actual damages.⁵ By a statute in England, the injured party in an action for a penalty given by a contract, was restricted to the collection of the actual

¹ Sun, etc., *Association v. Moore*,
183 U. S. 642; *Watts v. Camors*, 115
U. S. 353.

² *Lowe v. Peers*, 4 Burr. 2225.

³ *Wallis v. Smith*, 21 Ch. D. 243,
see 260.

⁴ *Wallis v. Smith*, 21 Ch. D. 243,
see 260.

⁵ *Lowe v. Peers*, 4 Burr. 2225.

damages.⁶ In the United States, partly by the adoption of this English statute as a part of our Common Law, and partly by our own statutes, this power is very generally exercised by the courts of Common Law. The doctrine of equity as to what is a penalty and what is a stipulation for liquidated damages have been to this extent adopted into our Common Law.

§1170. Legal effect of each compared.—Penalty.

The importance of the distinction between liquidated damages and penalty, consists in the effect which the courts give to the two kinds of stipulation. At Modern Law a contract for a penalty is unenforceable and practically void. The actual damage, and that alone, may be recovered. This may be, on the one hand, less than the amount of the penalty,¹ and on the other it may exceed it.² The actual damages sustained must be shown;³ otherwise only nominal damages can be recovered.⁴ There is some authority for treating a provision for a penalty as *prima facie* evidence of the amount of damage suffered, in the absence of evidence to the contrary.⁵

⁶ 8 and 9 William III., c. 11.

¹ *Watts v. Camors*, 115 U. S. 353; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Chicago House-Wrecking Co. v. United States*, 106 Fed. 385; 53 L. R. A. 122; 45 C. C. A. 343; *Henry v. Ry.*, 91 Ala. 585; 8 So. 343; *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058; *Low v. Nolte*, 16 Ill. 475; *Lord v. Gaddis*, 9 Ia. 265; *Foley v. McKeegan*, 4 Ia. 1; 66 Am. Dec. 107; *Hahn v. Horstman*, 12 Bush. (Ky.) 249; *Perkins v. Lyman*, 11 Mass. 76; 6 Am. Dec. 158; *Hamaker v. Schroers*, 49 Mo. 406; *Lindsay v. Anesley*, 28 N. C. 186; *Kelley v. Seay*, 3 Okla. 527; 41 Pac. 615; *Bigouy v. Tyson*, 75 Pa. 157; *Bear-den v. Smith*, 11 Rich. L. (S. C.) 554; *Johnson v. Cook*, 24 Wash. 474; 64 Pac. 729.

² *Watts v. Camors*, 115 U. S. 353; *Williston v. Mathews*, 55 Minn. 422; 56 N. W. 1112; *Morrill v. Weeks*, 70 N. H. 178; 46 Atl. 32; *Gloucester City v. Eschbach*, 54 N. J. L. 150; 23 Atl. 360; *Moore v. Colt*, 127 Pa. St. 289; 14 Am. St. Rep. 845; 18 Atl. 8; *Commerce, etc., Co. v. Morris*, 27 Tex. Civ. App. 553; 65 S. W. 1118.

³ *Wilson v. Dean*, 10 Ia. 432; *Johnson v. Cook*, 24 Wash. 474; 64 Pac. 729.

⁴ *Eva v. McMahon*, 77 Cal. 467; 19 Pac. 872; *O'Keefe v. Dyer*, 20 Mont. 477; 52 Pac. 196; *Johnson v. Cook*, 24 Wash. 474; 64 Pac. 729.

⁵ *Elston v. Roop*, 133 Ala. 331; 32 So. 129. (It was not clear whether this provision was for a penalty or for liquidated damages.)

§1171. Liquidated damages.

If a stipulation is one for liquidated damages, the amount contracted for may be recovered.¹ Proof of actual damage is unnecessary.² There must, however, be at least more than nominal damages.³ Furthermore, if the actual damages exceed those contracted for, the injured party is bound by the stipulation of the contract, and cannot recover the actual amount of damages.⁴ It is therefore held that a stipulation for liquidated damages applies to cases in which there has been a *bona fide* attempt to perform the contract, but does not apply to willful and deliberate injury, if the damages arising therefrom exceed those stipulated for.⁵ Such a provision in case of failure of water supply does not apply where such failure is due to defendant's failure to make repairs stipulated for.⁶ To prevent recovery of actual damages, the provision claimed to be for liquidated damages must furthermore be exclusive. If the party not in default is merely given an election on default to be exercised at his option, he is not thereby precluded from recovering damages.⁷ Thus in a sub-contract for building an ore dock, it was provided that if a material-man did not furnish timber according to contract, the contractor might buy it in open market and charge the necessary expense to the sub-contractor's account. This provision was held to be merely optional with the contractor, and not a stipulation for an exclusive meas-

¹ Sun, etc., Association v. Moore, 183 U. S. 642; affirming Moore v. Publishing Association, 101 Fed. 591; 41 C. C. A. 506; Van Tuyl v. Young, 23 Ohio C. C. 15; Pittsburgh, etc., Co. v. Tube Works Co., 184 Pa. St. 251; 39 Atl. 76; Drumheller v. Surety Co., 30 Wash. 530; 71 Pac. 25.

² Clark v. Barnard, 108 U. S. 436; Jacqua v. Headington, 114 Ind. 309; 16 N. E. 527; (City of) Salem v. Anson, 40 Or. 339; 56 L. R. A. 169; 67 Pac. 190; Kelso v. Reid, 145 Pa. St. 606; 27 Am. St. Rep. 716; 23 Atl. 323; American, etc., Works v.

Malting Co., 30 Wash. 178; 70 Pac. 236.

³ Hathaway v. Lynn, 75 Wis. 186; 6 L. R. A. 551; 43 N. W. 956.

⁴ Hennessy v. Metzger, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058; O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196; Jackson v. Hunt, — Vt. —; 56 Atl. 1010.

⁵ West Chicago, etc., Ry. Co. v. Morrison, etc., Co., 160 Ill. 288; 43 N. E. 393.

⁶ Pengra v. Wheeler, 24 Or. 532; 21 L. R. A. 726; 34 Pac. 354.

⁷ Williston v. Mathews, 55 Minn. 422; 56 N. W. 1112.

ure of damages.⁸ A provision for a deposit as security is not a contract for liquidated damages so as to prevent the recovery of actual damages.⁹ So a provision in a lease for the deposit by the lessee with the lessor of a certain sum as security for performance and in case the tenancy is not sooner terminated, that it is to be applied on the rent for the last three months of the term, is not intended as liquidated damages if the lessee makes default before the end of the term.¹⁰

§1172. Effect of name employed.

The use of the term "penalty," or "liquidated damages," is not conclusive.¹ On the one hand a provision for "liquidated damages" may appear from the context of the contract to be really a provision for a penalty, and will accordingly be so treated.² A like result has been reached where a liability imposed by statute, penal in its nature, is spoken of by statute as "liquidated damages." It is, notwithstanding, treated as a penalty.³ On the other hand a contract for a "penalty" may appear from the context to be a contract for liquidated damages, and will be so treated.⁴ So a provision for a "penalty"—"named as stipulated damages,"⁵ or for a "fine,"⁶ or "as a for-

⁸ Williston v. Mathews, 55 Minn. 422; 56 N. W. 1112.

⁹ Chaude v. Shepard, 122 N. Y. 397; 25 N. E. 358.

¹⁰ Chaude v. Shepard, 122 N. Y. 397; 25 N. E. 358.

¹ McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806; Hennessy v. Metzger, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058; Willson v. Baltimore, 83 Md. 203; 55 Am. St. Rep. 339; 34 Atl. 774; May v. Crawford, 142 Mo. 390; 44 S. W. 260.

² Kemble v. Farren, 6 Bing. 141; Chicago House-Wrecking Co. v. United States, 106 Fed. 385; 53 L. R. A. 122; 45 C. C. A. 343; Tilley v.

Loan Association, 52 Fed. 618; Disosway v. Edwards, 134 N. C. 254; 46 S. E. 501; Fitzpatrick v. Cottingham, 14 Wis. 219.

³ Anderson v. Byrnes, 122 Cal. 272; 54 Pac. 821.

⁴ Robinson v. Aid Society, 68 N. J. L. 723; 54 Atl. 416; Illinois Central Ry. v. Cabinet Co., 104 Tenn. 568; 78 Am. St. Rep. 933; 50 L. R. A. 729; 58 S. W. 303.

⁵ Tode v. Gross, 127 N. Y. 480; 24 Am. St. Rep. 475; 13 L. R. A. 652; 28 N. E. 469.

⁶ Manistee Iron Works Co. v. Lumber Co., 92 Wis. 21; 65 N. W. 863.

feiture," or as a "guarantee or forfeiture,"⁸ or "as forfeit,"⁹ have each been held to be provisions for liquidated damages where such appeared to be their real nature. *Prima facie* the term used by the parties is the correct one.¹⁰ The presumption of the accuracy of the term used by the parties is possibly somewhat stronger when the term employed is "penalty" than when it is "liquidated damages."¹¹ "The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention."¹²

§1173. Intention of parties controls.

The intention of the parties is said to be paramount and controlling.¹ This means, however, not what they have agreed to call it, nor even what they may in good faith think it is; for this involves their opinion upon the law.² When their intent is said to be paramount, what is meant is that if from the surrounding facts and circumstances it appears that they are in good faith contracting for the actual amount of the loss as estimated in advance, the contract is one for liquidated damages; while, if they are contracting for an arbitrary sum, intended

⁷ *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806.

⁸ *Sanders v. Carter*, 91 Ga. 450; 17 S. E. 345.

⁹ *Hardie, etc., Co. v. Oil Mill*, — Miss. —; 36 So. 262.

¹⁰ "Liquidated damages"—*prima facie* correct. *Stegman v. O'Connor*, 80 L. T. (N. S.) 234; *Kelly v. Fejervary*, 111 Ia. 693; 83 N. W. 791; *Garst v. Harris*, 177 Mass. 72; 58 N. E. 174. "Penalty"—*prima facie* correct. *Smith v. Brown*, 164 Mass. 584; 42 N. E. 101; *Wilkinson v. Colley*, 164 Pa. St. 35; 26 L. R. A. 114; 30 Atl. 286. Held penalties "in the penal sum of estimated amount of freight." *Watts v. Camors*, 115 U. S. 353. "Forfeiture"

Van Buren v. Digges, 11 How. (U. S.) 461.

¹¹ *Foley v. McKeegan*, 4 Ia. 1; 66 Am. Dec. 107; *Smith v. Brown*, 164 Mass. 584; 42 N. E. 101; *Smith v. Wainwright*, 24 Vt. 97.

¹² *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 13, 17.

¹ *Kelly v. Fejervary*, 111 Ia. 693; 83 N. W. 791; *Heatwole v. Gorrell*, 35 Kan. 692; 12 Pac. 135; *Perkins v. Lyman*, 11 Mass. 76; 6 Am. Dec. 158; *Taylor v. Newspaper Co.*, 83 Minn. 523; 86 N. W. 760; *Cottheal v. Talmage*, 9 N. Y. 551; 61 Am. Dec. 716.

² *Willson v. Mayor of Baltimore*, 83 Md. 203; 55 Am. St. Rep. 339; 34 Atl. 774.

to coerce performance or punish default, they are contracting for a penalty.³ In case of doubt, the courts prefer to treat the stipulation as one for a penalty, since this construction makes the actual amount of the damages the amount of recovery.⁴

§1174. "Artificial rules" for determining question.

To lay down a general test, or set of tests, for determining whether a stipulation is for a penalty or liquidated damages, is even more difficult than the general attempt to lay down an arbitrary rule for determining in advance what the parties to a contract mean by the use of certain language. These "artificial rules"¹ are liable to fail of application in any particular contract by reason of the context and subject-matter which may show an intent different from that which the rule indicates. The difficulty is intensified in this case by the fact that on many elementary questions as to the application of specific tests, the courts are absolutely at variance. A summary of the English cases on this subject is given in *Wallis v. Smith*,² in which the following classes are enumerated: "Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations."³ Cases "in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations, either must be small, or will, in all human probability, be small — that is, where it is not absolutely necessary that they should be small; but it

³ *Sanford v. National Bank*, 94 Ia. 680; 63 N. W. 459; *Cushing v. Drew*, 97 Mass. 445; *May v. Crawford*, 142 Mo. 390; 44 S. W. 260; *Streeper v. Williams*, 48 Pa. St. 450.

⁴ *Amanda, etc., Co. v. Mill Co.*, 28 Colo. 251; 64 Pac. 218; *Hennessey v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058; *Day Bros. Lumber Co. v. Ison (Ky.)*,

62 S. W. 516; *Wallis v. Carpenter*, 13 All. (Mass.) 19; *O'Keefe v. Dyer*, 20 Mont. 477; 52 Pac. 196; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186; 44 Am. Dec. 298.

¹ *Bagley v. Peddie*, 16 N. Y. 469, 471; 69 Am. Dec. 713; quoted *Sun. etc., Co. v. Moore*, 183 U. S. 642.

² 21 Ch. D. 243.

³ *Wallis v. Smith*, 21 Ch. D. 243, 256.

is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.”⁴ This class of cases the court says is in part open for discussion and in part included in another class, i. e., the one following. “The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are dicta there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.”⁵ “A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does apply and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.”⁶ This classification is apparently approved by the Supreme Court of the United States,⁷ and in the same case more of these “artificial rules” are suggested.

§1175. Difficulty of proving actual damages.

One test which has been suggested is whether it is easy or difficult to prove the actual damages. Where this test is recognized it is held that if the actual damages can be proved with reasonable certainty, a stipulation in advance, fixing the amount thereof, is a penalty.¹ This is in some states a statu-

⁴ Wallis v. Smith, 21 Ch. D. 243, 257.

⁵ Wallis v. Smith, 21 Ch. D. 243, 258.

⁶ Wallis v. Smith, 21 Ch. D. 243, 258.

⁷ Sun, etc., Association v. Moore, 183 U. S. 642.

¹ Hall v. Crowley, 5 All. (Mass.)

304; 81 Am. Dec. 745; Fasler v. Beard, 39 Minn. 32; 38 N. W. 755; Brennan v. Clark, 29 Neb. 385; 45 N. W. 472; Lansing v. Dodd, 45 N. J. L. 525; Cæsar v. Robinson, 174 N. Y. 492; 67 N. E. 58; Krutz v. Robbins, 12 Wash. 7; 50 Am. St. Rep. 871; 28 L. R. A. 676; 40 Pac. 415.

tory rule.² The party who claims that it is difficult to prove the amount of damages and who is seeking to uphold the provision for the payment of money as an agreement for liquidated damages has the burden of showing that such damages are difficult to ascertain;³ and the recital in the contract that such damages are difficult to prove is ineffectual.* Under such statutes a provision for paying ten dollars a day for delay in completing a house,⁵ or for forfeiting twenty per cent of the invoice price on countermanding an order for personalty,⁶ or for paying a fixed sum per head in case of shortage in the number of cattle contracted for,⁷ or for returning the amount paid as rent in case of failure to furnish the amount of water agreed upon,⁸ is in each case held a penalty. If the actual damages are not easy to prove, a stipulation in advance therefor is to be treated *prima facie* as a stipulation for liquidated damages, and it is only when such stipulations have an excessive and unreasonable amount that the provisions are to be treated as a penalty.⁹ On this theory a contract to furnish public utilities such as electric lights,¹⁰ or a public bridge,¹¹ or a contract

² Home, etc., Co. v. McNamara, 111 Fed. 822; 49 C. C. A. 642; Pacific Factor Co. v. Adler, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36; Drew v. Pedlar, 87 Cal. 443; 22 Am. St. Rep. 257; 25 Pac. 749; Mansur, etc., Implement Co. v. Willet, 10 Okla. 383; 61 Pac. 1066; Seim v. Krause, 13 S. D. 530; 83 N. W. 583.

³ Deuninck v. Irrigation Co., 28 Mont. 255; 72 Pac. 618.

⁴ Pacific Factor Co. v. Adler, 90 Cal. 110; 25 Am. St. Rep. 102; 27 Pac. 36.

⁵ Seim v. Krause, 13 S. D. 530; 83 N. W. 583.

⁶ Mansur, etc., Implement Co. v. Willet, 10 Okla. 383; 61 Pac. 1066. For similar case see Mansur, etc., Co. v. Hardware Co., 136 Ala. 597; 53 So. 818.

⁷ Home, etc., Co. v. McNamara, 111 Fed. 822; 49 C. C. A. 642.

⁸ Deuninck v. Irrigation Co., 28 Mont. 255; 72 Pac. 618.

⁹ Green v. Price, 13 M. & W. 695; Pressed Steel Car Co. v. Ry., 121 Fed. 609; 57 C. C. A. 635; Sanders v. Carter, 91 Ga. 450; 17 S. E. 345; Hennessy v. Metzger, 152 Ill. 505; 43 Am. St. Rep. 267; 38 N. E. 1058; Garst v. Harris, 177 Mass. 72; 58 N. E. 174; Chase v. Allen, 13 Gray (Mass.) 42; Brennan v. Clark, 29 Neb. 385; 45 N. W. 472; Ward v. Building Co., 125 N. Y. 230; 26 N. E. 256; Grasselli v. Lowden, 11 O. S. 349; Everett Land Co. v. Maney, 16 Wash. 552; 48 Pac. 243.

¹⁰ Brooks v. Wichita, 114 Fed. 297; 52 C. C. A. 209.

¹¹ Malone v. Philadelphia, 147 Pa. St. 416; 23 Atl. 628.

whereby a telephone company is to pay a fixed sum if it merges with a competitor,¹² is one for breach of which it is not easy to estimate damages; and hence covenants to pay fixed sums on breach are covenants for liquidated damages. Other examples of such covenants are agreements to pay money on breach of a contract not to publish libelous articles,¹³ to refund money if a dike should be destroyed exposing the promisee's land to high tides;¹⁴ an agreement to pay a certain sum as liquidated damages in case of a sublessee's being ousted by lessee;¹⁵ a provision that if a partner shall violate his promise to abstain from intoxicating liquors he shall forfeit all his interest in the business and receive a monthly salary;¹⁶ an agreement to pay a certain sum of money on breach of a contract to form a partnership,¹⁷ or a contract to convey realty,¹⁸ or a contract to give two weeks' notice before quitting work,¹⁹ the work in other departments being dependent on the work in the department in which this employee was working; or a contract to deduct a fixed amount from the price of logs not delivered on time, and thus exposed to the weather;²⁰ or a contract to pay one thousand dollars in case of a breach by an employee of his covenant not to drink intoxicating liquor.²¹ This test, however, has been repudiated by the Supreme Court of the United States,²² and it has been held by them that even though the actual damages can be readily ascertained with certainty, a stipulation for damages in advance is not necessarily a penalty.

¹² (City of) *New Britain v. Telephone Co.*, 74 Conn. 326; 50 Atl. 881, 1015. For a similar contract by a railroad see *Grand Trunk Ry. v. Halton County*, 21 Can. S. C. 716.

¹³ *Emery v. Boyle*, 200 Pa. St. 249; 49 Atl. 779.

¹⁴ *Jennings v. McCormick*, 25 Wash. 427; 65 Pac. 764.

¹⁵ *Guerin v. Stacy*, 175 Mass. 595; 56 N. E. 892.

¹⁶ *Henderson v. Murphree*, 109 Ala. 556; 20 So. 45.

¹⁷ *Sanford v. National Bank*, 94 Ia. 680; 63 N. W. 459.

¹⁸ *Sanders v. Carter*, 91 Ga. 450; 17 S. E. 345; *Talkin v. Anderson* (Tex.), 19 S. W. 852.

¹⁹ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154; 30 Am. St. Rep. 865; 15 L. R. A. 211; 18 S. W. 262.

²⁰ *Kilbourne v. Lumber Co.*, 111 Ky. 693; 64 S. W. 631.

²¹ *Keeble v. Keeble*, 85 Ala. 552; 5 So. 149.

²² *Sun, etc., Association v. Moore*, 183 U. S. 642.

§1176. Relation of stipulated amount to actual damage.

Another test which has been suggested is, whether the amount stipulated for is greatly in excess of the actual damages or not. Where this test is applied, it is held that if the amount stipulated for is no greater than the actual damages,¹ or if in excess of actual damages such excess is moderate, the stipulation is for liquidated damages. Thus an agreement to pay for the use of a button-sewing machine at a certain rate per thousand buttons, and if the lessee does not keep account of the number of buttons sewed, the lessor to have the option to charge five dollars a day for its use, is held to be a rough estimate of the value of the machine and not a penalty.² If the amount stipulated for is excessive, the stipulation is for a penalty.³ Thus a provision for paying in case of breach of a contract for work and labor a sum greatly in excess of the cost of completing the contract,⁴ or for paying a fine for wrongful use of electrotypes "equal to tenfold the price of the wrongfully used electrotypes,"⁵ or for paying in case of breach "five hundred dollars besides all damages,"⁶ have each been held to be agreements for

¹ *Standard Button-Fastening Co. v. Breed*, 163 Mass. 10; 39 N. E. 346; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626; 19 L. R. A. 456; 26 Atl. 140; *Lansing v. Dodd*, 45 N. J. L. 525; *Hoagland v. Segur*, 38 N. J. L. 230; *Whitfield v. Levy*, 35 N. J. L. 149; *Illinois Central Ry. v. Cabinet Co.*, 104 Tenn. 568; 78 Am. St. Rep. 933; 50 L. R. A. 729; 58 S. W. 303.

² *Standard Button-Fastening Co. v. Breed*, 163 Mass. 10; 39 N. E. 346.

³ *Gay Mfg. Co. v. Camp*, 65 Fed. 794; 13 C. C. A. 137; *Glasscock v. Rosengrant*, 55 Ark. 376; 18 S. W. 379; *Heisen v. Westfall*, 86 Ill. App. 576; *Condon v. Kemper*, 47 Kan. 126; 13 L. R. A. 671; 27 Pac. 829; *Meyer v. Estes*, 164 Mass. 457; 32

L. R. A. 283; 41 N. E. 683; *Carter v. Strom*, 41 Minn. 522; 43 N. W. 394; *Wheeldon v. Trust Co.*, 128 N. C. 69; 38 S. E. 255; *Clements v. Ry.*, 132 Pa. St. 445; 19 Atl. 274; 276; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186; 44 Am. Dec. 298; *McIntosh v. Johnson*, 8 Utah 359; 31 Pac. 450; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532; 88 N. W. 599; *Gates v. Parmly*, 93 Wis. 294; 66 N. W. 253; affirmed on rehearing, 93 Wis. 321; 67 N. W. 739.

⁴ *Heisen v. Westfall*, 86 Ill. App. 576; *Condon v. Kemper*, 47 Kan. 126; 13 L. R. A. 671; 27 Pac. 829. (Cost of work \$100, amount to be paid \$500.)

⁵ *Meyer v. Estes*, 164 Mass. 457; 32 L. R. A. 283; 41 N. E. 683.

⁶ *Foot & Davies Co. v. Malony*, 115 Ga. 985; 42 S. E. 413.

penalties. Where this test is applied, it is the facts as they exist when the contract is made, and not those in existence when the contract was broken, which determine whether the amount stipulated for is reasonable or unreasonable.⁷

§1177. One penalty for breaches of different covenants.

Another test which has met with general favor is the following: If provision is made for breach of several different covenants of a contract, and a gross sum is fixed which is to be paid in case of the breach of any one of such covenants, and the covenants are of different degrees of importance so that the damage resulting from the breach of one would be much greater than those resulting from the breach of another, the stipulation is held to be a penalty.¹ Thus a promise to pay a fixed sum for failure to build a house or to pay off all liens thereon,² or to pay a certain additional amount per ton for every ton of hay or straw sold off the premises, where the value of manure from hay is different from that from straw,³ or a promise to pay a certain sum in case of any default in a contract to sell and deliver a certain number of sheep,⁴ or a promise to pay a fixed sum for breach of any one of a number of covenants, ranging from the payment of royalty to keeping gates closed,⁵ or a bond

⁷ Gibson v. Oliver, 158 Pa. St. 277; 27 Atl. 961.

¹ Willson v. Love (1896), 1 Q. B. 626; Kemble v. Farren, 6 Bing. 141; Home, etc., Co. v. McNamara, 111 Fed. 822; 49 C. C. A. 642; Smith v. Newell, 37 Fla. 147; 20 So. 249; State v. Larson, 83 Minn. 124; 54 L. R. A. 487; 86 N. W. 3; Carter v. Strom, 41 Minn. 522; 43 N. W. 394; Squires v. Elwood, 33 Neb. 126; 49 N. W. 939; El Reno v. Cullinane, 4 Okla. 457; 46 Pac. 510; Berry v. Wisdom, 3 O. S. 241; Wilhelm v. Eaves, 21 Or. 194; 14 L. R. A. 297; 27 Pac. 1053; Keck v. Bieber, 148 Pa. St. 645; 33 Am. St. Rep. 846; 24 Atl. 170; Johnson v.

Cook, 24 Wash. 474; 64 Pac. 729; (City of) Madison v. Engineering Co., 118 Wis. 480; 95 N. W. 1097; Kerslake v. McInnis, 113 Wis. 659; 89 N. W. 895.

² Johnson v. Cook, 24 Wash. 474; 64 Pac. 729. (Amount agreed on \$3,000 — value of house \$2,000.)

³ Willson v. Love (1896), 1 Q. B. 626.

⁴ Squires v. Elwood, 33 Neb. 126; 49 N. W. 939. See for a similar contract of a less marked type. Home, etc., Co. v. McNamara, 111 Fed. 822; 49 C. C. A. 642.

⁵ Keck v. Bieber, 148 Pa. St. 645; 33 Am. St. Rep. 846; 24 Atl. 170.

in the sum of ten thousand dollars, conditioned on the release of a number of debts varying in amount from eight thousand dollars to ten thousand dollars," have each been held to be provisions for penalties. This test has proved so satisfactory in its operation that it is a matter of regret that so many cases present facts which do not admit of determination by it. Even this test, however, is not unanimously adopted. It has been repudiated in several courts, though often in obiter, as a decisive test;⁷ and it has been said that this principle has no application to cases where the damage from each breach, though not the same in each, is in each uncertain,⁸ but that it applies only where the damages are readily ascertainable, either on some,⁹ or all,¹⁰ of the breaches, as where one of the covenants is to pay money.¹¹

§1178. Breach of single covenant.

If the amount fixed is to be paid in case of breach of a single covenant, it is, if fair and reasonable, to be treated *prima facie* as a covenant for liquidated damages.¹ "Where payment is conditioned on one event, the payment is in the nature of liquidated damages."² Though there are several covenants in a given contract, still if the amount to be paid in case of breach is apportioned to the different covenants, and is fair and reasonable for each, the stipulation is *prima facie* for liquidated damages.³ Thus a provision in a contract for transporting cattle

⁶ Bignall v. Gould, 119 U. S. 495.

⁷ Wallis v. Smith, 21 Ch. D. 243; Sun, etc., Co. v. Moore, 183 U. S. 642; May v. Crawford, 142 Mo. 390; 41 S. W. 260.

⁸ Wallis v. Smith, 21 Ch. D. 243; Cotheal v. Talmage, 9 N. Y. 551; 61 Am. Dec. 716.

⁹ Kemble v. Farren, 6 Bing. 141.

¹⁰ Pierce v. Jung, 10 Wis. 30.

¹¹ Clement v. Cash, 21 N. Y. 253; quoted with approval in Sun, etc., Association v. Moore, 183 U. S. 642, 673.

¹ Law v. Redditch Local Board (1892), 1 Q. B. 127; Sun, etc., As-

sociation v. Moore, 183 U. S. 642; Duffy v. Shockey, 11 Ind. 70; 71 Am. Dec. 348; Cushing v. Drew, 97 Mass. 445.

² Strickland v. Williams (1899), 1 Q. B. 382, 384; quoted in Sun, etc., Association v. Moore, 183 U. S. 642, 667, with the warning that it must be understood that the event is "not the mere non-performance of an *ordinary* agreement for the payment of money."

³ Boys v. Ancell, 5 Bing. N. C. 390; Morris v. Wilson, 114 Fed. 74; 52 C. C. A. 22.

that the steamer should sail on the day named "or pay expenses of keep of animals at rate of fifty cents per head per day in full," is a stipulation for liquidated damages.⁴ This principle finds application in agreements in building contracts to pay a certain sum per day for delay in completing the work.⁵

§1179. Forfeiture of deposits and part payments.

Agreements are frequently made that one or both parties to a contract shall deposit a certain sum of money which is to be the property of the other if the contract is not performed. Such agreements are, if fair and reasonable, treated as stipulations for liquidated damages, and enforced.¹ Thus under a contract for the sale of realty a deposit of money,² or a certified check,³ may be retained by the party not in default. If the check is lost, equity will give affirmative relief.⁴ So under a contract for the sale of personalty a deposit of a certified check,⁵ may be retained by the party not in default. Under this theory a provision in a contract of employment whereby the employer was to retain six days' wages until the end of the term of employment to secure performance was treated as a covenant for liquidated damages.⁶ If unreasonable, and intended merely to coerce performance, they are treated as penalties.⁷ Thus a provision in a contract for the sale of lumber whereby the vendee was to retain fifty cents per thousand to

⁴ *Morris v. Wilson*, 114 Fed. 74; 52 C. C. A. 22.

⁵ See § 1183.

¹ *Allison v. Dunwoody*, 100 Ga. 51; 28 S. E. 651; *Sanders v. Carter*, 91 Ga. 450; 17 S. E. 345; *Sanford v. Bank*, 94 Ia. 680; 63 N. W. 459; *Woodbury v. Mfg. Co.*, 96 Ky. 459; 29 S. W. 295.

² *Womack v. Coleman*, 89 Minn. 17; 93 N. W. 663.

³ *Moore v. Durnam*, 63 N. J. Eq. 96; 51 Atl. 449.

⁴ *Moore v. Durnam*, 63 N. J. Eq. 96; 51 Atl. 449.

⁵ *Millar v. Smith*, 28 Tex. Civ. App. 386; 67 S. W. 429.

⁶ *Wilson v. Godkin*, — Mich. —; 98 N. W. 985.

⁷ *Sherburne v. Hirst*, 121 Fed. 998; *Kennedy v. United States*, 24 Ct. Cl. 122; *Carson v. Arvantes*, 10 Colo. App. 382; 50 Pac. 1080; *Willson v. Baltimore*, 83 Md. 203; 55 Am. St. Rep. 339; 34 Atl. 774; *Tinkham v. Satori*, 44 Mo. App. 659; *Monmouth Park Association v. Warren*, 55 N. J. L. 598; 27 Atl. 932; *Chaude v. Shepard*, 122 N. Y. 397; 25 N. E. 358; *Lindsey v. Rockwall County*, 10 Tex. Civ. App. 225; 30 S. W. 380.

insure performance is treated as a penalty.⁸ Thus under a building contract, the retention of a certain percentage of the contract price to secure performance, and to be the property of the owner in case of breach by the contractor is a penalty.⁹ So if one thousand dollars is deposited by the lessee to become the property of the lessor in case of breach of the covenants of the lease, this is held to be a penalty if all the covenants of the lease have been performed except the payment of forty-five dollars of rent.¹⁰ So deposits made by a bidder to secure his making a formal contract in accordance with the terms under which he bids, if his bid is accepted, have been held to be penalties.¹¹ A similar conflict of view exists where contracts are involved by the terms of which payments made thereunder are in case of default on the part of the one who makes them to become the property of the adversary party. In some cases such provisions are treated as valid, on the theory that they are for liquidated damages,¹² while in others they are treated as agreements for penalties.¹³ Under statutory provisions forbidding contracts for liquidated damages unless it is impracticable to show actual damages, such provisions cannot be enforced.¹⁴ As in case of deposits, most of these cases can be reconciled on the theory that some of the contracts are for amount reasonably apportioned to the amount of actual damage, while others are for excessive and unreasonable amounts.

⁸ *Stony Creek Lumber Co. v. Fields*, — Va. —; 45 S. E. 797. So under a logging contract. *Kerslake v. McInnis*, 113 Wis. 659; 89 N. W. 895.

⁹ *Gleason v. United States*, 33 Ct. Cl. 65; *Satterlee v. United States*, 30 Ct. Cl. 31; *Kennedy v. United States*, 24 Ct. Cl. 122.

¹⁰ *Cesar v. Robinson*, 174 N. Y. 492; 67 N. E. 58.

¹¹ *Willson v. Baltimore*, 83 Md. 203; 55 Am. St. Rep. 339; 34 Atl. 774; *Lindsey v. Rockwall County*, 10 Tex. Civ. App. 225; 30 S. W. 380.

¹² *Wallis v. Smith*, 21 Ch. D. 243; *Glock v. Colony Co.*, 123 Cal. 1; 69 Am. St. Rep. 17; 43 L. R. A. 199; 55 Pac. 713; *Havens v. Patterson*, 43 N. Y. 218; *Reddish v. Smith*, 10 Wash. 178; 45 Am. St. Rep. 781; 38 Pac. 1003.

¹³ *In re Dagenham Dock Co.*, L. R. 8 Ch. 1022.

¹⁴ Contract to forfeit payments for realty if vendee does not perform. *Phelps v. Brown*, 95 Cal. 572; 30 Pac. 774; *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; 24 Pac. 280; *Barnes v. Clement*, 12 S. D. 270; 81 N. W. 301.

§1180. Default in payment of money.—Larger sum due.

If the default which is to make a specified sum due and payable is itself the non-payment of a smaller sum of money, the question whether the contract is for a penalty or for liquidated damages depends on which sum the original debt was. If the original debt was the smaller sum, the promise to pay the larger sum in case of default is a penalty.¹ The outward form of the contract does not prevent the application of this principle. The parties may stipulate that the larger sum is the real debt due, and that it is to be discharged by the payment of the smaller sum. This, however, is a penalty if the smaller sum is the real debt.² Thus an agreement to pay rent for machines, due on the first of each month, payable by the first of the next month, with a discount of fifty per cent if paid by the fifteenth day of the first month,³ or an agreement for the sale of realty which in legal effect is a sale at eight hundred dollars, with a provision for paying ten installments of a hundred dollars each with interest, but if each payment is made punctually when due, "eight hundred dollars and its yearly interest will be accepted in full payment,"⁴ are each agreements for a penalty for delay. If, however, the larger sum is the real debt, and the creditor has agreed to discharge it on payment of the smaller sum in the manner stipulated in the contract, the agreement that in case of default the larger sum shall be due and payable, is not a stipulation for a penalty.⁵ Thus A had a life interest in an undivided third of B's property. The parties estimated the value of this at eight hundred dollars, and A released her estate in consideration of B's promise, se-

¹ Gay Mfg. Co. v. Camp, 65 Fed. 794; 13 C. C. A. 137; Smith v. Newell, 37 Fla. 147; 20 So. 249; Goodyear, etc., Co. v. Selz, 157 Ill. 186; 41 N. E. 625; Fisk v. Gray, 11 All. (Mass.) 132; Morrill v. Weeks, 70 N. H. 178; 46 Atl. 32; Cairnes v. Knight, 17 O. S. 68; Longworth v. Askren, 15 O. S. 370; Fitzpatrick v. Cottingham, 14 Wis. 219.

² Chaffee v. Landers, 46 Ark. 364;

Moore v. Hylton, 1 Dev. Eq. (N. C.) 429; Longworth v. Askren, 15 O. S. 370.

³ Goodyear, etc., Co. v. Selz, 157 Ill. 186; 41 N. E. 625.

⁴ Longworth v. Askren, 15 O. S. 370.

⁵ United States Mortgage Co. v. Sperry, 138 U. S. 313; Waggoner v. Cox, 40 O. S. 539.

cured by mortgage, to pay to A eight hundred dollars on a specified date, provided if B paid twenty dollars semi-annually to A on specified dates "it shall discharge the whole debt." This was held not to be a penalty.⁶

§1181. Increase in rate of interest.

A contract that if default is made in paying a debt when due the debt shall bear a higher rate of interest after maturity than it did before, is not a stipulation for a penalty if the higher rate does not exceed the maximum rate fixed by statute.¹ Even if the rate exacted after maturity is in excess of the maximum rate allowed by law, some courts hold that the stipulation is not for a penalty.² In other states a provision for unlawful interest after maturity is treated as a penalty.³ Whether such contracts are usurious is a question discussed elsewhere.⁴ It may here be remarked that the theory that such a stipulation is for a penalty and therefore void is invoked in some cases to save the contract from the consequence of usury,⁵ and in other cases to enable the court to give relief to a debtor who has not brought himself within the protection of the courts on the ground of usury, as by omitting to tender

⁶ *Waggoner v. Cox*, 40 O. S. 539. For a case much like the foregoing except that the smaller sum was treated as the real debt and the larger one therefore as the penalty, see *Cairnes v. Knight*, 17 O. S. 68.

¹ *Linton v. Ins. Co.*, 104 Fed. 584; 44 C. C. A. 54; *Dehass v. Dibert*, 70 Fed. 227; 30 L. R. A. 189; 17 C. C. A. 79; *Thompson v. Garner*, 104 Cal. 168; 43 Am. St. Rep. 81; 37 Pac. 900; *Eccles v. Herrick*, 15 Colo. App. 350; 62 Pac. 1040; *Dusenberry v. Abbott*, 1 Neb. Unofficial 101; 95 N. W. 466; *Omaha, etc., Co. v. Hansen*, 46 Neb. 870; 65 N. W. 1058; *Havemyer v. Paul*, 45 Neb. 373; 63 N. W. 932; *Close v. Riddle*, 40 Or. 592; 91 Am. St. Rep. 580; 67 Pac. 932.

² *Walker v. Abt*, 83 Ill. 226; *Bane v. Gridley*, 67 Ill. 388; *Smith v. Whitaker*, 23 Ill. 367.

³ *First National Bank v. Davis*, 108 Ill. 633; *Wilson v. Dean*, 10 Ia. 432; *Gower v. Carter*, 3 Ia. 244; 66 Am. Dec. 71; *Newell v. Houlton*, 22 Minn. 19; *Richardson v. Campbell*, 34 Neb. 181; 33 Am. St. Rep. 633; 51 N. W. 753; *Upton v. O'Donahue*, 32 Neb. 565; 49 N. W. 267; *Weyrich v. Hobelman*, 14 Neb. 432; 16 N. W. 436; *Brockway v. Clark*, 6 Ohio 45; *Fisher v. Otis*, 3 Pinn. (Wis.) 78; 3 Chand. (Wis.) 83.

⁴ See § 465.

⁵ *Fisher v. Otis*, 3 Pinn. (Wis.) 78; 3 Chand. (Wis.) 83.

the amount lawfully due.⁶ Agreements that in case of default the debt shall bear a higher though lawful rate of interest from the date at which it was contracted have been held in some states to be provisions for liquidated damages;⁷ in others as penalties.⁸

§1182. Other provisions.

A provision that default in payment of one installment of interest will make the whole debt due and payable is held in some jurisdictions to be a penalty,¹ though by the great weight of authority such provisions are not penalties, and are valid.² So a provision making the principal due in case of failure to pay taxes before they become delinquent is valid.³ In some states a provision for the payment of attorney's fees, in case the debt is collected by litigation, is treated as a penalty.⁴ Provisions of the classes here discussed are sometimes attacked as being penalties; sometimes as being disguised forms of usury;⁵ and sometimes as being unconscionable,⁶ so as to be an element in establishing constructive fraud or undue influence. If such provision is held valid, it means of course that none of these objections is well taken. The converse of this proposition is not always true. Such provision may be held not to be a penalty, but to be usurious; and *vice versa*. Even if invalid, the difference in the results that would follow from holding it a penalty, or usurious, or unconscionable, may be so great as to make the solution of this question a matter of great practical importance.

⁶ Brockway v. Clark, 6 Ohio 45.

⁷ Alexander v. Troutman, 1 Ga. 469.

⁸ Waller v. Long, 6 Munf. (Va.) 71.

¹ Tiernan v. Hinman, 16 Ill. 400.

² Parker v. Olliver, 106 Ala. 549; 18 So. 40; Moore v. Sargent, 112 Ind. 484; 14 N. E. 466; Swearingen v. Lahner, 93 Ia. 147; 57 Am. St.

Rep. 261; 26 L. R. A. 765; 61 N. W. 431; First National Bank v. Bank, — Wyom. —; 70 Pac. 726.

³ Plummer v. Park, 62 Neb. 665; 87 N. W. 534.

⁴ Exchange Bank v. Lumber Co., 128 N. C. 193; 38 S. E. 813.

⁵ See § 488.

⁶ See § 234.

§1183. Application of general principles.—Building contracts.

Provisions in a building contract, that the contractor shall pay a certain sum per day if the building is not completed by the time agreed upon, are generally held to be for liquidated damages if reasonable in amount.¹ Thus in the case of a contract for the erection of a building, a provision for the payment of fifty dollars a day,² twenty dollars a day,³ ten dollars a day,⁴ or five dollars a day,⁵ have each been held to be valid as liquidated damages, where not greatly in excess of the actual damage caused by the delay. A provision in a contract for installing an electric light plant, for paying five pounds a day for delay after the time fixed by the contract, has been held to be valid as a provision for liquidated damages.⁶ So provisions for paying one hundred dollars a day for delay in erecting a grand stand,⁷ or fifty dollars a day for delay in erecting a church,⁸ have been held to be covenants for liquidated damages. So a provision for paying a reasonable amount per day for delay in building a sewer,⁹ or sewage works,¹⁰ is a provision for liquidated damages. A provision that if a street railway company does not complete the first line of its road within a year it shall lose its right of way and privileges, and shall pay five hundred

¹ *Lincoln v. Granite Co.*, 56 Ark. 405; 19 S. W. 1056; *Emack v. Campbell*, 14 App. (D. C.) 186; *Kelly v. Fejervary*, 111 Ia. 693; 83 N. W. 791; *De Graff v. Wickham*, 89 Ia. 720; 52 N. W. 503; *Lamson v. Marshall*, — Mich. —; 95 N. W. 78; *Carter v. Kaufman*, — S. C. —; 45 S. E. 1017; *Collier v. Betterton*, 87 Tex. 440; 29 S. W. 467.

² *Curtis v. Van Bergh*, 161 N. Y. 47; 55 N. E. 398; *Bird v. Church*, 154 Ind. 138; 56 N. E. 129.

³ *Davis v. Hospital Association*, — Wis. —; 99 N. W. 351 (for delay in completing a hospital to cost twenty-four thousand dollars).

⁴ *Kelly v. Fejervary*, 111 Ia. 693; 83 N. W. 791; *Collier v. Betterton*, 87 Tex. 440; 29 S. W. 467; *Reich-*

enbach v. Sage, 13 Wash. 364; 52 Am. St. Rep. 51; 43 Pac. 354.

⁵ *Young v. Gaut*, 69 Ark. 114; 61 S. W. 372; *Brown Iron Co. v. Norwood* (Tex. Civ. App.), 69 S. W. 253.

⁶ *Stegmann v. O'Connor* (1900), A. C.; 81 L. T. N. S. 627.

⁷ *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626; *sub nomine*, *Wallis Iron Works v. Park Association*, 19 I. R. A. 456; 26 Atl. 140.

⁸ *Bird v. Church*, 154 Ind. 138; 56 N. E. 129.

⁹ *Lamson v. Marshall*, — Mich. —; 95 N. W. 78; *Thorn, etc., Co. v. Bank*, 158 Mo. 272; 59 S. W. 109.

¹⁰ *Law v. Redditch Local Board* (1892), 1 Q. B. 127.

dollars is a provision for liquidated damages.¹¹ So a provision that unless a certain amount of water is diverted into a given ditch the right of way thereof will be given up, is held to be a provision for liquidated damages.¹² A contractor who is working under a contract by which he is to receive one hundred dollars per day for each day less than the time limit fixed by the contract in which he performs the contract, and he is to pay a thousand dollars a day for each day that he exceeds such time limit, may make a provision with a subcontractor for the payment of one hundred and fifty dollars a day for each day of delay on the part of such subcontractor; and such last provision will be treated as a provision for liquidated damages.¹³ If delay will cause great damage to the adversary party, the provision for payment can not be said to be necessarily a penalty, though it greatly exceeds the rental value of the property, if it does not greatly exceed the actual damage which will be caused by the delay.¹⁴ A provision in a contract for excavation that the contractor shall be liable for the wages of a superintendent and inspector from the time that the contract should have been performed to the time when the work is completed, is a provision for liquidated damages.¹⁵ Such provisions are upheld even if the building is one which would ordinarily not have a market value for rental purposes. Thus a provision for the payment of a certain reasonable amount for each day's delay in constructing a court house is a provision for liquidated damages.¹⁶ The courts are by no means harmonious, however, in treating such provisions as covenants for liquidated damages. Some courts treat them as penalties.¹⁷ A provision "to forfeit the sum of \$20 per day for each and every day's delay "

¹¹ Nilson v. Jonesboro, 57 Ark. 168; 20 S. W. 1093.

¹² Pogue v. Water Co., 138 Cal. 664; 72 Pac. 144.

¹³ Kunkel v. Wherry, 189 Pa. St. 198; 69 Am. St. Rep. 802; 42 Atl. 112.

¹⁴ Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398. (Rental \$5.75

per day; stipulated damages \$50.00 per day.)

¹⁵ O'Brien v. Pipe Works, 93 Ala. 582; 9 So. 415.

¹⁶ Heard v. Dooly County, 101 Ga. 619; 28 S. E. 986.

¹⁷ Mundy v. United States, 35 Ct. Cl. 265; The Smith Co. v. United States, 34 Ct. Cl. 472; Brennan v. Clark, 29 Neb. 385; 45 N. W. 472.

in completing a lighthouse has been held to be a penalty.¹⁸ It has been held that such provisions are to be treated as penalties if the rental value of the building is easy to be determined.¹⁹ This view is very generally taken if the amount stipulated for is unreasonable. Under a contract to erect a building of the value of eighteen thousand dollars, a provision for paying fifty dollars a day for delay, is treated as a penalty.²⁰ Under a contract to erect a building worth three thousand four hundred dollars, a provision for paying three dollars a day for delay has been held to be a penalty.²¹ So an agreement to pay ten dollars a day for delay in completing a house the rental value of which is thirty dollars a month, is a penalty in the absence of a showing of damage other than loss of rents.²² However, if the amount is reasonable, the contract will generally be treated even in these jurisdictions as a provision for liquidated damages, as where the rental value is three hundred dollars a month and the contract calls for the payment of ten dollars a day for delay.²³ A provision for liquidated damages, which amounts to half the contract price, the amount of which is incurred after the contract has been substantially performed, has been held to be so excessive as to be treated as a penalty.²⁴ An agreement to pay a lump sum for delay without reference to the extent thereof or the amount of damage caused has been held to be a penalty. Thus an agreement to pay twenty thousand dollars "as liquidated damages and not as a penalty" for delay in the performance of a contract to tear down a brick building and remove it, is a stipulation for a penalty.²⁵ The same result has been reached under a bond to pay twenty-five thousand dollars in the event of the breach of

¹⁸ *Smith Co. v. United States*, 34 Ct. Cl. 472.

¹⁹ *Connelly v. Priest*, 72 Mo. App. 673. (To pay \$10 a day for delay.)

²⁰ *Cochran v. Ry.*, 113 Mo. 359; 21 S. W. 6.

²¹ *Zimmerman v. Conrad*, — Mo. App. —; 74 S. W. 139.

²² *Wheeldon v. Trust Co.*, 128 N. C. 69; 38 S. E. 255.

²³ *Ramlose v. Dollman*, 100 Mo. App. 347; 73 S. W. 917.

²⁴ *Edgar, etc., Works v. United States*, 34 Ct. Cl. 205.

²⁵ *Chicago House-Wrecking Co. v. United States*, 106 Fed. 385; 53 L. R. A. 122.

a contract to erect a sewage plant.²⁶ If the owner insists upon payment of liquidated damages for delay, he must allow the contractor the contract price for the work which he has done.²⁷

§1184. Sale of personalty.

In a contract for the sale of personal property, a provision for the payment of a reasonable sum in case of breach, has been held to be liquidated damages.¹ A provision for paying a reasonable sum per day for delay in delivery of the property sold,² as a provision for a certain reasonable amount per day for failure to place an engine and boiler in a barge,³ or a provision for paying ten dollars a day for delay in delivering church pews,⁴ or a provision for paying fifty dollars a day for delay in delivering turbines,⁵ or a provision for deducting fifteen cents a hundred feet for delay in delivering logs, thereby exposing them to the weather for a longer time,⁶ have each been held to be a provision for liquidated damages. So a covenant to pay five dollars a day for delay in delivering an engine is held to be a provision for liquidated damages.⁷ If the amount contracted for is unreasonable, it will be treated as a penalty.⁸ Thus a contract to pay fifty dollars a day for delay in delivering an engine, was held to be a contract for a penalty.⁹ If a gross sum is to be paid for breach of the contract, the provision is more likely to be treated as a penalty. Thus under a contract for purchasing a crop of oranges while on the trees for

²⁶ (City of) *Madison v. Engineering Co.*, 118 Wis. 480; 95 N. W. 1097.

²⁷ *Lennon v. Smith*, 124 N. Y. 578; 27 N. E. 243.

¹ *Kilbourne v. Lumber Co.*, 111 Ky. 693; 64 S. W. 631; *Lynde v. Thompson*, 2 All. (Mass.) 456.

² *Pressed Steel Car Co. v. Ry.*, 121 Fed. 609; 57 C. C. A. 635; *American, etc., Works v. Malting Co.*, 30 Wash. 178; 70 Pac. 236.

³ *Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21; 65 N. W. 863.

⁴ *Illinois Central Ry. v. Cabinet Co.*, 104 Tenn. 568; 78 Am. St. Rep. 933; 50 L. R. A. 729; 58 S. W. 303.

⁵ *Wood v. Paper Co.*, 121 Fed. 818; 58 C. C. A. 256.

⁶ *Kilbourne v. Lumber Co.*, 111 Ky. 693; 64 S. W. 631.

⁷ *Hardie, etc., Co. v. Oil Mill*, — Miss. —; 36 So. 262.

⁸ *Glasscock v. Rosengrant*, 55 Ark. 376; 18 S. W. 379.

⁹ *Iroquois Furnace Co. v. Mfg. Co.*, 181 Ill. 582; 54 N. E. 987.

a lump sum, a provision that the purchaser is to pay the vendor fifteen hundred dollars as part payment, and that if the purchaser fails or refuses to comply with the provision of the contract, such payment shall be forfeited, was held to be a penalty.¹⁰ A provision for payment by the vendee of twenty per cent of the invoice price in case of his countermanding the order, has been held to be a penalty.¹¹

§1185. Sale of good-will.—Reasonable restraint of trade.

Contracts for the sale of good will, which contain a covenant in reasonable restraint of trade, often provide for the amount of damage to be paid in case of the breach of such covenant. Such damages are very difficult to prove, and accordingly such provisions have been treated as liquidated damages.¹ So a promise to pay \$5,000 as liquidated damages in case of a breach of a clause forbidding the buyer to advertise the sale of certain lines of goods reserved by the seller;² or to pay a certain sum in case of breach of an agreement not to disclose a trade-secret,³ have each been held to be agreements for liquidated damages. Even in such jurisdictions a clause binding the promisor "in the penal sum of four hundred dollars," not to practice medicine in a certain locality, is held to be *prima facie* a contract

¹⁰ Nichols v. Haines, 98 Fed. 692; 39 C. C. A. 235.

¹¹ Mansur, etc., Implement Co. v. Hardware Co., 136 Ala. 597; 33 So. 818; Mansur, etc., Implement Co. v. Willet, 10 Okla. 383; 61 Pac. 1066.

¹ Green v. Price, 13 M. & W. 695; McCurry v. Gibson, 108 Ala. 451; 54 Am. St. Rep. 177; 18 So. 806. (Sale of practice of medicine—to pay \$200 in case of breach of covenant not to engage in practice.) Potter v. Ahrens, 110 Cal. 674; 43 Pac. 388; Augusta Steam Laundry Co. v. Debow, 98 Me. 496; 57 Atl. 845; Robinson v. Aid Society, 68 N. J. L. 723; 54 Atl. 416; Kelso v. Reid, 145 Pa. St. 606; 27 Am. St.

Rep. 716; 23 Atl. 323. (Sale of country store and good-will for \$6,000, to pay \$1,000 for breach of agreement not to compete.) Muse v. Swayne, 2 Lea (Tenn.) 251; 31 Am. Rep. 607; Tobler v. Austin, 22 Tex. Civ. App. 99; 53 S. W. 706; Borley v. McDonald, 69 Vt. 309; 38 Atl. 60. (Employee to pay \$500 if he competes with his employer for one year after his employment ends.)

² May v. Crawford, 142 Mo. 390; 44 S. W. 260.

³ Tode v. Gross, 127 N. Y. 480; 24 Am. St. Rep. 475; 13 L. R. A. 652; 28 N. E. 469; Bagley v. Peddie, 16 N. Y. 469; 69 Am. Dec. 713.

for a penalty.⁴ On the other hand, there may be breaches of a covenant in reasonable restraint of trade of very different degrees of importance, causing very different amounts of damage. Some courts have therefore held that a provision for the payment of a fixed sum in case of any breach of a covenant in restraint of trade, is a provision for a penalty.⁵

§1186. Sale of realty.

Under a contract for the sale of realty, a provision for the payment of a certain sum in case of breach, is held in some jurisdictions to be a provision for liquidated damages.¹ Thus an agreement whereby either vendor,² or vendee,³ to a contract for the sale of realty is to forfeit a deposit if he does not perform his part of the contract; or a covenant that if the vendor shall not in a specified time make a deed to vendee, the latter shall have a right to occupy the realty for a specified time;⁴ or a provision that the vendor shall remove an incumbrance within a specified time, and in default thereof shall pay a certain sum,⁵ or, where lots were sold for \$3,050, a provision that the price should be \$4,000 if in eighteen months the purchaser did not erect a certain building thereon,⁶ have been held valid as stipulations for liquidated damages. In other jurisdictions such a provision is held to be a penalty.⁷ Thus a contract to sell realty for \$45,000 and to pay \$5 an acre for each acre under twenty thousand,⁸ or a bond for six hundred dollars

⁴ *Wilkinson v. Colley*, 164 Pa. St. 35; 26 L. R. A. 114; 30 Atl. 286.

⁵ *Radloff v. Haase*, 196 Ill. 365; 63 N. E. 729. (Sale of bakery to pay \$2,000 in case of competition.) *Heatwole v. Gorrell*, 35 Kan. 692; 12 Pac. 135; *Perkins v. Lyman*, 11 Mass. 76; 6 Am. Dec. 158.

¹ See §§ 1174, 1179.

² *Sanders v. Carter*, 91 Ga. 450; 17 S. E. 345.

³ *Womack v. Coleman*, 89 Minn. 17; 93 N. W. 663; *Talkin v. Anderson* (Tex.), 19 S. W. 852.

⁴ *Lorius v. Abbott*, 49 Neb. 214; 68 N. W. 486.

⁵ *Fasler v. Beard*, 39 Minn. 32; 38 N. W. 755.

⁶ *Everett Land Co. v. Maney*, 16 Wash. 552; 48 Pac. 243.

⁷ *O'Keefe v. Dyer*, 20 Mont. 477; 52 Pac. 196; *Monroe v. South* (Tex. Civ. App.), 64 S. W. 1014.

(A provision to forfeit "as a penalty the sum of three hundred dollars.")

⁸ *Gates v. Parmly*, 93 Wis. 294; 66 N. W. 253; affirmed on rehearing, 67 N. W. 739.

conditioned to convey realty worth three hundred dollars,⁹ have been held to be provisions for penalties. The two lines of cases are not all inconsistent; since where such provision is held to be a penalty the amount provided for is generally greatly in excess of the actual damages.

§1187. Lease of realty or personalty.

An agreement to pay a certain sum of money in case of the violation of a covenant of a lease is held to be a provision for liquidated damages if apportioned to the separate covenants, and not unreasonable, especially if the actual damages are difficult to estimate. Thus a provision in a lease which provides for an annual rental of seven thousand dollars, that in case the premises are retained after the expiration of the term, damages shall be paid for such detention at the rate of thirty dollars a day, is liquidated damages.¹ So a covenant that lessees shall pay five dollars a day for delay in removing tracks and ties from realty has been held to be a provision for liquidated damages.² A provision in a lease for paying five thousand dollars in case of breach is treated as a covenant for a penalty where the only breach is delay in payment of rent.³ So under a lease, a provision that if the tenant should assign or underlet, or remove or attempt to remove any of his goods and chattels his term should cease immediately and "one whole year's rent of three thousand dollars shall immediately thereon become due and owing," is rent, and not a penalty.⁴ An agreement made when a vessel is chartered, to pay a certain sum therefor if the vessel is lost, or irreparably damaged is treated as liquidated damages.⁵ By California statute in such cases, however, as such provisions are void by statute, only the actual damages sustained can be recovered.⁶ So an agreement to pay

⁹ McIntosh v. Johnson, 8 Utah 359; 31 Pac. 450.

¹ Poppers v. Meagher, 148 Ill. 192; 35 N. E. 805; affirming, 47 Ill. App. 593.

² Townsend v. Ry. Co., 28 Ont. 195.

³ Gay Mfg. Co. v. Camp, 65 Fed. 794; 13 C. C. A. 137.

⁴ Dermott v. Wallach, 1 Wall. (U. S.) 61.

⁵ Sun, etc., Association v. Moore, 183 U. S. 642.

⁶ Wilmington Transportation Co. v. O'Niel, 98 Cal. 1; 32 Pac. 705.

for the use of a button-sewing machine at a certain sum per thousand buttons, with a provision that if the lessee does not keep account of the number of buttons sewed, the lessor may, at his option, charge five dollars a day for the use of such machine is not a penalty.⁷

§1188. Contracts for royalties.

Provisions fixing the amount of royalty to be paid for the use of another's mine, patent, and the like, are usually held not to be penalties. A provision in a mining contract for the payment of a minimum royalty is not a penalty.¹ So a provision in an oil lease that the lessee shall sink one well during the first year, and in default thereof will pay five hundred dollars a year for delay, is not a penalty,² even if a subsequent test of adjoining realty shows that there is no oil or gas on the leased property.³ So a provision in a contract for the use of a patent to pay the minimum royalty,⁴ or to pay double the contract rate if the patent right is used after the time fixed for the expiration of the license,⁵ are not penalties.

⁷ Standard, etc., Co. v. Breed, 163 Mass. 10; 39 N. E. 346.

¹ Martin v. Mining Co., 114 Fed. 553; Consolidated Coal Co. v. Peers, 150 Ill. 344; 37 N. E. 937.

² Gibson v. Oliver, 158 Pa. St. 277; 27 Atl. 961.

³ Gibson v. Oliver, 158 Pa. St. 277; 27 Atl. 961.

⁴ Van Tuyl v. Young, 23 Ohio C. C. 15.

⁵ Knox Rock-Blasting Co. v. Stone Co., 64 O. S. 361; 60 N. E. 563; reversing, 16 Ohio C. C. 21; 8 Ohio C. D. 478.

CHAPTER LVI.

THE PAROL EVIDENCE RULE.

I. SCOPE OF RULE.

§1189. Accurate statement of rule.

If the parties to a contract have reduced it to writing, they must intend such writing to be the repository of their common intention. It merges all prior and contemporaneous negotiations.¹ Accordingly, a contract in writing complete on its face, cannot be contradicted by extrinsic evidence,² nor can prior or contemporaneous parol agreements be used to contradict the written contract,³ so as to substitute for the intention therein expressed, that expressed in such oral agreements.⁴ To violate this rule and to admit extrinsic evidence of the intention of the parties direct for the purpose of displacing their intention as shown in the written contract, is "to substitute the inferior for the superior degree evidence — conjecture for fact — presumption for the highest degree of legal authority — loose

¹McElveen v. Ry., 109 Ga. 249; 77 Am. St. Rep. 371; 34 S. E. 281; Gray v. Phillips, 88 Ga. 199; 14 S. E. 205; Walters v. Ward, 153 Ind. 578; 55 N. E. 735; McCrary v. Bank, 97 Tenn. 469; 37 S. W. 543.

²Pike v. McIntosh, 167 Mass. 309; 45 N. E. 749; Doyle v. Dixon, 12 All. (Mass.) 576; Hall's Appeal, 60 Pa. St. 458; 100 Am. Dec. 584; Gilbert v. Stockman, 76 Wis. 62; 20 Am. St. Rep. 23; 44 N. W. 845.

³"A written contract cannot be varied or contradicted by a prior or contemporaneous parol agree-

ment between the parties." Garneau v. Cohn, 61 Neb. 500, 501; 85 N. W. 531 (citing among other cases Sylvester v. Paper Co., 55 Neb. 621; 75 N. W. 1092; Commercial State Bank v. Antelope County, 48 Neb. 496; 67 N. W. 465; Quinn v. Moss, 45 Neb. 614; 63 N. W. 931; Gerner v. Church, 43 Neb. 690; 62 N. W. 51.)

⁴Davis v. Robert, 89 Ala. 402; 18 Am. St. Rep. 126; 8 So. 114; Martin v. Ry., 48 W. Va. 542; 37 S. E. 563.

recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt.⁵ In an early Massachusetts case, the court after observing that it was "remarkable that so considerable a degree of obscurity should remain at this day [1814] upon a branch of the law of evidence so constant in its recurrence in courts of law," said, "When parties have deliberately put their engagements in writing, in such terms as impart a legal obligation, without any uncertainty as to the object or extent of such obligation, it shall be presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; so that oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties."⁶ The parol evidence rule applies to suits on contracts in equity, as well as to actions at law.⁷ This rule is often stated inaccurately in some such form as this: extrinsic evidence is inadmissible to contradict or vary the terms of a written contract.⁸ As we shall see hereafter,⁹ extrinsic evidence is often admissible to vary the contract, in the sense that the contract in connection with the admissible evidence has a different meaning from that which it would have had but for such evidence. The evidence forbidden by the rule is not extrinsic evidence in general, but extrinsic evidence of the intention direct of the parties to the contract,

⁵ *Baugh v. Ramsey*, 4 T. B. Mon. (Ky.) 155, 157.

⁶ *Stackpole v. Arnold*, 11 Mass. 27, 30.

⁷ "It is a common error to suppose that these are rigid principles of law, the severity of which will be mitigated by a court of equity, and that the party who feels their operation has nothing to do but to change his ground and get into the climate of the chancellor to meet with different treatment. This,

however, will be found a vain and fruitless escape." *Baugh v. Ramsey*, 4 T. B. Mon. (Ky.) 155, 157.

⁸ Its positive terms, being expressed in writing, cannot be contradicted or varied by parol evidence." *Walker v. Price*, 62 Kan. 327, 333; 84 Am. St. Rep. 392; 62 Pac. 1001; citing *Willard v. Ostrander*, 46 Kan. 591; 26 Pac. 1017; *Rodgers v. Perrault*, 41 Kan. 385; 21 Pac. 287.

⁹ See § 1216 *et seq.*

introduced to displace the intention set forth in the written contract.

§1190. Place of rule in law.

The question of the application of the rule is generally raised by objection to the admission of oral evidence to show the intention of the parties. The parol evidence rule was in its origin applied to sealed contracts, and forbade varying them by parol.¹ It has therefore come to be known as the parol evidence rule, but its true place is not in the law of evidence. Any rule of substantive law can be stated in terms of the admissibility of evidence. A few illustrations will suffice to show that this is not a rule of evidence. (1) In its original form the rule was stated as a rule of pleading,² namely that the legal effect of a sealed instrument could not be aided on behalf of the pleader by averment. (2) While the written contract usually acts substantially as a merger of prior or contemporaneous oral negotiations,³ it also operates as a merger of prior written negotiations,⁴ as where it merges prior letters between the parties,⁵ or a prior written instrument not made part of the subsequent contract.⁶ Thus a term of an accepted bid which is not carried into the complete written contract subsequently entered into between the parties is no part of their contract.⁷ The real objection to the evidence therefore

¹ Butcher v. Butcher, 1 Bos. & P. N. R. 113; Blake v. Marnell, 2 Ball & B. 35; affirmed, 4 Dow. 248; Palmer v. Newell, 20 Beav. 32.

² Rutland's Case, 5 Coke 25.

³ See §§ 1189, 1191.

⁴ Graham v. Sadlier, 165 Ill. 95; 46 N. E. 221. Thus a deed merges a prior written contract. Neal v. Hopkins, 87 Md. 19; 39 Atl. 322.

⁵ South Boston Iron Works v. United States, 34 Ct. Cl. 174; Graham v. Sadlier, 165 Ill. 95; 46 N. E. 221; Christopher, etc., Co. v. Yeager, 202 Ill. 486; 67 N. E. 166; affirming, 105 Ill. App. 126; Ralya

v. Atkins, 157 Ind. 331; 61 N. E. 726; Gage v. Phillips, 21 Nev. 150; 37 Am. St. Rep. 494; 26 Pac. 60; Hunter v. Hathaway, 108 Wis. 620; 84 N. W. 996.

⁶ Brown v. Markland, 16 Utah 360; 67 Am. St. Rep. 629; 52 Pac. 597. Still less can the meaning of a contract between A and B be affected by a similar clause in a contract between A and X. Commonwealth Roofing Co. v. Leather Co., 67 N. J. L. 566; 52 Atl. 389.

⁷ McCrary v. Trust Co., 97 Tenn. 469; 37 S. W. 543.

is not that it is oral as distinguished from written, but that it is extrinsic — that is, that it tends to prove what is not a term of the contract. (3) If a contract is made and to be performed in one jurisdiction and suit is brought in another, the law of the former jurisdiction applies in determining whether oral agreements are merged by the written contract.⁸ If the rule were really one of evidence the law of the forum would apply. Being really a rule of substantive law, the law of the place of performance ordinarily controls. Accordingly, there is a strong tendency at Modern Law to treat the parol evidence rule as a rule of substantive law.⁹

In South Carolina, however, the parol evidence rule has been treated rather as a rule of evidence. It was held that a demurrer to a complaint, based on a note signed by "A, agent," who was alleged to have executed the instrument as the agent of B, was improperly sustained, even though no evidence in support of the allegations of agency could have been introduced.¹⁰ It was, however, suggested that the evidence might show that the principal was doing business in the name of the agent.

§1191. Written contract merges prior negotiations.

In an action on a written contract, complete in itself, the validity of which is conceded, the parties are not permitted to show that their prior or contemporaneous oral agreements were not all reduced to writing, but remain as oral contracts in full force and effect between the parties.¹ This rule applies as

⁸ *Bank v. Talbot*, 154 Mass. 213; 13 L. R. A. 53; 28 N. E. 163.

⁹ *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110.

¹⁰ *Tarver v. Garlington*, 27 S. C. 107; 13 Am. St. Rep. 628; 2 S. E. 846. "Upon the face of the paper, unexplained by parol testimony the jury would have been compelled under the cases above to answer (the question of agency) in the negative. But before the judge, with the agency not even disputed, it seems to us error to hold that there was no cause of action."

¹ *Abrey v. Crux*, L. R. 5 C. P. 37; *Woolam v. Hearn*, 7 Ves. Jr. 211; *Omerod v. Hardman*, 5 Ves. Jr. 722; *Union, etc., Ins. Co. v. Mowry*, 96 U. S. 549; *Sun, etc., Association v. Edwards*, 113 Fed. 445; 51 C. C. A. 279; *Hildreth v. Tramway Co.*, 73 Conn. 631; 48 Atl. 963; *Quinn v. Roath*, 37 Conn. 16; *Rector v. Deposit Co.*, 190 Ill. 380; 60 N. E. 528; affirming, 92 Ill. App. 175; *Tichenor v. Newman*, 186 Ill. 264; 57 N. E. 826; *Ehrsam v. Brown*, 64

well where the intention of the parties is completely embodied in two written contracts instead of one.² If the parties have voluntarily omitted terms in reducing the contract to writing,³ as where they voluntarily omit from a lease a clause providing for an abatement of rent,⁴ they cannot enforce such terms thus voluntarily omitted. Accordingly, where A executes a written instrument whereby she relinquishes her claim to certain horses and carriages in B's possession until B's claim for board is paid in full, A cannot show a contemporaneous oral agreement that she might use such horses in the ordinary course of her business.⁵ So in jurisdictions where there is no priority of payment between notes secured by one mortgage but falling due at different times, extrinsic evidence is inadmissible to show that the assignee should have priority.⁶ So an indorser of one of several notes secured by mortgage cannot show an oral agreement that the proceeds of the mortgage were to be applied first to the note last maturing.⁷ So if a mortgage is given to secure four notes, extrinsic evidence is inadmissible to show that such mortgage was to be released when two of such notes were paid.⁸ So if a contractor has agreed in writing to assume the contracts

Kan. 466; 67 Pac. 867; *Wight v. R. R.*, 16 B. Mon. (Ky.) 4; 63 Am. Dec. 522; *Holmes v. Holmes*, 129 Mich. 412; 89 N. W. 47; *McCray Refrigerator Co. v. Zent*, 99 Mich. 269; 41 Am. St. Rep. 599; 58 N. W. 320; *Loth v. Friederick*, 95 Mich. 598; 55 N. W. 369; *Plumb v. Cooper*, 121 Mo. 668; 26 S. W. 678; *Largey v. Leggatt*, — Mont. —; 75 Pac. 950; *Montana Mining Co. v. Milling Co.*, 20 Mont. 394; 51 Pac. 824; *Crawford v. Improvement Co.*, 15 Mont. 153; 38 Pac. 713; *Russell v. Russell*, 63 N. J. Eq. 282; 49 Atl. 1081; affirming, 47 Atl. 37; *Thomas v. Scutt*, 127 N. Y. 133; 27 N. E. 961; *Travelers' Ins. Co. v. Myers*, 62 O. S. 529; 57 N. E. 458; *Union Central, etc., Co. v. Hook*, 62 O. S. 256; 56 N. E. 906; *Philadelphia, etc., Ry. v. Conway*, 177 Pa. St. 364; 35 Atl.

716; *Heist v. Hart*, 73 Pa. St. 286; *Gilbert v. Stockman*, 76 Wis. 62; 20 Am. St. Rep. 23; 44 N. W. 845. *Contra*, under the California statute. *Snyder v. Mfg. Co.*, 134 Cal. 324; 66 Pac. 311.

² *Harrison v. Tate*, 100 Ga. 383; 28 S. E. 227.

³ *Eleventh Street Church v. Pennington*, 18 Ohio C. C. 408; 10 Ohio C. D. 74.

⁴ *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190; 46 Atl. 535.

⁵ *Radigan v. Johnson*, 174 Mass. 68; 54 N. E. 358.

⁶ *Jennings v. Moore*, 83 Mich. 231; 21 Am. St. Rep. 601; 47 N. W. 127.

⁷ *Schulty v. Bank*, 141 Ill. 116; 33 Am. St. Rep. 290; 30 N. E. 346.

⁸ *First National Bank v. Prior*, 10 N. D. 146; 86 N. W. 362.

for materials already made, he cannot show a contemporaneous oral agreement that he should assume only a certain amount of these contracts, the other party to assume the excess over such amount.⁹ So under a contract for payment of an entire indebtedness, extrinsic evidence is inadmissible to show that a part only of such indebtedness was to be paid.¹⁰ So under a contract to pay "all of the outstanding indebtedness" of X, "not to exceed in all one hundred thirty thousand dollars," extrinsic evidence is inadmissible to show an oral contract to pay part only of all X's debts.¹¹ So under a contract to supply X the material which he needed, evidence is inadmissible to show that the contract was for a limited amount only.¹² So under a complete written contract for the sale of machines, extrinsic evidence is inadmissible to show that the agent was to set them up.¹³ Under written permission for the assignment of a lease, it is inadmissible to show that the lessee's liability was to end by such assignment.¹⁴ So if a written contract for the sale of land provides for the payment of taxes and assessments, extrinsic evidence is inadmissible to show an agreement by the vendor to pay taxes upon such realty,¹⁵ or to show that certain taxes were excepted from a covenant against encumbrances.¹⁶ So if the parties have made a contract whereby one of them is to furnish castings and sink a well at a given price, extrinsic evidence is inadmissible to show that he was to furnish the tubing and pump for the same price.¹⁷ So under a contract for employing an insurance agent, which by its terms could be ended at will without liability except for commissions earned, the agent cannot show a contemporaneous oral contract

⁹ *Bandholz v. Judge*, 62 N. J. L. 526; 41 Atl. 723.

¹⁰ *First National Bank v. Ry.* (Tenn. Ch. App.), 46 S. W. 312.

¹¹ *Bell v. Mendenhall*, 78 Minn. 57; 80 N. W. 843.

¹² *Dean v. Mfg. Co.*, 177 Mass. 137; 58 N. E. 162.

¹³ *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473, 478; 86 N. W. 954; rehearing denied, 87 N. W. 886.

¹⁴ *Rector v. Deposit Co.*, 190 Ill. 380; 60 N. E. 528.

¹⁵ *Gilbert v. Stockman*, 76 Wis. 62; 20 Am. St. Rep. 23; 44 N. W. 845; and see *Garwood v. Wheaton*, 128 Cal. 399; 60 Pac. 961.

¹⁶ *Stanisics v. McMurtry*, 64 Neb. 761; 90 N. W. 884.

¹⁷ *Meador v. Allen*, 110 Ia. 588; 81 N. W. 799.

giving him commissions on future renewals.¹⁸ So one who ships under an ordinary bill of lading, constituting a contract in writing between himself and the railroad company, cannot enforce a prior oral contract to give him as low a rate as was given to any shipper.¹⁹

§1192. Evidence inadmissible to contradict written contract.

Extrinsic evidence is inadmissible to contradict the intention of the parties as expressed in a written contract by showing a prior or contemporaneous oral agreement contrary to the written agreement.¹ Thus extrinsic evidence is inadmissible to show that a deed was not intended to convey the land therein described,² or that it was meant only as a power of attorney,³ or that a bill of sale,⁴ or chattel mortgage,⁵ of personal property, was not intended to include all property therein described, or that under a written contract of sale, title was really reserved

¹⁸ *Stowell v. Ins. Co.*, 163 N. Y. 298; 57 N. E. 480.

¹⁹ *Hopkins v. Ry.*, 29 Kan. 544.

¹ *Housekeeper Publishing Co. v. Swift*, 97 Fed. 290; 38 C. C. A. 187; *Smith v. Bank*, 89 Fed. 832; 32 C. C. A. 368; *Bomar v. Rosser*, 131 Ala. 215; 31 So. 430; *Adams v. Turner*, 73 Conn. 38; 46 Atl. 247; *American Harrow Company v. Dolvin*, 119 Ga. 186; 45 S. E. 983; *Carter v. Williamson*, 106 Ga. 280; 31 S. E. 651; *Maxwell v. Willingham*, 101 Ga. 55; 28 S. E. 672; *Becker v. Dalby* (Ia.), 86 N. W. 314; *Crane v. Williamson*, 111 Ky. 271; 63 S. W. 610, 975; *White v. Williams*, 105 Ky. 802; 49 S. W. 808; *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769; 28 So. 136; *Baylor v. Butterfass*, 82 Minn. 21; 84 N. W. 640; *Ming v. Pratt*, 22 Mont. 262; 56 Pac. 279; *Aultman v. Hawk* (Neb.), 95 N. W. 695; *Hoffman v. Accident Co.*, 127 N. C. 337; 37 S.

E. 466; *First National Bank v. Chandelier Co.*, 17 Ohio C. C. 443; *Harley v. Weber*, 1 Ohio C. D. 360; *Kaufmann v. Friday*, 201 Pa. St. 178; 50 Atl. 942; *Ivery v. Phillips*, 196 Pa. St. 1; 46 Atl. 133; *Burwell & Dunn Co. v. Chapman*, 59 S. C. 581; 38 S. E. 222; *Martin v. Ry.*, 48 W. Va. 542; 37 S. E. 563; *Coman v. Wunderlich*, — Wis. —; 99 N. W. 612; *Newell v. Canning Co.*, 119 Wis. 635; 97 N. W. 487.

² *Oliver v. Brown*, 102 Ga. 157; 29 S. E. 159; *Jacob Tome Institution v. Davis*, 87 Md. 591; 41 Atl. 166.

³ *Anderson v. Ins. Co.*, 112 Ga. 532; 37 S. E. 766.

⁴ *Hodson v. Varney*, 122 Cal. 619; 55 Pac. 413.

⁵ *Drum-Flato Commission Co. v. Barnard*, 66 Kan. 568; 72 Pac. 257; *Lawrence v. Comstock*, 124 Mich. 120; 82 N. W. 808.

by the vendor,⁶ or that written contracts for work were not intended to include work specified therein.⁷ So a deed deposited in escrow under a written contract for delivery on specified conditions cannot be shown to be intended as a gift.⁸ An oral contemporaneous agreement that a written release of mutual rights should have no validity cannot be enforced.⁹ A written contract whereby a lessor whose title is in dispute agrees to indemnify his lessee against any loss that might be incurred from paying rent, in case his title is adjudged defective cannot be contradicted by a contemporaneous oral contract providing that the rent should not be paid until the title was settled.¹⁰ So where a railroad ticket is a complete contract, extrinsic evidence is inadmissible to contradict its terms, as to show that a limited ticket was by oral agreement to operate as an unlimited ticket.¹¹ Extrinsic evidence is inadmissible to show that a different amount from that specified in a written contract for the payment of money was to be paid.¹² Thus under a contract for the sale of milk, evidence is inadmissible to show that there was to be a discount of four cents a can to be applied on a note for a milk route.¹³ So a contract to pay royalties at a certain rate cannot be contradicted by showing an oral contract for a certain minimum amount to be paid.¹⁴ So, where a written contract shows that it was "agreed and stipulated" that a criminal case should be discontinued, evidence is inadmissible to show that it was discontinued by the prosecuting witness, and that the defendant merely acquiesced therein.¹⁵ So under a contract between two railroad companies, whereby all the trains belonging to one company are to have a priority

⁶ *Finnigan v. Shaw*, 184 Mass. 112; 68 N. E. 35.

⁷ *Norwood v. Lathrop*, 178 Mass. 208; 59 N. E. 650; *Daly v. Kingston*, 177 Mass. 312; 58 N. E. 1109.

⁸ *Hilgar v. Miller*, 42 Or. 552; 72 Pac. 319.

⁹ *Loth v. Friederick*, 95 Mich. 598; 55 N. W. 369.

¹⁰ *Prouty v. Adams*, 141 Cal. 304; 74 Pac. 845.

¹¹ *Walker v. Price*, 62 Kan. 327;

84 Am. St. Rep. 392; 62 Pac. 1001.

¹² *McLeod v. Hunt*, 128 Mich. 124; 87 N. W. 101; *O'Neal v. McLeod* (Miss.), 28 So. 23.

¹³ *Kelley v. Thompson*, 175 Mass. 427; 56 N. E. 713.

¹⁴ *Standard Fireproofing Co. v. Fireproofing Co.*, 177 Mo. 559; 76 S. W. 1008.

¹⁵ *Russell v. Morgan*, 24 R. I. 134; 52 Atl. 809.

of crossings, extrinsic evidence is inadmissible to show that this priority was to apply only to certain classes of trains.¹⁶ So a contract to "purchase" land can not be shown to be a contract for a right of way.¹⁷ A contract which on its face is to be performed in the alternative, cannot be shown to be restricted by oral agreement to the performance of one of the alternatives. Thus where a bill of lading is a contract whereby the carrier agrees to deliver to a connecting railroad, or to a steamer, extrinsic evidence is inadmissible to show that the contract was to deliver to the connecting railroad, and not to the steamer.¹⁸ So under a contract to ship property to New York, not specifying by which route, extrinsic evidence is inadmissible to show that the parties had agreed upon one specific route.¹⁹ However, where the bill of lading did not show the route it was held proper to show an oral agreement specifying to what connecting carrier the initial carrier was to deliver the goods.²⁰ Where a contract for a policy provides it shall not go into effect until the application is accepted, and the policy is issued and delivered, extrinsic evidence is inadmissible to show that the policy is to go into effect at once.²¹ Extrinsic evidence is inadmissible to show that a policy which on its face covers only the husband's interest, was intended to cover the wife's interest too. Accordingly, a clause providing that the policy shall become inoperative if the insured conveys his interest, operates where the husband conveys to the wife, an oral provision to the contrary notwithstanding.²² So where a clause provides that the policy shall become inoperative if the building is enlarged without the consent of the insurance company, extrinsic evidence is inadmissible to show that the enlargement was agreed upon before the policy issued, where the building is described as it existed when the policy issued.²³ So, where

¹⁶ Appeal of Cornwall, etc., R. R., 125 Pa. St. 232; 11 Am. St. Rep. 889; 17 Atl. 427.

¹⁷ Camden, etc., Ry. v. Adams, 62 N. J. Eq. 656; 51 Atl. 24.

¹⁸ McElveen v. Ry., 109 Ga. 249; 77 Am. St. Rep. 371; 34 S. E. 281.

¹⁹ Webster v. Paul, 10 O. S. 531.

²⁰ Louisville, etc., Ry. v. Duncan, 137 Ala. 446; 34 So. 988.

²¹ Chamberlain v. Ins. Co., 109 Wis. 4; 83 Am. St. Rep. 851; 85 N. W. 128.

²² Walton v. Ins. Co., 116 N. Y. 317; 5 L. R. A. 677; 22 N. E. 443.

²³ Frost's, etc., Works v. Ins. Co.,

a policy is made payable directly to a granddaughter, extrinsic evidence is inadmissible to show that it was issued to the grandfather on his own life, and at his request made payable to the granddaughter.²⁴ So extrinsic evidence is inadmissible to show that a policy payable on its face to the insured was really payable to his sister.²⁵ So extrinsic evidence is inadmissible to eliminate a warranty.²⁶ So extrinsic evidence is inadmissible to contradict the effect of a covenant against incumbrances.²⁷ The maker of a note cannot show an oral agreement between himself and the payee, that the note should have no validity.²⁸ Thus extrinsic evidence is inadmissible to show that a note and mortgage were given to the bank in order that the bank might use them as apparent collateral security,²⁹ or might show them to the bank examiner as apparent assets.³⁰ In some jurisdictions, however, an extension of the principle that conditions precedent to a written instrument's taking effect may be shown,³¹ has induced the courts to hold that extrinsic evidence is admissible to show that a written contract delivered between the parties was delivered as a mere form and was never intended to take effect. Thus where A had signed a contract agreeing to take a certain amount of street-car advertising from B at certain rates, and had delivered it to B's agent, A could show in an action on the contract that the real contract was an oral agreement for a less amount at a lower rate, and that A signed

37 Minn. 300; 5 Am. St. Rep. 846; 34 N. W. 35.

²⁴ *Burton v. Ins. Co.*, 119 Ind. 207; 12 Am. St. Rep. 405; 21 N. E. 746.

²⁵ *Union Central Life Ins. Co. v. Phillips*, 102 Fed. 19; 41 C. C. A. 263; reversing, 101 Fed. 33.

²⁶ *Arguimbau v. Ins. Co.*, 106 La. 139; 30 So. 148.

²⁷ *Smith v. Bank*, 171 Mass. 178; 50 N. E. 545.

²⁸ *Leonard v. Miner*, 120 Cal. 403; 52 Pac. 655; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443; 73 Am. St. Rep. 305; 53 N. E. 881; *Lillie*

v. Bates, 2 Ohio C. D. 54. This rule, of course, assumes that the note is in other respects valid. If there is in fact no consideration for the note, this may, of course, be shown. See §§ 273, 279.

²⁹ *Dominion National Bank v. Manning*, 60 Kan. 729; 57 Pac. 949. (Questioning and distinguishing *Higgins v. Ridgway*, 153 N. Y. 130; 47 N. E. 32; *Breneman v. Furniss*, 90 Pa. 186; 35 Am. Rep. 651.)

³⁰ *Mills County National Bank v. Perry*, 72 Ia. 15; 2 Am. St. Rep. 228; 33 N. W. 341.

³¹ See § 1209.

the written contract merely to enable B to show A's order to other prospective customers, and yet conceal the fact that B had been given an especially low rate.³² If this case were carried to its logical conclusion, it would be difficult to imagine a case to which parol evidence rule would apply. Where a payee in assigning a note signs it on the face under the name of the maker, he cannot use extrinsic evidence to show that he was merely an indorser.³³ So a surety may not show an agreement with the payee whereby he was not to be held liable on the note.³⁴ So a note, negotiable in form, cannot be shown to be intended to be non-negotiable.³⁵ So the maker of a check in payment of a subscription to a soldiers' monument cannot show an agreement with the payee that the check should be surrendered and the maker's bond payable at a later time, or be taken in place thereof,³⁶ and where a written subscription is given, extrinsic evidence is inadmissible to show that it was given solely to secure the necessary certificate of the state engineer, and that the town was to raise funds to pay the amount of the subscription.³⁷ If a son receives property from his father, and gives his father his note in return therefor, extrinsic evidence is inadmissible to show that the property was given as an advancement, and that the note was intended merely as a receipt therefor.³⁸ A different view has been expressed in some authorities, holding that extrinsic evidence of such agreement is admissible. This can be reconciled with the general rule only on the theory that under the facts of the transaction there was no consideration for the note.³⁹ So extrinsic evidence that an obligor signed a bond under an agreement with the obligee

³² Southern, etc., Co. v. Mfg. Co., 91 Md. 61; 46 Atl. 513.

³³ Cook v. Brown, 62 Mich. 473; 4 Am. St. Rep. 870; 29 N. W. 46. (No mistake in execution being shown.)

³⁴ Kulenkamp v. Groff, 71 Mich. 675; 15 Am. St. Rep. 283; 1 L. R. A. 594; 40 N. W. 57.

³⁵ Mallory v. Fitzgerald's Estate, — Neb. —; 95 N. W. 601.

³⁶ La Fayette County Monument Corporation v. Magoon, 73 Wis. 627; 3 L. R. A. 761; 42 N. W. 17.

³⁷ Grand Isle v. Kinney, 70 Vt. 381; 41 Atl. 130.

³⁸ Russell v. Smith, 115 Ia. 261; 88 N. W. 361.

³⁹ Marsh v. Chown, 104 Ia. 556; 73 N. W. 1046; Brook v. Latimer, 44 Kan. 431; 21 Am. St. Rep. 292; 11 L. R. A. 805; 24 Pac. 946.

that he should not be liable thereon, is inadmissible.⁴⁰ So a written receipt for wheat, with the promise to pay therefor, cannot be contradicted by showing that the person receiving the wheat did so merely as a bailee.⁴¹ So a written contract for the sale of a machine cannot be contradicted by showing that it was merely a rental on commission.⁴² A written promise to pay money cannot be contradicted by showing that it was to be paid in work,⁴³ or in property,⁴⁴ as in building material,⁴⁵ or in corporate stock,⁴⁶ or in lots and in corporate stock,⁴⁷ or in accounts against third person.⁴⁸ So in an action on a lease to recover rent, evidence is inadmissible to show that part of the rent was to be paid to the lessor by the lessee's furnishing him with table-board.⁴⁹ So in an action on a note evidence is inadmissible to show that such note was to be paid by the maker's collecting certain claims for the payee at a certain commission, which commission would amount to the face of the note.⁵⁰ Such a contract may, however, be the basis of a counterclaim if broken. So a contract that a note is to be paid in part by having damages due the maker arising out of another transaction credited on the note is unenforceable.⁵¹ If a note is payable in money, an oral contract that it is payable in certain bank notes not legal tender is unenforceable,⁵² though a contract to redeem in gold the bank-bills for which the note

⁴⁰ *Wallace v. Langston*, 52 S. C. 133; 29 S. E. 552.

⁴¹ *Horn v. Hansen*, 56 Minn. 43; 22 L. R. A. 617; 57 N. W. 315.

⁴² *Price v. Marthen*, 122 Mich. 655; 81 N. W. 551.

⁴³ *Stein v. Forgarty*, 4 Ida. 702; 43 Pac. 681; *Merrigan v. Hall*, 175 Mass. 508; 56 N. E. 605; *Vradenburg v. Johnson*, — Neb. —; 91 N. W. 496.

⁴⁴ *Clement v. Houck*, 113 Ia. 504; 85 N. W. 765.

⁴⁵ *Kimball v. Bryan*, 56 Ia. 632; 10 N. W. 218.

⁴⁶ *Perry v. Bigelow*, 128 Mass. 129.

⁴⁷ *Mosher v. Rogers*, 117 Ill. 446; 5 N. E. 583.

⁴⁸ *Bender v. Montgomery*, 8 Lea (Tenn.) 586.

⁴⁹ *Stull v. Thompson*, 154 Pa. St. 43; 25 Atl. 890.

⁵⁰ *Singer Mfg. Co. v. Potter*, 59 Minn. 240; 61 N. W. 23. But see *Johnston v. McCart*, 24 Wash. 19; 63 Pac. 1121, where such a contract was enforced.

⁵¹ *Phelps v. Abbott*, 114 Mich. 88; 72 N. W. 3.

⁵² *Baugh v. Ramsey*, 4 T. B. Mon. (Ky.) 155; *Racine County Bank v. Keep*, 13 Wis. 209.

was given is enforceable.⁵³ An exception to this rule was recognized in contracts made during the Civil War in Southern states, in which the weight of authority recognizes the right of the parties to the contract to show that they intended payment in money of the United States,⁵⁴ or in money of the Confederate States.⁵⁵ Whether this is an illustration of evidence showing the intention of the parties direct, or whether it is merely an illustration of the admissibility of evidence showing the surrounding facts and circumstances, to enable the court to place itself in the position of the parties to the contract, and thus to determine what medium of payment they contemplated is a question not always easy to determine from an examination of the opinions of the courts. So a written contract to pay money, which by its terms imports a general personal liability cannot be shown to be a contract to pay out of a particular fund,⁵⁶ as out of the profits of the transaction in connection with which the written promise was made,⁵⁷ or out of dividends on the stock for which the note was given.⁵⁸ So if a note is payable to the firm of A and B it cannot be shown that A was intended as the real payee.⁵⁹

§1193. Evidence of intention direct inadmissible.

Extrinsic evidence is inadmissible in an action on a written contract, to show the understanding of the meaning and effect of such contract entertained by one or both the parties thereto when the contract was entered into. If the intention of one party alone is shown; and the evidence does not show that the

⁵³ *Racine County Bank v. Keep*, 13 Wis. 209.

⁵⁴ *Bryan v. Harrison*, 76 N. C. 360; *Stearns v. Mason*, 24 Gratt. (Va.) 484.

⁵⁵ *Confederate Note Case*, 19 Wall. (U. S.) 548; *Carmichael v. White*, 11 Heisk. (Tenn.) 262; *Donley v. Tindall*, 32 Tex. 43; 5 Am. Rep. 234.

⁵⁶ *Conner v. Clark*, 12 Cal. 168; 73 Am. Dec. 529; *Murchie v. Peck*, 160 Ill. 175; 43 N. E. 356; *Currier*

v. Hale, 8 All. (Mass.) 47; *Harrison v. Morrison*, 39 Minn. 319; 40 N. W. 66; *Wilson v. Wilson*, 26 Or. 251; 38 Pac. 185; *Ellis v. Hamilton*, 4 Sneed (Tenn.) 512.

⁵⁷ *Lake Side Land Co. v. Dromgoole*, 89 Ala. 505.

⁵⁸ *Fuller v. Law*, 207 Pa. St. 101; 56 Atl. 333.

⁵⁹ *McMicken v. Webb*, 6 How. (U. S.) 292.

other parties acquiesced therein, no contract of any sort is shown to exist.¹ If extrinsic evidence is introduced to show the common understanding and intention of both the parties to the contract, such evidence violates the parol evidence rule.² Thus where the contract is conceded to be valid, extrinsic evidence of representations of an agent, made at the time the contract was entered into, is inadmissible to show the intention of the parties.³ So a written contract for employment cannot be varied by extrinsic evidence of a contract to pay extra compensation for work overtime.⁴ So if the time of performance

¹ *Terrell v. Huff*, 108 Ga. 655; 34 S. E. 345; *Brown v. Langner*, 25 Ind. App. 538; 58 N. E. 743; *McLeod v. Johnson*, 96 Me. 271; 52 Atl. 760; *Gulledge v. Woolen Mills*, 75 Miss. 297; 22 So. 952; *Arming-ton v. Stelle*, 27 Mont. 13; 94 Am. St. Rep. 811; 69 Pac. 115; *Liverpool, etc., Co. v. Lumber Co.*, 11 Okla. 579, 585; 69 Pac. 936, 938.

² *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126; 8 So. 114; *Hartford, etc., Association v. Goldreyer*, 71 Conn. 95; 41 Atl. 659; *Bass Dry-Goods Co. v. Mfg. Co.*, 113 Ga. 1142; 39 S. E. 471; *Commercial, etc., Co. v. Bates*, 176 Ill. 194; 52 N. E. 49; *Cravens v. Cotton Mills*, 120 Ind. 6; 16 Am. St. Rep. 298; 21 N. E. 981; *Buckeye Mfg. Co. v. Machine Works*, 26 Ind. App. 7; 58 N. E. 1069; *Clement v. Drybread*, 108 Ia. 701; 78 N. W. 235; *Pratt v. Prouty*, 104 Ia. 419; 65 Am. St. Rep. 472; 73 N. W. 1035; *Neal v. Hopkins*, 87 Md. 19; 39 Atl. 322; *Morton v. Clark*, 181 Mass. 134; 63 N. E. 409; *Haynes v. Hobbs*, — Mich. —; 98 N. W. 978; *Crane v. Bayley*, 126 Mich. 323; 85 N. W. 874; *Sheley v. Brooks*, 114 Mich. 11; 72 N. W. 37; *Chicago, etc., Co. v. Higginbotham (Miss.)*, 29 So. 79; *Garneau v. Cohn*, 61 Neb. 500; 85 N. W. 531; *Faulkner v. Gilbert*, 61 Neb. 602;

85 N. W. 843; *Latenser v. Misner*, 56 Neb. 340; 76 N. W. 897; *Saddlery Hardware Co. v. Hillsborough Mills*, 68 N. H. 216; 73 Am. St. Rep. 569; 44 Atl. 300; *Price v. Weed*, 9 N. M. 397; 54 Pac. 231; *McKenzie v. Houston*, 130 N. C. 566; 41 S. E. 780; *Dougherty v. Norwood*, 196 Pa. St. 92; 46 Atl. 384; *Melcher v. Hill*, 194 Pa. St. 440; 45 Atl. 488; *Sloan v. King (Tex. Civ. App.)*, 69 S. W. 541; *Gibson v. Rourke Co.*, 22 Wash. 449; 61 Pac. 162; *Michels v. Rustemeyer*, 20 Wash. 597; 56 Pac. 380; *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360; 38 S. E. 679; *Crislip v. Cain*, 19 W. Va. 438; *Johnson v. Pugh*, 110 Wis. 167; 85 N. W. 641; *Wussow v. Hase*, 108 Wis. 382; 84 N. W. 433.

³ *McMaster v. Ins. Co.*, 99 Fed. 856; 40 C. C. A. 119; affirming, 90 Fed. 40; *Barrie v. Smith*, 105 Ga. 34; 31 S. E. 121; *Burgher v. Ry.*, 105 Ia. 335; 75 N. W. 192; *Scott v. Ry.*, 93 Md. 475; 49 Atl. 327; *Union Central Life Ins. Co. v. Hook*, 62 O. S. 256; 56 N. E. 906; *Meyer-Bruns v. Ins. Co.*, 189 Pa. St. 579; 42 Atl. 297; *Milwaukee Carnival Association v. King, etc., Co.*, 112 Wis. 647; 88 N. W. 598.

⁴ *The Lakme*, 93 Fed. 230.

is fixed in the written contract a contemporaneous oral agreement changing such time, either lengthening it,⁵ or shortening it,⁶ is inadmissible. So a contemporaneous agreement cannot change the place of performance from that fixed by the written contract.⁷

§1194. Evidence of intention direct inadmissible to vary written contract.

Extrinsic evidence of prior or contemporaneous oral agreements between parties is inadmissible to vary the terms of the written contract which they have entered into;¹ and this is true of prior written negotiations.² Thus, in a land contract, extrinsic evidence changing a corner³ or a boundary,⁴ of the land contracted for, is inadmissible. So under a written lease extrinsic evidence of an oral covenant not to assign is inadmissible.⁵ So under a written contract for subscription to corporate stock of a railroad company a prior oral contract that a railroad station will be located next to the property of the subscriber cannot be enforced.⁶ So under a written contract to make and sell a machine an oral representation that such machine could be put on the market at a certain price cannot be regarded as a term of the contract.⁷

⁵ *Gordon v. Niemann*, 118 N. Y. 152; 23 N. E. 454.

⁶ *Cleckley v. Fidelity Co.*, 117 Ga. 466; 43 S. E. 725.

⁷ *Samuel M. Lawder & Sons Co. v. Grocer Co.*, 97 Md. 1; 54 Atl. 634.

¹ *Anderson v. Wainwright*, 67 Ark. 62; 53 S. W. 566; *Bullard v. Brewer*, 118 Ga. 918; 45 S. E. 711; *Rose v. Zinc Co.*, — Kan. —; 74 Pac. 625; *Rough v. Breitung*, 117 Mich. 48; 75 N. W. 147; *Coates v. Bacon*, 77 Miss. 320; 27 So. 621; *Norfolk Beet Sugar Co. v. Berger*, 1 Neb. Unofficial Rep. 151; 95 N. W. 336; *Te Poel v. Shutt*, 57 Neb. 592; 78 N. W. 288; *Liverpool, etc., Ins. Co. v. Lumber Co.*, 11 Okla. 579, 585; 69

Pac. 936, 938; *Streator v. Paxton*, 201 Pa. St. 135; 50 Atl. 926; *Haskins v. Dern*, 19 Utah 89; 56 Pac. 953; *Maupin v. Ins. Co.*, 53 W. Va. 557; 45 S. E. 1003.

² *Rough v. Breitung*, 117 Mich. 48; 75 N. W. 147.

³ *Town of Kane v. Farrelly*, 192 Ill. 521; 61 N. E. 648.

⁴ *Weaver v. Stoner*, 114 Ga. 165; 39 S. E. 874.

⁵ *Rickard v. Dana*, 74 Vt. 74; 52 Atl. 113.

⁶ *Philadelphia, etc., Co. v. Conway*, 177 Pa. St. 364; 35 Atl. 716.

⁷ *Macklem v. Fales*, 130 Mich. 66; 89 N. W. 581.

§1195. Legal effect of contract cannot be contradicted.

The rule that prior or contemporaneous negotiations can not be used to contradict, add to, or otherwise vary, a written contract applies not merely to the letter of the written contract, but also to its legal effect.¹ Thus where no time is fixed for performance, and the implication therefrom would be that a reasonable time was allowed, evidence that a specific time had been agreed upon is inadmissible.² It has been held, however, that among other circumstances evidence of conversations between the parties to the contract may be considered to show what they considered to be a reasonable time.³ If the contract in legal effect calls for prompt performance, an oral contract delaying performance until some specified time in the future is unenforceable. Thus where a bill of exchange has been drawn an oral contract that it should not be presented for payment until another draft had been paid was unenforceable.⁴ It has been held, however, that an oral contract, made when a check was delivered that it should not be presented until a certain date in the future was valid.⁵ So under a contract of sale, with delivery in installments at a gross price, the legal effect of which was to make the price payable when the entire quantity was delivered, an oral contract that at the delivery of each installment the price therefor should be paid was unenforceable.⁶ So a guaranty for a specified amount to be advanced by the maker, payable on demand after thirty days, can

¹ *Fisk v. Casey*, 119 Cal. 643; 51 Pac. 1077; *Nelson v. Godfrey*, 74 Vt. 470; 52 Atl. 1037; *Stickney v. Hughes*, — Wyom. —; 75 Pac. 945.

² *Central R. R. v. Hasselkus*, 91 Ga. 382; 44 Am. St. Rep. 37; 17 S. E. 838; *Loeb v. Stern*, 198 Ill. 371; 64 N. E. 1043; *Barney v. Ry.*, 157 Ind. 228; 61 N. E. 194; *Tripp v. Smith*, 180 Mass. 122; 61 N. E. 804; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147; 30 Am. St. Rep. 421; 51 N. W. 197; *Sloman v. Express Co.*, — Mich. —; 95 N. W. 999;

Stange v. Wilson, 17 Mich. 342; *Liljengren, etc., Co. v. Mead*, 42 Minn. 420; 44 N. W. 306; *Irish v. Dean*, 39 Wis. 562.

³ *Cocker v. Mfg. Co.*, 3 Sumn. (U. S.) 530; *Coates v. Sangston*, 5 Md. 121.

⁴ *Brown v. Wiley*, 20 How. (U. S.) 442.

⁵ *Gray v. Anderson*, 99 Ia. 342; 61 Am. St. Rep. 243; 68 N. W. 790.

⁶ *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

not be modified by showing that the guaranty was to last for thirty days only.⁷ If the written contract is so drawn that time is not of its essence, the parties cannot show a contemporaneous oral agreement that time should be of the essence.⁸ So under a contract appointing an agent "in the immediate vicinity of" a certain town, extrinsic evidence is inadmissible to show that he was to have the exclusive agency.⁹ Where a check was given, payable on the date thereof, the drawer could not show an oral agreement that the check was not to bear interest.¹⁰ So where two persons have signed a contract in such a way that they are jointly liable thereon, an oral agreement that each shall be severally liable for one-half of the liability cannot be used to modify the contract.¹¹ So where A, a member of a firm, made and signed a written entry of part payment on a partnership note barred by the statute of limitations the legal effect of which was to make A liable for the entire amount of the note, A cannot show that he signed under an oral contract that he should be liable for only one half the amount of the note.¹² So in a contract by one person to support another, where no place of support is fixed, and therefore the party to be supported may fix any reasonable place for receiving support, extrinsic evidence is inadmissible to show that the parties had agreed that such a support was to be furnished at a fixed place.¹³ It has, however, been held under a contract of employment that where no specific place of performance is fixed, oral evidence of the intention of the parties direct is admissible to show on what locality they had agreed.¹⁴ So where no rate is fixed in a bill of lading, and accordingly a

⁷ West-Winfree Tobacco Co. v. Waller, 66 Ark. 445; 51 S. W. 320.

⁸ Ferguson v. Arthur, 128 Mich. 297; 87 N. W. 259; Tufts v. Morris, 87 Mo. App. 98.

⁹ Roberts v. Machine Co., 8 S. D. 579; 59 Am. St. Rep. 777; 67 N. W. 607.

¹⁰ Haynes v. Wesley, 112 Ga. 668; 81 Am. St. Rep. 72; 37 S. E. 990.

¹¹ Hanson v. Gunderson, 95 Wis.

613; 70 N. W. 827. So of a joint chattel mortgage. Williams Bros. Co. v. Hanmer, — Mich. —; 94 N. W. 176.

¹² Powell v. Fraley, 98 Ga. 370; 25 S. E. 450.

¹³ Tuttle v. Burgett, 53 O. S. 498; 53 Am. St. Rep. 649; 30 L. R. A. 214; 42 N. E. 427.

¹⁴ Cook v. Todd (Ky.), 72 S. W. 779.

reasonable rate is implied, an oral agreement between the parties fixing the rate cannot be enforced.¹⁵ A written contract of hire cannot be contradicted by showing that the employer could terminate the contract at will.¹⁶ A contract to convey land "for all legitimate railroad purposes" cannot be modified by showing an oral agreement not to erect an eating house or hotel thereon;¹⁷ nor can a lease for "business purposes" be modified by a contemporaneous oral agreement not to use the premises as a saloon.¹⁸ A contract for the sale of land which states the area as an estimate, and provides for a survey to ascertain the exact amount, cannot be varied by contemporaneous oral agreement that this estimate was to be taken as correct for purposes of tendering the price of the property.¹⁹ So a deed of land in which the description is such as to carry future accretions on the side bounded by a river cannot be modified by a prior oral contract that accretions should not pass to the grantee.²⁰ A written contract of employment cannot be added to by showing an oral agreement that the employees should give bond.²¹ So under a written contract to confess judgment and take a stay of execution, which in law required giving a surety on the stay-bond cannot be modified by an oral contract that no surety should be required.²² So a contract "to deliver to the order of A \$800 (less 20 per cent discount) in wall paper at wholesale price," means wholesale price at the time of demand, and an oral provision that the wholesale price fixed by a price card given to the vendee when the contract was made, containing the prices intended, was unenforceable.²³ Under a written lease conveying a dining-room situated in a hotel, the lessee

¹⁵ Louisville, etc., R. R. v. Wilson, 119 Ind. 352; 4 L. R. A. 244; 21 N. E. 341.

¹⁶ Drennen v. Satterfield, 119 Ala. 84; 24 So. 723.

¹⁷ Abraham v. Ry., 37 Or. 495; 82 Am. St. Rep. 779; 60 Pac. 899.

¹⁸ Harrison v. Howe, 109 Mich. 476; 67 N. W. 527.

¹⁹ Starin v. Kraft, 174 Ill. 120; 50 N. E. 1059.

²⁰ Gorton v. Rice, 153 Mo. 676; 55 S. W. 241.

²¹ Kerr v. Sanders, 122 N. C. 635; 29 S. E. 943.

²² Mayse v. Briggs, 3 Head. (Tenn.) 36.

²³ Fawcner v. Wall Paper Co., 88 Ia. 169; 45 Am. St. Rep. 230; 55 N. W. 200.

agreed to furnish "board or meals, such as are served to the guests of the hotel, for three persons." This provision in legal effect meant any three suitable persons whom the lessor might designate; and the lessee could not show by oral contemporaneous agreement between himself and the lessor that it meant the housekeeper, the chambermaid and the porter.²⁴ Under a written contract in escrow, by the terms of which A's note was to be delivered to B, when B delivered to A a certain track-laying machine then in the custody of X, who was asserting a lien thereon, A's expenses in getting such machine to be credited upon the note, B could not show an oral contract whereby A promised to take certain steps to obtain this machine from X.²⁵ So a contract giving the right to construct a telephone over A's land generally cannot be shown by oral agreement to be limited to a particular part of the land.²⁶

II. CASES OUTSIDE THE TERMS OF THE RULE.

§1196. Limitations of the rule.

From the statement of the parol evidence rule, it evidently can apply only under a combination of different facts. The rule applies, (1) where there is a complete written contract; (2) in an action between the parties to the contract or their representatives; (3) where the validity of the contract itself is not in issue; and (4) where an attempt is made to show prior or contemporaneous oral terms of such contract. If any one of these facts is lacking, the parol evidence rule has no application. Accordingly it is necessary to consider a group of cases where the rule may seem applicable at first glance, but which are on analysis seen to be completely without the very terms of the rule itself.

²⁴ *Rector v. Bernaschina*, 64 Ark. 650; 44 S. W. 222.

²⁵ *Pacific National Bank v. Bridge Co.*, 23 Wash. 425; 63 Pac. 207. (The legal effect of the written contract was not to bind either party to

obtain the machine, but to give B the option to furnish the machine and get the note, or to give up the note.)

²⁶ *Southern, etc., Co. v. Harris*, 117 Ga. 1001; 44 S. E. 885.

§1197. Incomplete contracts.

The parol evidence rule has but a limited application to contracts and memoranda which are incomplete on their face. Extrinsic evidence is admissible to show the other terms of such a contract as far as consistent with the terms in writing.¹ As far as such a contract is incomplete on its face, it is not within the meaning of the parol evidence rule.² So where a written contract was made by a widow to take \$10,000, and the amount given her by will, in lieu of the distributive share of her husband's estate, and the contract was not complete on its face, it was permissible to show additional terms of the contract, and to show what parties had assented thereto.³ So where a written assignment of a chose in action is incomplete, the oral contract under which it was given may be shown.⁴ So extrinsic evidence is admissible to show the conditions of an escrow;⁵ that the vendee knew of the possession by a squatter of the realty sold;⁶ that the amount of notes given included not only the purchase price of the realty conveyed, but also other claims,⁷ whether a stock option includes dividends or

¹ Chamberlain v. Lesley, 39 Fla. 452; 22 So. 736; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; Louisville, etc., Ry. v. Reynolds, 118 Ind. 170; 20 N. E. 711; Dietrich v. Stebbins, 100 Ia. 426; 69 N. W. 564; Peneix v. Rodgers (Ky.), 49 S. W. 447; Gould v. Excelsior Co., 91 Me. 214; 64 Am. St. Rep. 221; 39 Atl. 554; Courtney v. Mfg. Co., 97 Md. 499; 55 Atl. 614; Stahelin v. Sowle, 87 Mich. 124; 49 N. W. 529; Beyerstedt v. Mill Co., 49 Minn. 1; 51 N. W. 619; State v. Cunningham, 154 Mo. 161; 55 S. W. 282; Bell v. Wiltson (Neb.), 98 N. W. 1049; Jamestown Business Association v. Allen, 172 N. Y. 291; 92 Am. St. Rep. 740; 64 N. E. 952; Virginia-Carolina Chemical Co. v. Moore, 61 S. C. 166; 39 S. E. 346; Waterbury

v. Russell, 8 Baxt. (Tenn.) 159; Howell v. Denton (Tex. Civ. App.), 68 S. W. 1002; Steed v. Harvey, 18 Utah 367; 72 Am. St. Rep. 789; 54 Pac. 1011; Knowles v. Rogers, 27 Wash. 211; 67 Pac. 572; Seeger v. Boiler Co., — Wis. —; 97 N. W. 485; Naumann v. Ullman, 102 Wis. 92; 78 N. W. 159.

² Sloan v. Courtenay, 54 S. C. 314; 32 S. E. 431.

³ Baldwin v. Hill, 97 Ia. 586; 66 N. W. 889.

⁴ Randall v. Turner, 17 O. S. 262, and see §1199.

⁵ Fred v. Fred (N. J. Eq.), 50 Atl. 776.

⁶ Leonard v. Woodruff, 23 Utah 494; 65 Pac. 199.

⁷ Brader v. Brader, 110 Wis. 423; 85 N. W. 681.

not,⁸ and whether in a memorandum for the sale of a quarry "with all the improvements thereon" the parties had agreed upon the sale of any of the personal property used in connection therewith.⁹ If the contract is not required to be in writing or to be proved by writing, and it consists of several writings, no one of which is complete in itself, they may be connected by oral evidence.¹⁰ Extrinsic evidence is not admissible to show oral terms inconsistent with those reduced to writing.¹¹ Analogous to the rule that an oral provision consistent with an incomplete written memorandum may be proved and enforced is the rule that if the written contract is ambiguous, the parol evidence rule does not prevent the parties from relying on the real contract, though oral, as long as it does not contradict terms of the written contract which are plain and unequivocal.¹² So if the provisions of the written contract admit, a similar result is reached by holding that the written contract will be construed as having the same scope as the oral contract in pursuance of which it is entered into.¹³

§1198. What contracts are incomplete.

In order that a written contract may be treated as incomplete so as to make extrinsic evidence of other terms admissible, it must show upon its face that it is incomplete.¹ A

⁸ *Rivers v. Sugar Co.*, 52 La. Ann. 762; 27 So. 118.

⁹ *Crown Slate Co. v. Allen*, 199 Pa. St. 239; 48 Atl. 968.

¹⁰ *Nelson v. Willey*, 97 Md. 373; 55 Atl. 527.

¹¹ *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; *Railroad v. Morey*, 47 O. S. 207; 7 L. R. A. 701; 24 N. E. 269.

¹² *Merrill v. Syper*, 65 Ark. 51; 44 S. W. 462; *Barrie v. Miller*, 104 Ga. 312; 30 S. E. 840; *Chapman v. Clements* (Ky.), 56 S. W. 646; *Germain v. Lumber Co.*, 116 Mich. 245; 74 N. W. 644; same case, 78 N. W.

1007; *State v. Cass County*, 60 Neb. 566; 83 N. W. 733; *Doubleday v. Coal Co.*, 122 N. C. 675; 30 S. E. 21; *F. A. Thomas Machine Co. v. Voelker*, 23 R. I. 441; 50 Atl. 838.

¹³ *Greenfield v. Gilman*, 140 N. Y. 168; 35 N. E. 435; *Bruce v. Moon*, 57 S. C. 60; 35 S. E. 415.

¹ *Telluride Power Transmission Co. v. Crane*, 208 Ill. 218; 70 N. E. 319; affirming, 103 Ill. App. 647; *Brantingham v. Huff*, 174 N. Y. 53; 95 Am. St. Rep. 545; 66 N. E. 620; *Dady v. O'Rourke*, 172 N. Y. 447; 65 N. E. 273; *Stowell v. Ins. Co.*, 163 N. Y. 298; 57 N. E. 480; *Case v. Bridge Co.*, 134 N. Y. 78; 31 N.

written contract is assumed to be complete.² A form of attack on the parol evidence rule, often so disguised as to be difficult of detection, consists in claiming that a written contract, complete on its face, is incomplete, and in offering to establish this by extrinsic evidence of terms not reduced to writing. This evidence is sought to be used both to show that the written contract is incomplete and to establish the terms of the contract not reduced to writing. This cannot be done. The use of such evidence violates the spirit and purpose of the parol evidence rule.³ So under a complete written contract of sale extrinsic evidence is inadmissible to show sale by sample.⁴ So under a complete written contract for the sale of a boiler of certain specified dimensions for a tug extrinsic evidence is inadmissible to show that the seller was to examine the tug and furnish the size of boiler necessary.⁵ The question of whether a written contract upon which suit is brought is complete or not is for the court.⁶ A contract may show on its face that it is incomplete by express reference to an oral agreement as

E. 254; *Thomas v. Scutt*, 127 N. Y. 133; 27 N. E. 961; *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468; 94 N. W. 337.

² *Mackey v. Magnon*, 28 Colo. 100; 62 Pac. 945; affirming, 54 Pac. 907; *McKegney v. Widekind*, 6 Bush. (Ky.) 107.

³ *The Bertha*, 91 Fed. 272; 33 C. C. A. 509; *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485; *McEnery v. McEnery*, 110 Ia. 718; 80 N. W. 1071; *Church of Holy Communion v. Paterson*, 63 N. J. L. 470; 55 L. R. A. 81; 43 Atl. 696; *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380; *Slaughter v. Smither*, 97 Va. 202; 33 S. E. 544; *Pacific National Bank v. Bridge Co.*, 23 Wash. 425; 63 Pac. 207. "If we may go outside of the instrument to prove that

there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little value left in the rule itself." *Eighmie v. Taylor*, 98 N. Y. 288, 294; quoted in *Pacific National Bank v. Bridge Co.*, 23 Wash. 425, 430; 63 Pac. 207.

⁴ *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830.

⁵ *The Bertha*, 91 Fed. 272; 33 C. C. A. 509.

⁶ *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830; *Hirsch v. Mills Co.*, 40 Or. 601; 67 Pac. 949; 68 Pac. 733. Apparently *contra*, *Hines v. Willcox*, 96 Tenn. 148; 54 Am. St. Rep. 823; 34 L. R. A. 824; 33 S. W. 914; *Steed v. Harvey*, 18 Utah 367; 72 Am. St. Rep. 789; 54 Pac. 1011.

part thereof without specifying what such oral agreement is.⁷ Thus "as per conversation,"⁸ or "as per our conversation of yesterday,"⁹ or "as hereafter agreed,"¹⁰ shows that the contract is incomplete. So a contract for advertisements which refers to "our contract price for glass other than we have estimated on, or contracted for prior to the date hereof," and does not otherwise specify what that contract price is, is on its face incomplete by reason of the reference to such other contract, and such other contract may be enforced, though oral.¹¹ A note given in performance of a contract is not a complete memorandum of the terms of the contract. Accordingly evidence is admissible to show an agreement to pay the debt for which the note was given out of the proceeds of an insurance policy, thereby waiving exemptions as to such policy,¹² or to show an oral warranty, by the payee, of the article sold,¹³ even if the note reserves title to the horse until payment.¹⁴ So a writing intended only to secure a lien¹⁵ or to make a charge of the price¹⁶ neither of them prevent evidence of an oral warranty. So if a written order for shipping soap is made out by the vendor's agent, the vendee writing on it "accepted" and signing his name, the vendee may show that the contract was that all the soap was to be shipped to him, but that he was to take and pay for only one half of it, the other half to be delivered by him to another druggist.¹⁷ A sheriff's return of a sale is so far incomplete that it may be shown that the purchaser bought for another lien-holder, and that conveyance was made under

⁷ Wolff v. Wells Fargo & Co., 115 Fed. 32; 52 C. C. A. 626.

⁸ Selig v. Rehfuß, 195 Pa. St. 200; 45 Atl. 919.

⁹ Anderson v. Surety Co., 196 Pa. St. 288; 46 Atl. 306.

¹⁰ Morrison v. Dickey, 119 Ga. 698; 46 S. E. 863.

¹¹ Hand v. Drug Co., 63 Minn. 539; 65 N. W. 1081.

¹² Murdy v. Skyles, 101 Ia. 549; 63 Am. St. Rep. 411; 70 N. W. 714.

¹³ Hille v. Adair (Ky.), 58 S. W. 697.

¹⁴ Nauman v. Ullman, 102 Wis. 92; 78 N. W. 159.

¹⁵ Potter v. Easton, 82 Minn. 247; 84 N. W. 1011.

¹⁶ "Terms cash. Mr. E. P. Putnam to T. F. McDonald, dr., one bicycle \$47.50. Paid July 27, 1896." Putnam v. McDonald, 72 Vt. 4; 47 Atl. 159.

¹⁷ Colgate v. Latta, 115 N. C. 127; 26 L. R. A. 321; 20 S. E. 388.

such arrangement.¹⁸ A memorandum may appear incomplete on its face by showing that a time of payment was fixed, but not showing what the time was,¹⁹ or where the memorandum shows only the purchase price and the time of payment.²⁰ The use of "etc." does not of itself show that the contract is incomplete.²¹

§1199. Purpose of instrument.

If the instrument does not show on its face what its purpose was, extrinsic evidence is admissible to show what that purpose was, if such evidence does not contradict the terms of the contract.¹ Thus an instrument conveying title which on its face is absolute may be shown by extrinsic evidence to be given as a mortgage to secure certain liabilities.² The purpose of any contract which purports only to transfer legal title may thus be shown.³ So the grantee may show that a deed was given to

¹⁸ *Emery v. Hanna* (Neb.), 94 N. W. 973.

¹⁹ *Aultman v. Clifford*, 55 Minn. 159; 43 Am. St. Rep. 478; 56 N. W. 593. (Evidence allowed to show a contract as to quality of the article sold.)

²⁰ *Perkins v. Brown*, 115 Mich. 41; 72 N. W. 1095. (Evidence admitted to show that vendor was to set out the trees and care for them.)

²¹ *Harrison v. McCormick*, 89 Cal. 327; 23 Am. St. Rep. 469; 26 Pac. 830.

¹ *Ruiz v. Dow*, 113 Cal. 490; 45 Pac. 867; *Lamkin v. Mfg. Co.*, 72 Conn. 57; 44 L. R. A. 786; 43 Atl. 593; *Bever v. Bever*, 144 Ind. 157; 41 N. E. 944; *Hathaway v. Rogers*, 112 Ia. 638; 84 N. W. 674; *Raphael v. Mullen*, 171 Mass. 111; 50 N. E. 515; *Buhl v. Bank*, 123 Mich. 591; 82 N. W. 282; *Hillman v. Allen*, 145 Mo. 638; 47 S. W. 509; *Downes v. Congregational Society*, 63 N. H. 151; *Weiseham v. Hocker*, 7 Okla.

250; 54 Pac. 464; *Sheaffer v. Sensenig*, 182 Pa. St. 634; 38 Atl. 473; *Meyer v. Elevator Co.*, 12 S. D. 172; 80 N. W. 189; *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871; 26 Atl. 589; *Schierl v. Newburg*, 102 Wis. 552; 78 N. W. 761.

² *Morgan v. Shinn*, 15 Wall. (U. S.) 105; *Florida, etc., Ry. v. Usina*, 111 Ga. 697; 36 S. E. 928; *Zuber v. Johnson*, 108 Ia. 273; 79 N. W. 76; *Buhl v. Bank*, 123 Mich. 591; 82 N. W. 282; *Hillman v. Allen*, 145 Mo. 638; 47 S. W. 509; *Watkins v. Williams*, 123 N. C. 170; 31 S. E. 388; *Weiseham v. Hocker*, 7 Okla. 250; 54 Pac. 464; *Myerstown Bank v. Roessler*, 186 Pa. St. 431; 40 Atl. 963; *Masterson v. Burnett*, 27 Tex. Civ. App. 370; 66 S. W. 90; *Schierl v. Newburg*, 102 Wis. 552; 78 N. W. 761. *Contra*, *Munford v. Green*, 103 Ky. 140; 44 S. W. 419.

³ *Lease. Meyer v. Elevator Co.*, 12 S. D. 172; 80 N. W. 189. *Bill of sale. Raphael v. Mullen*, 171 Mass. 111; 50 N. E. 515; *Martin v.*

secure certain notes and not in payment of them.⁴ So a mortgage which recites that it is to secure a certain note may be shown to be an indemnity mortgage.⁵ So a mortgage to A may be shown to be in part for A's benefit and in part in trust for X.⁶ So a bill of sale given by a debtor may be shown to have been given with the consent of creditors and for their benefit.⁷ An assignment of an interest under a contract may be shown by extrinsic evidence to be as security.⁸ Thus an assignment of a contract to purchase realty,⁹ a building contract,¹⁰ an insurance policy,¹¹ assignment by orders drawn on a debtor,¹² or an assignment of accounts¹³ may in each case be shown to have been made, not absolutely, but merely as security. Extrinsic evidence is admissible to show such facts as create an implied trust of realty.¹⁴ Thus the recital in a deed that the consideration was paid by A does not prevent evidence that it was paid by B.¹⁵ Neither the

Martin, 43 Or. 119; 72 Pac. 639. Assignment of bill of lading. Walker v. Bank, 43 Or. 102; 72 Pac. 635. Assignment of note. Clark v. Ducheneau, 26 Utah 97; 72 Pac. 331. Power of attorney. Coldwater National Bank v. Buggie, 117 Mich. 416; 75 N. W. 1057.

⁴ Loud v. Hamilton (Tenn. Ch. App.), 45 L. R. A. 400; 51 S. W. 140.

⁵ Honaker v. Vesey, 57 Neb. 413; 77 N. W. 1100.

⁶ Tapia v. Demartini, 77 Cal. 383; 11 Am. St. Rep. 288; 19 Pac. 641.

⁷ Neresheimer v. Smyth, 167 N. Y. 202; 60 N. E. 449.

⁸ Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353; Jones v. Albee, 70 Ill. 34; Lovejoy v. Bank, 23 Kan. 331; Kendall v. Assurance Society, 171 Mass. 568; 51 N. E. 464; Ittner v. Hughes, 154 Mo. 55; 55 S. W. 267; Hudson v. Wolcott, 39 O. S. 618; Westbury v. Simmons, 57 S. C. 467; 35 S. E. 764.

⁹ Hieronymus v. Glass, 120 Ala. 46; 23 So. 674 (disapproving Mose-

ley v. Moseley, 86 Ala. 289; 5 So. 732); Gettleman v. Assurance Co., 97 Wis. 237; 72 N. W. 627.

¹⁰ Davis v. Water Works Co., 57 Minn. 402; 47 Am. St. Rep. 622; 59 N. W. 482.

¹¹ Kendall v. Assurance Society, 171 Mass. 568; 51 N. E. 464; Westbury v. Simmons, 57 S. C. 467; 35 S. E. 764.

¹² Ittner v. Hughes, 154 Mo. 55; 55 S. W. 267.

¹³ Matthews v. Forslund, 112 Mich. 591; 70 N. W. 1105.

¹⁴ Champlin v. Champlin, 136 Ill. 309; 29 Am. St. Rep. 323; 26 N. E. 526; Burden v. Sheridan, 36 Ia. 125; 14 Am. Rep. 505; Blodgett v. Hildreth, 103 Mass. 484; Livermore v. Aldrich, 5 Cush. (Mass.) 431; Depeyster v. Gould, 3 N. J. Eq. 474; 29 Am. Dec. 723; Smith v. Eckford (Tex.), 18 S. W. 210; Neill v. Keese, 5 Tex. 23; 51 Am. Dec. 746; Deck v. Tabler, 41 W. Va. 332; 56 Am. St. Rep. 837; 23 S. E. 721.

¹⁵ Chicago, etc., Ry. v. Bank, 58 Neb. 548; 78 N. W. 1064.

parol evidence rule nor the statute of frauds prevent this. Unless such evidence were admissible, no available remedy would be given for much of the fraud that is thus met. Extrinsic evidence is admissible to prove trusts concerning personal property.¹⁶ Thus if A gives a note to B, extrinsic evidence is admissible to show that it is charged with a trust in favor of C.¹⁷ If the instrument shows its purpose on its face, the rule admitting evidence of the intention of the parties to show the purpose of the instrument does not apply, since such intention would be used in such case to contradict the intention as expressed in the writing.¹⁸ Thus extrinsic evidence cannot be received to show that C is the beneficiary intended in a deed of trust which names B as beneficiary.¹⁹ So under a conveyance which reserves a life estate to the grantor such reservation cannot be shown to be intended only as security for the performance by the grantee of his contract to support the grantor.²⁰

§1200. Written evidence.

Since the parol evidence rule applies solely to written contracts, in actions brought to enforce them, it does not forbid the use of extrinsic evidence to contradict written evidence as long as the written evidence is not the written contract on which the action is based.¹ Thus if letters written by one of the

¹⁶ *Northrop v. Hale*, 72 Me. 275; *Chace v. Chapin*, 130 Mass. 128; *Gerrish v. New Bedford Institution*, 128 Mass. 159; 35 Am. Rep. 365; *Barnes v. Trafton*, 80 Va. 524.

¹⁷ *Thompson v. Caruthers*, 92 Tex. 530; 50 S. W. 331.

¹⁸ *Burnes v. Scott*, 117 U. S. 582; *Dickson v. Harris*, 60 Ia. 727; 13 N. W. 335; *Crane v. Bayley*, 126 Mich. 323; 85 N. W. 874; *Adair v. Adair*, 5 Mich. 204; 71 Am. Dec. 779; *Gilbert v. Thompson*, 14 Minn. 544; *Ming v. Pratt*, 22 Mont. 262; 56 Pac. 279.

¹⁹ *American National Bank v.*

Harlan, 89 Md. 675; 43 Atl. 756. See to the same effect *Holtzheid v. Smith* (Ky.), 74 S. W. 689.

²⁰ *Hall v. Small*, 178 Mo. 629; 77 S. W. 733.

¹ *Wise v. Collins*, 121 Cal. 147; 53 Pac. 640; *Smith v. Mayfield*, 163 Ill. 447; 45 N. E. 157; *Parno v. Ins. Co.*, 114 Ia. 132; 86 N. W. 210; *Dean v. Shepard Co.*, 95 Ia. 89; 63 N. W. 582; *Gully v. Grubbs*, 1 J. J. Mar. (Ky.) 387; *German Ins. Co. v. Frederick*, 57 Neb. 538; 77 N. W. 1106; *Kister v. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696; 5 L. R. A. 646; 18 Atl. 447.

parties are not a part of a written contract, oral evidence is admissible to contradict the statements made therein.² So extrinsic oral evidence is admissible to rebut evidence tending to show fraud, even if the latter evidence is in writing. Thus where false statements are contained in an application for insurance, extrinsic evidence is admissible to show that the applicant stated the facts correctly to the agent of the insurance company, and that the latter wrote the application.³ In Michigan such evidence is admissible if the application is signed before the agent writes the answers.⁴ A memorandum in lead-pencil, made by one party and not intended by both parties as the written contract may be contradicted.⁵ So a written acknowledgment of a contract⁶ or a chattel mortgage, prepared by plaintiffs to be executed by defendant, but not in fact executed by him,⁷ may be contradicted, since neither is a written contract within the meaning of this rule. On the same principle, recitals of fact and receipts may be contradicted even if in writing, and even if in an instrument a part of which is a contract.⁸ So A loaned B \$280 and by mistake B gave his note for \$250. B repaid \$280 and then sued to recover \$30 as paid by mistake. It was held that A could show the real transaction as the action was not on the note.⁹ The test which determines the admissibility of extrinsic evidence in such cases is this: Is the written provision a contractual term? In such case the parol evidence rule applies. Or is it merely the written recital of a fact? In such case the parol evidence rule has no appli-

² Alexander v. Thompson, 42 Minn. 498; 44 N. W. 534; Abrahams v. Swan, 18 W. Va. 274; 41 Am. St. 692.

³ Parno v. Ins. Co., 114 Ia. 132; 86 N. W. 210; Mutual, etc., Association v. Ogletree, 77 Miss. 7: 25 So. 869; German Ins. Co. v. Frederick, 57 Neb. 538; 77 N. W. 1106; Kister v. Ins. Co., 128 Pa. St. 553; 15 Am. St. Rep. 696; 5 L. R. A. 646; 18 Atl. 447; Bennett v. Ins. Co., 107 Tenn. 371; 64 S. W. 758; Virginia,

etc., Ins. Co. v. Goode, 95 Va. 762; 30 S. E. 370.

⁴ Brown v. Ins. Co., 65 Mich. 306; 8 Am. St. Rep. 894; 32 N. W. 610.

⁵ Pecos Valley Bank v. Evans-Snyder-Buel Co., 107 Fed. 654; 46 C. C. A. 534.

⁶ Burkhardt v. Hart, 36 Or. 586; 60 Pac. 205.

⁷ Wise v. Collins, 121 Cal. 147; 53 Pac. 640.

⁸ See § 1201 *et seq.*

⁹ Foster v. Kirby, 31 Mo. 496.

cation. Illustrations of this distinction will be found in the following sections.

§1201. Recital of facts.—Receipts.

A receipt, if free from contractual terms, is a mere recital of the fact of the payment of money or delivery of property. The parol evidence rule does not apply to such receipts, and they may be contradicted by extrinsic evidence like other recitals of fact.¹ Thus a receipt for an insurance premium,² the receipt of property by a common carrier shown in the bill of lading,³ either as to the fact of the receipt of goods at all⁴ or as to the quantity of goods received,⁵ a receipt of property shown by a load-check,⁶ a check given by a sleeping-car conductor to a passenger on the surrender of the passenger's ticket

¹ *Rarden v. Cunningham*, 136 Ala. 263; 34 So. 26; *Gravlee v. Lamkin*, 120 Ala. 210; 24 So. 756; *Jenne v. Burger*, 120 Cal. 444; 52 Pac. 706; *Colorado, etc., Co. v. Ponick*, — Colo. App. —; 66 Pac. 458; *Starkweather v. Maginnis*, 196 Ill. 274; 63 N. E. 692; *McDonald v. Danahy*, 196 Ill. 133; 63 N. E. 648; *Merchants' Dispatch Transportation Co. v. Furthmann*, 149 Ill. 66; 41 Am. St. Rep. 265; 36 N. E. 624; *Henry v. Henry*, 11 Ind. 236; 71 Am. Dec. 354; *Missouri Pacific Ry. v. Lovelace*, 57 Kan. 195; 45 Pac. 590; *Wilkinson v. Scott*, 17 Mass. 249; *Hennessy v. Furniture Co.*, — Mont. —; 76 Pac. 291; *Morse v. Rice*, 36 Neb. 212; 54 N. W. 308; *Kenny v. Kane*, 50 N. J. L. 562; 14 Atl. 597; *Smith v. Holland*, 61 N. Y. 635; *Kirkpatrick v. Smith*, 10 Humph. (Tenn.) 188; *Cushwa v. Building Association*, 45 W. Va. 490; 32 S. E. 259; *Twohy Mercantile Co. v. McDonald's Estate*, 108 Wis. 21; 83 N. W. 1107.

² *Robison v. Wolf*, 27 Ind. App. 683; 62 N. E. 74; *Sargent v. Ins.*

Co., 189 Pa. St. 341; 41 Atl. 351.

³ *The Lady Franklin*, 8 Wall. (U. S.) 325; *Planters' Fertilizer Mfg. Co. v. Elder*, 101 Fed. 1001; 42 C. C. A. 130; *Pereira v. Ry.*, 66 Cal. 92; 4 Pac. 988; *Lake Shore, etc., Ry. v. Bank*, 178 Ill. 506; 53 N. E. 326; *Merchants' Dispatch Co. v. Furthmann*, 149 Ill. 66; 41 Am. St. Rep. 265; 36 N. E. 624; *Chapin v. Ry.*, 79 Ia. 582; 44 N. W. 820; *Blanchard v. Page*, 8 Gray (Mass.) 281; *Strong v. Ry.*, 15 Mich. 206; 93 Am. Dec. 184; *Meyer v. Peck*, 28 N. Y. 590; *Ellis v. Willard*, 9 N. Y. 529; *Dean v. King*, 22 O. S. 118; *May v. Babcock*, 4 Ohio 334.

⁴ *Grant v. Norway*, 10 C. B. 665; *The Lady Franklin*, 8 Wall. (U. S.) 325; *National Bank v. Ry.*, 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560.

⁵ *Hall v. Mayo*, 7 All. (Mass.) 454; *Meyer v. Peck*, 28 N. Y. 590; *Dean v. King*, 22 O. S. 118.

⁶ *Anderson v. Flouring Mills Co.*, 37 Or. 483; 82 Am. St. Rep. 711; 50 L. R. A. 235; 60 Pac. 839.

to the conductor,⁷ an entry by a bank in a pass-book, showing money received by the bank to the credit of the depositor,⁸ and a recital in a non-negotiable note that a part of its consideration is for services heretofore rendered,⁹ are each mere receipts, and may be contradicted by extrinsic evidence. Accordingly the party giving the receipt may show that the party paying money to him did so as agent for another person.¹⁰ So a receipt does not prevent the parties thereto from showing by whom the purchase was really made.¹¹

§1202. Receipts and releases containing contractual terms.

An instrument which is in part a receipt may also contain contractual terms. In such case, while the part of it which is a receipt may be contradicted by extrinsic evidence, the contractual terms are within the operation of the parol evidence rule.¹ A bill of lading,² a storage receipt,³ or a warehouse receipt,⁴ often contained contractual terms which come within the operation of the parol evidence rule. Thus a shipper cannot introduce evidence of an oral contract to show that the clause in the written bill of lading, limiting the carrier's liabil-

⁷ Mann-Boudoir Sleeping Car Co. v. Dupre, 54 Fed. 646; 21 L. R. A. 289; 4 C. C. A. 540.

⁸ Anderson v. Leverich, 70 Ia. 741; Union Bank v. Knapp, 3 Pick. (Mass.) 96; 15 Am. Dec. 182; Talcott v. Bank, 53 Kan. 480; 24 L. R. A. 737; 36 Pac. 1066; Davis v. Bank, 53 Mich. 163; 18 N. W. 629; Quattrochi v. Bank, 89 Mo. App. 500.

⁹ Mulligan v. Smith, 13 Colo. App. 231; 57 Pac. 731.

¹⁰ Rand v. Scofield, 43 Ill. 167; McKinney v. Harvie, 38 Minn. 18; 8 Am. St. Rep. 640; 35 N. W. 668.

¹¹ French v. Newberry, 124 Mich. 147; 82 N. W. 840.

¹ Coon v. Knap, 8 N. Y. 402; 59 Am. Dec. 502; Milos v. Covacevich,

40 Or. 239; 66 Pac. 914; Kammermayer v. Hilz, 107 Wis. 101; 82 N. W. 689.

² McElveen v. Ry., 109 Ga. 249; 77 Am. St. Rep. 371; 34 S. E. 281; Louisville R. R. v. Wilson, 119 Ind. 352; 4 L. R. A. 244; 21 N. E. 341; Sonia Cotton-Oil Co. v. The Red River, 106 La. 42; 87 Am. St. Rep. 294; 30 So. 303; Bank v. R. R., 44 Minn. 224; 20 Am. St. Rep. 566; 9 L. R. A. 263; 46 N. W. 342, 560; Van Etten v. Newton, 134 N. Y. 143; 30 Am. St. Rep. 630; 31 N. E. 334.

³ Thompson v. Thompson, 78 Minn. 379, 384; 81 N. W. 204; 81 N. W. 543.

⁴ Union Storage Co. v. Speck, 194 Pa. St. 126; 45 Atl. 48.

ity, was not to be operative,⁵ or to show that the contract was made with the consignee and not with the consignor.⁶ So where a bill of lading recited the delivery of 54,000 bushels of wheat, and provided "all the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," the statement as to the amount of wheat received was thereby made a contractual term, and not a mere receipt; and accordingly, the carrier was liable for any deficiency, though he did not receive the amount stipulated.⁷ A certificate of deposit is a contract and not merely a receipt.⁸ Accordingly if signed "A, manager," and A was manager of a private bank, an oral agreement that the deposit was with another bank of which A was president cannot be enforced.⁹ An instrument which purports to be a release of claims of a receipt in full is contractual in its nature as far as it discharges one party thereto from liability.¹⁰ Accordingly, where a receipt in full is given in the settlement of all the claims of a certain class, extrinsic evidence cannot be introduced to show that the parties had, when such receipt was given, agreed that some specified claim should not be affected by the receipt.¹¹ Thus an instrument acknowledging the receipt of a certain sum of money in consideration of which one party releases all interest in a given estate is a written contract, and the party thus releasing her interest cannot show an oral agreement that she should receive a greater sum than that mentioned in the receipt, in case another party interested in the

⁵ *Davis v. R. R.*, 66 Vt. 290; 44 Am. St. Rep. 852; 29 Atl. 313.

⁶ *Van Etten v. Newton*, 134 N. Y. 143; 30 Am. St. Rep. 630; 31 N. E. 334.

⁷ *Rhodes v. Newhall*, 126 N. Y. 574; 22 Am. St. Rep. 859; 27 N. E. 947.

⁸ *Bickley v. Bank*, 39 S. C. 281; 39 Am. St. Rep. 721.

⁹ *Bickley v. Bank*, 39 S. C. 281; 39 Am. St. Rep. 721.

¹⁰ *Green v. Ry.*, 92 Fed. 873; 35 C. C. A. 68; *Bull v. Bull*, 43 Conn.

455; *Squires v. Amherst*, 145 Mass. 192; 13 N. E. 609; *Morris v. Ry.*, 21 Minn. 91; *Church v. Ry.*, 63 N. J. L. 470; 43 Atl. 696; *Jackson v. Ely*, 57 O. S. 450; 49 N. E. 792; *Conant v. Kimball*, 95 Wis. 550; 70 N. W. 74; *Vaughan v. Mason*, 23 R. I. 348; 50 Atl. 390. *Contra*, *French v. Arnett*, 15 Ind. App. 674; 44 N. E. 551; *Mounce v. Kurtz*, 101 Ia. 192; 70 N. W. 119; *Allen v. Mill Co.*, 18 Wash. 216; 51 Pac. 372.

¹¹ *Seeman v. Mining Co.*, 22 Ohio C. C. 311; 12 Ohio C. D. 206.

estate received a greater sum.¹² So an instrument as follows: "\$15.5. Wooster, Ohio, May 13, 1890. This is to certify that I have this day settled with John Ely and he has paid me all he owed me, up to this date, and I have no claims or demands against him of any kind whatsoever. Mrs. Wm. Jackson," is not merely a receipt but also a contract; and extrinsic evidence cannot be used to show that outstanding items of indebtedness were omitted.¹³ So if an action for personal injuries is settled by the parties, and a written instrument is executed which purports to be a full settlement and discharge of all damages in consideration of a certain sum of money, extrinsic evidence is inadmissible to show a promise by the party liable for damages to pay a further sum in settlement of such action.¹⁴ So where a creditor gives a release of a joint debtor, and surrenders a note executed by the joint debtors, extrinsic evidence is inadmissible to show an oral agreement that the other debtor should not be released.¹⁵ However, a receipt given "in full settlement of all claims and demands for all logs contained" in a specified raft of logs has been held to be a mere receipt, and not a contract, and hence not within the parol evidence rule.¹⁶

§1203. Consideration recited as fact.

If the consideration is not recited in the written contract, or if recited appears only as a recital of fact and not as a contractual term, extrinsic evidence is admissible to show what the real consideration is.¹ "The language with reference to the

¹² Cassilly v. Cassilly, 57 O. S. 582; 49 N. E. 795.

¹³ Jackson v. Ely, 57 O. S. 450; 49 N. E. 792.

¹⁴ Milich v. Packing Co., 60 Kan. 229; 56 Pac. 1; Jackowski v. Steel Co., 103 Wis. 448; 79 N. W. 757.

¹⁵ Clark v. Mallory, 185 Ill. 227; 56 N. E. 1099; affirming 83 Ill. App. 488.

¹⁶ Allen v. Mill Co., 18 Wash. 216; 51 Pac. 372.

¹ Stone v. Minter, 111 Ga. 45; 50 L. R. A. 356; 36 S. E. 321; Brosseau v. Louy, 209 Ill. 405; 70 N. E. 901; affirming 110 Ill. App. 16; Ryan v. Hamilton, 205 Ill. 191; 68 N. E. 781; reversing 103 Ill. App. 212; Lake Erie, etc., Ry. v. Holland, — Ind. —; 69 N. E. 138; Stewart v. R. R., 141 Ind. 55; 40 N. E. 67; Pickett v. Green, 120 Ind. 584; 22 N. E. 737; Citizens' Street Ry. v. Heath, 29 Ind. App.

consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of such consideration, and not an agreement to pay it, and hence such recitals may be contradicted."² Thus the real consideration can be shown under ordinary forms of deeds³ and notes.⁴ Under such a written contract it may be shown that the real consideration was the assumption of the debt of another person,⁵ as where in a deed the grantee assumes as a part of the consideration the payment of the debts of the grantor, which have become liens upon the property,⁶ or is to pay the vendor one half the proceeds of the

395; 62 N. E. 107; *Moore v. Harrison*, 26 Ind. App. 408; 59 N. E. 1077; *Farmers' Savings Bank v. Hansmann*, 114 Ia. 49; 86 N. W. 31; *Poor's Executor v. Scott* (Ky.), 68 S. W. 397; *Price v. Price*, 111 Ky. 771; 64 S. W. 746; 66 S. W. 529; *Jensen v. Crosby*, 80 Minn. 158; 83 N. W. 43; *Aldrich v. Whitaker*, 70 N. H. 627; 47 Atl. 591; *Medical College Laboratory v. University*, 178 N. Y. 153; 70 N. E. 467; *Keuka College v. Ray*, 167 N. Y. 96; 60 N. E. 325; *Forester v. Van Auken*, — N. D. —; 96 N. W. 301; *Miller v. Livingston*, 22 Utah 174; 61 Pac. 569; *Williams v. Blumenthal*, 27 Wash. 24; 67 Pac. 393; *Butt v. Smith*, — Wis. —; 99 N. W. 328; *Cuddy v. Foreman*, 107 Wis. 519; 83 N. W. 1103; *Perkins v. McAuliffe*, 105 Wis. 582; 81 N. W. 645.

² *Pickett v. Green*, 120 Ind. 584, 588; 22 N. E. 737.

³ *Harraway v. Harraway*, 136 Ala. 499; 34 So. 836; *Hamaker v. Coons*, 117 Ala. 603; 23 So. 655; *Anthony v. Chapman*, 65 Cal. 73; 2 Pac. 889; *Martin v. White*, 115 Ga. 866; 42 S. E. 279; *Harkless v. Smith*, 115 Ga. 350; 41 S. E. 634; *Leggett v. Patterson*, 114 Ga. 714; 40 S. E. 736; *Stewart v. R. R.*, 141 Ind. 55; 40 N. E. 67; *Coleman v. Gammon*

(Ia.), 83 N. W. 898; *Ford v. Savage*, 111 Mich. 144; 69 N. W. 240; *Le May v. Brett*, 81 Minn. 506; 84 N. W. 339; *Langan v. Iverson*, 78 Minn. 299; 80 N. W. 1051; *Columbia National Bank v. Baldwin*, 64 Neb. 732; 90 N. W. 890; *Baird v. Baird*, 145 N. Y. 659; 28 L. R. A. 375; 40 N. E. 222; *Carter v. Day*, 59 O. S. 96; 69 Am. St. Rep. 757; 51 N. E. 967; *Lenhardt v. Ponder*, 64 S. C. 354; 42 S. E. 169; *Alexander v. McDaniel*, 56 S. C. 252; 34 S. E. 405; *Halvorsen v. Halvorsen*, — Wis. —; 97 N. W. 494. Such evidence cannot be used to contradict the effect and operation of such deed.

⁴ *Folmar v. Siler*, 132 Ala. 297; 31 So. 719; *Booth v. Fire-Engine Co.*, 118 Ala. 369; 24 So. 405; *Burke v. Napier*, 106 Ga. 327; 32 S. E. 134; *Gifford v. Fox* (Neb.), 95 N. W. 1066.

⁵ *Main v. Aukam*, 12 App. D. C. 375; *Harts v. Emery*, 184 Ill. 560; 56 N. E. 865; affirming 84 Ill. App. 317.

⁶ *Carter v. Griffin*, 114 Ga. 321; 40 S. E. 290; *Lowery v. Downey*, 150 Ind. 364; 50 N. E. 79; *McDill v. Gunn*, 43 Ind. 315; *Logan v. Miller*, 106 Ia. 511; 76 N. W. 1005; *Lamb v. Tucker*, 42 Ia. 118; *Hopper v. Calhoun*, 52 Kan. 703; 39 Am. St.

minerals on the realty conveyed.⁷ So where a deed is given an oral contract whereby the grantor agrees to pay certain street assessments may be enforced.⁸ So it may be shown even where a covenant against encumbrances is inserted in a deed that the grantee retained the purchase price to pay the encumbrances, and subsequently settled with the grantor, the latter relying on the statement of the grantee that the encumbrances were paid.⁹ The agreement by the grantee to assume a mortgage may be shown even if the deed contains a covenant against encumbrances.¹⁰ If the deed excepts a prior mortgage from a covenant of warranty, oral evidence is admissible to show that the grantee was to assume the principal of the mortgage, but not the interest thereon.¹¹ So under a deed which recites a certain sum of money as a consideration, it may be shown that the transfer of title to certain horses was also a part of the consideration.¹² However, if the deed shows that the consideration was love and affection, neither of the parties can show that it was a valuable consideration.¹³ As between an execution creditor of grantor and the grantee, evidence of the real character of the consideration may be received.¹⁴ An oral contract of employment may be shown to be a part of the consideration for a release of damages.¹⁵ So it may be shown that a settlement

Rep. 363; 35 Pac. 816; Clark v. Lowe, 113 Mich. 352; 71 N. W. 638; Ford v. Savage, 111 Mich. 144; 69 N. W. 240; Bensick v. Cook, 110 Mo. 173; 33 Am. St. Rep. 422; 19 S. W. 642; Ketcham v. Brooks, 27 N. J. Eq. 347; Society v. Haines, 47 O. S. 423; 25 N. E. 119; Merri-man v. Moore, 90 Pa. St. 78; Miller v. Kennedy, 12 S. D. 478; 81 N. W. 906; Johnson v. Elmen, 94 Tex. 168; 86 Am. St. Rep. 845; 52 L. R. A. 162; 59 S. W. 253.

⁷ Michael v. Foil, 100 N. C. 178; 6 Am. St. Rep. 577; 6 S. E. 264.

⁸ Post v. Gilbert, 44 Conn. 9.

⁹ Becker v. Knudson, 86 Wis. 14; 56 N. W. 192.

¹⁰ Johnson v. Elmer, 94 Tex. 168;

52 L. R. A. 162. *Contra*, where the oral agreement to assume a mortgage would contradict a covenant of general warranty. Rooney v. Koenig, 80 Minn. 483; 83 N. W. 399.

¹¹ Ford v. Savage, 111 Mich. 144; 69 N. W. 240.

¹² Lathrop v. Humble, — Wis. —; 97 N. W. 905.

¹³ Latimer v. Latimer, 53 S. C. 483; 31 S. E. 304.

¹⁴ Thompson v. Cody, 100 Ga. 771; 28 S. E. 669.

¹⁵ Galvin v. Ry., 180 Mass. 587; 62 N. E. 961. *Contra*, on the theory that this is a contractual term. Atchison, etc., Ry. v. Vanordstrand, 67 Kan. 386; 73 Pac. 113.

of suit for money loaned in a criminal action included also a settlement of suit for a breach of promise.¹⁶ A note which on its face recites that it is for services rendered by a payee as attorney may be shown to be supported by a promise of the payee to attend to the interests of the maker of a note in a specified estate.¹⁷ So the consideration of a note may be shown to be a renewal of a prior note.¹⁸ The consideration for a conveyance may be shown to be the permission by the grantee to the grantor to grow wheat on a part of the land conveyed.¹⁹ So the real consideration may be shown to be the release of a guarantor²⁰ or of an obligor upon a note.²¹ Where A conveyed realty to B in payment of a debt, but A, in order to prevent trouble with his relatives, inserted a money consideration of \$2,800, and induced B to advance him that amount by a promise to refund it later, B may show the real transaction.²² If an instrument purports to be "for value received" the actual consideration may be shown. Thus a written guaranty of a note, purporting to be "for value received" may be shown to be in consideration of an agreement to forbear suit.²³ If a nominal valuable consideration is shown in the instrument, the real consideration may be shown, as where the consideration is one dollar,²⁴ or one dollar and other considerations,²⁵ or five dollars and love and affection.²⁶ So if a written contract shows on its face that it is divisible, it may be shown that the actual consideration was for one of the promises only.²⁷ This rule

¹⁶ Schubkagel v. Dierstein, 131 Pa. St. 46; 6 L. R. A. 481; 18 Atl. 1059.

¹⁷ Jones v. Rhea, 122 N. C. 721; 30 S. E. 346.

¹⁸ Merchants' National Bank v. Vandiver, 104 Ga. 165; 30 S. E. 650.

¹⁹ Breitenwischer v. Clough, 111 Mich. 6; 66 Am. St. Rep. 372; 69 N. W. 88.

²⁰ Martin v. Grocery Co. (Tex. Civ. Ap.), 66 S. W. 212; writ of error denied (Tex.), 67 S. W. 883.

²¹ Timmier v. Liles, 58 S. C. 284; 36 S. E. 652.

²² Stone v. Minter, 111 Ga. 45; 50 L. R. A. 356; 36 S. E. 321.

²³ Citizens', etc., Co. v. Babbitt, 71 Vt. 182; 44 Atl. 71.

²⁴ Wolf v. Haslach, 65 Neb. 303; 91 N. W. 283.

²⁵ Wright v. Stewart, 19 Wash. 179; 52 Pac. 1020.

²⁶ Barnes v. Black, 193 Pa. St. 447; 74 Am. St. Rep. 694; 44 Atl. 550.

²⁷ Platt v. Scribner, 18 Ohio C. C. 452.

has been extended to a case where an aggregate sum as consideration for several covenants may be shown to be made up of a separate amount for each, and thus failure of consideration for a note given may be shown.²⁸

§1204. Oral contract as inducement.

The principle that the consideration may be shown has been extended to cases where an oral contract has been proved as a consideration for the written contract, or as the courts sometimes put it, as an inducement for the written contract.¹ On this theory an oral contract to advance money may be shown as an inducement for a written contract to gather, cure and deliver a crop of raisins at a certain price; and breach of the oral contract may discharge the written contract.² In an action on a note an oral contract to enforce payment by exhausting security in the form of a conveyance of realty in trust before proceeding against the maker of the note may be shown.³ The holding in this case rests on the theory that it is fraud to obtain a note under such an agreement and then enforce it literally. The parol evidence rule has a peculiar meaning in Pennsylvania, however,⁴ being at law substantially the same as in suits in equity for reformation.⁵ So an oral contract to give certain logs as security may be shown as inducement for a written contract of sale of such logs.⁶ So an oral contract by an owner of realty to put in a side track may be shown as an inducement for a written contract to build.⁷ So, in Pennsyl-

²⁸ Field v. Austin, 131 Cal. 379; 63 Pac. 692.

¹ Langley v. Rodriguez, 122 Cal. 580; 68 Am. St. Rep. 70; 55 Pac. 406; *In re* Sutch's Estate, 201 Pa. St. 305; 50 Atl. 943; Clinch Valley, etc., Co. v. Willing, 180 Pa. St. 165; 57 Am. St. Rep. 626; 36 Atl. 737; Huckestein v. Kelly, etc., Co., 152 Pa. St. 631; 25 Atl. 747; Ferguson v. Rafferty, 128 Pa. St. 337; 6 L. R. A. 33; 18 Atl. 484.

² Langley v. Rodriguez, 122 Cal.

580; 68 Am. St. Rep. 70; 55 Pac. 406.

³ Clinch Valley, etc., Co. v. Willing, 180 Pa. St. 165; 57 Am. St. Rep. 626; 36 Atl. 737.

⁴ See cases cited in notes 5-8 this section.

⁵ Thomas v. Loose, 114 Pa. St. 35; 6 Atl. 626.

⁶ Ferguson v. Rafferty, 128 Pa. St. 337; 6 L. R. A. 33; 18 Atl. 484.

⁷ Huckestein v. Kelly, etc., Co., 152 Pa. St. 631; 25 Atl. 747.

vania, an oral contract giving vendee the right to countermand a written order may be shown.⁸ So if A becomes surety for B to C an oral contract of agency may be shown as consideration for the written bond, no consideration being expressed.⁹

So where a contract for judgment and stay of execution until the next term of court was entered into, an oral agreement that all matters in litigation up to the date of the contract were included and that a rent for the future was agreed upon may be shown.¹⁰ So under a deed an oral contract that the grantor should have the right to sow a crop of grain on the land conveyed may be shown.¹¹ So an oral contract to bequeath a certain amount may be shown as consideration for a written release.¹² So under a written contract to donate rent of a building to be used by a corporation to be formed, an oral contract that rent in arrears should be paid before the corporation was formed may be shown.¹³ Evidence of an oral contract by way of inducement must be clear.¹⁴

Many of the cases which rest on this principle may be explained on other theories. In some the written memorandum is incomplete. In others the consideration is recited as a fact. After eliminating these cases, however, there are a number left which really support the principle laid down. If these cases are correctly decided there is little left of the parol evidence rule. It does not apply to recitals of fact. If, further, it is held not to apply to contractual terms which form part of the consideration, it is hard to imagine any term of an oral contract to which it would apply. The principle seems contrary to that which forbids oral evidence of the consideration to vary contractual terms,¹⁵ or to add to a complete contract.¹⁶

⁸ Thomas v. Loose, 114 Pa. St. 35; 6 Atl. 626.

⁹ Singer Mfg. Co. v. Forsyth, 108 Ind. 334; 9 N. E. 372.

¹⁰ Bonney v. Morrill, 57 Me. 368.

¹¹ Breitenwischer v. Clough, 111 Mich. 6; 66 Am. St. Rep. 372; 69 N. W. 88 (distinguishing Addams v. Watkins, 103 Mich. 431; 61 N. W. 774, as a contract for the reserva-

tion of a crop already growing; and hence inconsistent with the deed).

¹² Andrews v. Brewster, 124 N. Y. 433; 26 N. E. 1024.

¹³ Chase v. Creamery Co., 12 S. D. 529; 81 Pac. 951.

¹⁴ *In re Sutch's Estate*, 201 Pa. St. 305; 50 Atl. 943.

¹⁵ See § 1205.

¹⁶ See § 1189.

§1205. Consideration as contractual term.

If the consideration appears in the written contract as a contractual term thereof, an oral agreement whereby an additional or other consideration is provided for violates the parol evidence rule and is unenforceable.¹ Thus in a contract for the sale of land, if it specifies the amount which the vendee agrees to pay, an oral contract whereby he agrees to pay more is unenforceable.² So in other contracts of sale, where the amount to be paid is agreed upon as a contractual term, oral contracts for the assumption of the vendor's debts in addition to the amounts specified in the contract, are unenforceable.³ So where A agreed to sell B quinine at fifty-nine cents an ounce, an oral agreement whereby A agreed to advance the price to sixty-one cents per ounce, and to send out trade circulars announcing such advance is unenforceable.⁴ Where an injured employee signs a release of damages in consideration of payment to him of twenty-five dollars, and all the expenses of physicians and hospital, an oral agreement that the twenty-five dollars was a mere gratuity, and that accordingly the only consideration was the payment of the expenses for physicians and hospital is unenforceable.⁵ So in an agreement for the sale of stock at a certain price per share an oral agreement that the vendee should pay only one fourth of the amount set forth in the written contract is unenforceable.⁶ So where a bill of sale sets forth the price to be paid for stock an oral contract to furnish such certificates and proofs of pedigree of such stock as

¹ *Schneider v. Turner*, 130 Ill. 28; 6 L. R. A. 164; *Indianapolis Union Ry. v. Houlihan*, 157 Ind. 494; 60 N. E. 943; *City of Paris v. Lilleston* (Ky.), 60 S. W. 919; *Cassard v. McGlannan*, 88 Md. 168; 40 Atl. 711; *Grier v. Ins. Co.*, 132 N. C. 512; 44 S. E. 28; *Kahn v. Kahn*, 94 Tex. 114; 58 S. W. 825; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382; 37 S. E. 583.

² *Trice v. Yeoman*, 60 Kan. 742; 57 Pac. 955.

³ *Thompson v. Bryant*, 75 Miss. 12; 21 So. 655; *Walter v. Dearing* (Tex. Civ. App.), 65 S. W. 380.

⁴ *Engelhorn v. Reitlinger*, 122 N. Y. 76; 9 L. R. A. 548; 25 N. E. 297.

⁵ *Indianapolis Union R. R. v. Houlihan*, 157 Ind. 494; 54 L. R. A. 787; 60 N. E. 943.

⁶ *Libby v. Spring & Land Co.*, 67 N. H. 587; 32 Atl. 772.

would enable the vendee to have them registered is unenforceable.⁷ So where a written contract shows that the consideration was to be determined in the future according to the amount of work done, but was "not to exceed five hundred dollars per week," an oral contract fixing the amount of compensation is unenforceable.⁸ So where a contract and conveyance of a right of way shows the consideration, an oral contract for an undercrossing, as an additional consideration, is unenforceable.⁹ And so where A sold certain patents to B, and guaranteed their validity, and B was to pay A certain royalties thereon, a subsequent written contract whereby, in lieu of such royalties, A is to receive a lump sum cannot be shown to rest in part upon an oral contract whereby B releases A from his contract guaranteeing the validity of such patents.¹⁰ So oral evidence cannot be considered to show a lower rent than that specified in a lease.¹¹

§1206. Rule does not apply to strangers to contract.

The parol evidence rule applies only between the parties to the contract and those claiming under them, and is limited to actions upon the contract.¹ A stranger to the instrument may

⁷ *McFarland v. McGill*, 16 Tex. Civ. App. 298; 41 S. W. 402 (citing *Pickett v. Green*, 120 Ind. 584; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109).

⁸ *United Press v. Press Co.*, 164 N. Y. 406; 53 L. R. A. 288; 58 N. E. 527.

⁹ *Schrimper v. Ry.* (Ia.), 82 N. W. 916.

¹⁰ *Sandage v. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165; 34 L. R. A. 363; 41 N. E. 380.

¹¹ *Merchants' State Bank v. Ruetell*, — N. D. —; 97 N. W. 853.

¹ *Central, etc., Co. v. Good*, 120 Fed. 793; 57 C. C. A. 161; *British, etc., Co. v. Cody*, 135 Ala. 662; 33 So. 832; *Walker v. State*, 117 Ala. 42; 23 So. 149; *Coleman v. Pike*

County, 83 Ala. 826; 3 Am. St. Rep. 746; 3 So. 755; *Dunn v. Price*, 112 Cal. 46; 44 Pac. 354; *Dickey v. Grice*, 110 Ga. 315; 35 S. E. 291; *Central Coal & Coke Co. v. Good*, — Ind. Ter. —; 64 S. W. 677; *Hamlin v. Simpson*, 105 Ia. 125; 44 L. R. A. 397; 74 N. W. 906; *Livingston v. Stevens*, 122 Ia. 62; 94 N. W. 925; *Livingston v. Heck*, 122 Ia. 74; 94 N. W. 1098; *Provident, etc., Society v. Johnson*, — Ky. —; 72 S. W. 754; *Edwards v. Ballard*, 14 B. Mon. (Ky.) 289; *Baker v. Briggs*, 8 Pick. (Mass.) 122; 19 Am. Dec. 311; *Wilson v. Mulloney*, — Mass. —; 70 N. E. 448; *Witzel v. Zuel*, 90 Minn. 340; 96 N. W. 1124; *Pfeifer v. Ins. Co.*, 62 Minn. 536; 64 N. W. 1018; *First National Bank*

introduce extrinsic evidence to contradict it, or to show the real intention of the parties;² and so may a party to the contract in an action between himself and a stranger thereto.³ So a stranger to the instrument cannot invoke the rule to prevent the other party to the action from introducing extrinsic evidence to contradict the written contract.⁴ Thus a third person suing for personal injuries due to negligence may show by extrinsic evidence that the relation between the parties to a written contract is that of master and servant, though on the face of the written contract the latter is an independent contractor.⁵ Thus, as between a bank and an attaching sheriff, the bank may show an oral agreement with the depositor, whose funds are sought to be attached, that such deposits should be applied to the payment of a note of the depositor's not yet due.⁶ So A gave a check on a bank in which he had no funds subject to check. The holder of the check neglected to present it for payment, and the bank failed soon after. In an action between the holder of the check and A, A was allowed to show that he had made a special deposit for which he had received a certificate of deposit, and that by oral agreement between himself and the bank checks drawn by him were to be paid out of such special deposit, though not ordinarily subject to check.⁷ So

v. Tolerton (Neb.), 97 N. W. 248; *Crockett v. Miller* (Neb.), 96 N. W. 491; *Roberts v. Bank*, 8 N. D. 474; 79 N. W. 993; *Clapp v. Banking Co.*, 50 O. S. 528; 35 N. E. 308; *Schuler v. Bank*, 13 S. D. 188; 82 N. W. 389; *Myers v. Taylor*, 107 Tenn. 364; 64 S. W. 719; *Kahle v. Stone*, 95 Tex. 106; 65 S. W. 623; *Oriental Investment Co. v. Barclay*, 25 Tex. Civ. App. 543; 64 S. W. 80; *Olmstead v. Ry.*, — Utah —; 76 Pac. 557; *Elliott v. S. S. Co.*, 22 Wash. 220; 60 Pac. 410.

² *Sigua Iron Co. v. Greene*, 88 Fed. 207; 31 C. C. A. 477; *Bruce v. Lumber Co.*, 87 Va. 381; 24 Am. St. Rep. 657; 13 S. E. 153.

³ *Sigua Iron Co. v. Greene*, 88 Fed.

207; 31 C. C. A. 477; *Coleman v. Pike County*, 83 Ala. 326; 3 Am. St. Rep. 746; 3 So. 755; *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 409; 15 N. E. 316; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686.

⁴ *Roberts v. Bank*, 8 N. D. 474; 79 N. W. 993.

⁵ *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925; 13 S. W. 691.

⁶ *Schuler v. Bank*, 13 S. D. 188; 82 N. W. 389.

⁷ *Hamlin v. Simpson*, 105 Ia. 125; 44 L. R. A. 397; 74 N. W. 906. *Contra*, *Baer's Appeal*, 127 Pa. St. 360; 4 L. R. A. 609, where an administrator who had deposited

in an action between an agent of one of the parties to a written contract and his principal,⁸ or the adversary party to the contract,⁹ or a third person,¹⁰ extrinsic evidence may be admitted to show the real understanding. So if an agent is a defendant in a criminal action in which he is charged with embezzlement, he may introduce extrinsic evidence to show the real contract between himself and his principal, and thus show that the money appropriated by him was not taken with criminal intent, though in an action between himself and his principal, upon the contract of employment, such evidence would have been inadmissible.¹¹ A subsequent holder or assignee of a written contract is of course as much bound by the parol evidence rule as the original party thereto, under whom he claims.¹² So if a third person bases his claim upon a contract, and is seeking to enforce it,¹³ as where he is seeking to show that the written contract was made between the parties thereto for his benefit,¹⁴ the parol evidence rule applies. If a release has been given to one of two joint wrongdoers, the other wrongdoer is a stranger thereto, within the meaning of the parol evidence rule, though the effect of such release may be to discharge him.¹⁵

§1207. Parol evidence rule does not apply where existence or validity of contract is in issue.

The parol evidence rule presupposes an action based on a valid contract, and between the parties thereto or those claim-

money of the estate in a bank, taking a certificate of deposit, was not allowed to show a contract between himself and the bank permitting him to withdraw the money at any time to relieve himself from liability after the bank had failed.

⁸ *Folinsbee v. Sawyer*, 157 N. Y. 196; 51 N. E. 994.

⁹ *Harvey v. Henry*, 108 Ia. 168; 78 N. W. 850.

¹⁰ *Elliott v. S. S. Co.*, 22 Wash. 220; 60 Pac. 410.

¹¹ *Walker v. State*, 117 Ala. 42; 23 So. 149.

¹² *Andrus v. Blazzard*, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

¹³ *Sayre v. Burdick*, 47 Minn. 367; 50 N. W. 245; *Schneider v. Kirkpatrick*, 80 Mo. App. 145.

¹⁴ *Schultz v. Bank*, 141 Ill. 116; 33 Am. St. Rep. 290; 30 N. E. 346; *Traders' National Bank v. Water-Power Co.*, 22 Wash. 467; 61 Pac. 152.

¹⁵ *O'Shea v. Ry.*, 105 Fed. 559; 44 C. C. A. 601.

ing under them. If the issue is as to the existence or validity of the contract, the rule by its very terms has no application and extrinsic evidence is necessarily admitted to determine such issue, whether such evidence tends to establish the validity¹ or the invalidity² of the contract in question. Specific instances of the application of this principle will be given in the following sections.

§1208. Facts of execution.

The so-called parol evidence rule has no application where the issue is whether or not the contract sued upon was entered into, and the evidence offered was for the purpose of showing that no contract was in fact made. Extrinsic evidence is admissible to show what took place at the execution of the instrument as affecting its validity.¹ Indeed, without such evidence a written contract could never be shown to be valid. Thus where A denies that he ever assented to the written contract alleged by B, A may show the oral contract which, as he claims, was the only contract entered into.² Evidence is admissible to show that one who is alleged to have signed an assignment of an insurance policy by mark did not sign it, was unable to read and did not know the contents of the assignment.³ So where a written contract is in form an offer by A, accepted by B in writing, it may be shown that B accepted it in writing before A agreed to it or signed it, and hence that it was really

¹ Verzon v. McGregor, 23 Cal. 339; Black v. Ry., 111 Ill. 351; 53 Am. Rep. 628; Uhl v. Moorhous, 137 Ind. 445; 37 N. E. 366; Safianski v. Ry., 72 Minn. 185; 75 N. W. 17.

² Brennecke v. Heald, 107 Ia. 376; 77 N. W. 1063; Church v. Case, 110 Mich. 621; 68 N. W. 424; Reiner v. Crawford, 23 Wash. 669; 83 Am. St. Rep. 848; 63 Pac. 516.

³ Jordan v. Davis, 108 Ill. 336; Williams v. Hall, 2 Dana (Ky.) 97; Wilbur v. Stoepele, 82 Mich. 344; 21

Am. St. Rep. 568; 46 N. W. 724; Johnson v. Smith, 165 Pa. St. 195; 30 Atl. 675; McCartney v. McCartney, 93 Tex. 359; 55 S. W. 310; reversing 53 S. W. 388; Hindle v. Holcomb, — Wash. —; 75 Pac. 873; Flowers v. Fletcher, 40 W. Va. 103; 20 S. E. 870; Curry v. Colburn, 99 Wis. 319; 67 Am. St. Rep. 860; 74 N. W. 778.

² Brennecke v. Heald, 107 Ia. 376; 77 N. W. 1063.

³ Wienecke v. Arbin, 88 Md. 182; 44 L. R. A. 142; 40 Atl. 709.

B's offer.⁴ So if a clause in a written contract executed by an agent makes it subject to the approval of the principal, it may be shown that the principal assented to such contract in advance.⁵ It has been held that it may be shown that a written contract was a mere formality, and never was to take effect.⁶ Thus evidence is admissible to show whether a person whose name appears upon an instrument in a place customary for a witness signs as a witness or as a maker;⁷ to show whether one signing a negotiable note on the bank did so before or after delivery, where, if the note were signed before delivery he would be liable as a co-maker;⁸ to show whether a person writing his initials upon a contract does so merely to witness an interlineation, or whether he intends his initials to be incorporated in the instrument as a part of the interlineation;⁹ to show that one who had signed a promissory note on the back thereof had, before delivery, ordered that his endorsement be erased, and that the transferee knew of such order;¹⁰ to show that a contract which on its face was signed by A on behalf of B, was in fact signed by A on behalf of B and in B's presence, thus satisfying the statute of frauds, which in that jurisdiction requires the authority of an agent, who signs a memorandum to be in writing,¹¹ or that a witness signed after the instrument was delivered.¹² So if a vote of a corporation is relied on as a written contract oral evidence is admissible, and indeed necessary, to show whether the adversary party ever knew of or accepted such vote.¹³ So it may be shown where a bond which recites that it is the obligation of a specified principal and sureties, is signed by the sureties, but not by the principal, that

⁴ *Elastic Tip Co. v. Graham*, 174 Mass. 507; 55 N. E. 315.

⁵ *Davis v. Furniture Co.*, 41 W. Va. 717; 24 S. E. 630.

⁶ *Olmstead v. Michaels*, 36 Fed. 455; 1 L. R. A. 840.

⁷ *Aultman & Taylor Co. v. Gunderson*, 6 S. D. 226; 55 Am. St. Rep. 837; 60 N. W. 859.

⁸ *Bank v. Jefferson*, 92 Tenn. 537; 36 Am. St. Rep. 100; 22 S. W. 211.

⁹ *Isham v. Cooper*, 56 N. J. Eq. 398; 39 Atl. 760; 37 Atl. 462.

¹⁰ *Gregg v. Groesbeck*, 11 Utah 310; 32 L. R. A. 266; 40 Pac. 202.

¹¹ *Morton v. Murray*, 176 Ill. 54; 43 L. R. A. 529; 51 N. E. 767 (contract for the sale of realty).

¹² *Webster v. Smith*, 72 Vt. 12; 47 Atl. 101.

¹³ *Sears v. R. R.*, 152 Mass. 151; 9 L. R. A. 117; 25 N. E. 98.

the sureties intended it to take effect without the principal's signature.¹⁴ If the question is as to what the words of the written contract are and if the instrument itself leaves any doubt on this point, extrinsic evidence is not only admissible but necessary. Such evidence is admissible to show when certain interlineations were made,¹⁵ or to show when and by whom grantee's name was changed,¹⁶ or to show of what words the real contract consisted where certain terms are found to be crossed out and marked "not agreed to."¹⁷ The parol evidence rule does not prevent one of the parties to a written contract from showing the true date thereof, even if such evidence contradicts the recitals of the written instrument.¹⁸ Thus extrinsic evidence is admissible to show that a sealed contract was delivered at a time subsequent to its date.¹⁹

§1209. Extrinsic evidence to annex condition precedent.

If the party against whom relief is sought on a written contract concedes that the contract was placed in the possession of the adversary party, but claims that it was taken with the understanding that it was not to go into effect until some other or further event should happen, and that such event has not happened, he is not seeking to vary or contradict the contract, but to show that no contract between the parties ever came into

¹⁴ *Safranski v. Ry.*, 72 Minn. 185; 75 N. W. 17.

¹⁵ *Pancake v. Campbell County*, 44 W. Va. 82; 28 S. E. 719.

¹⁶ *Goodwin v. Norton*, 92 Me. 532; 43 Atl. 111.

¹⁷ *Tate v. Torcutt*, 100 Mich. 308; 58 N. W. 993.

¹⁸ *Oshey v. Hicks*, Cro. Jac. 263; *Jayne v. Hughes*, 10 Exch. 430; *Hall v. Cazenove*, 4 East 477; *Steele v. Mart.* 4 Barn. & C. 272; *District of Columbia v. Iron Works*, 181 U. S. 453; affirming 15 App. D. C. 198; *United States v. Le Baron*. 19 How. (U. S.) 73; *Merrill v. Syper*. 65 Ark. 51; 44 S. W. 462; *Gately v.*

Irvine, 51 Cal. 172; *Lake Erie, etc., Ry. v. Charman*, 161 Ind. 95; 67 N. E. 923; *Tribble v. Oldham*, 5 J. Mar. (Ky.) 137; *Shaugnessey v. Lewis*, 130 Mass. 355; *Hinson v. Forsdick* (Miss.), 25 So. 353; *Lexington v. Bank*, 75 Miss. 1; 22 So. 291; *State v. Moore*, 46 Neb. 590; 50 Am. St. Rep. 626; 65 N. W. 193; *Fisher v. Butcher*, 19 Ohio 406; 53 Am. Dec. 436; *Parke v. Neeley*, 90 Pa. St. 52; *Alexander v. Bland*, *Cooke* (Tenn.) 431.

¹⁹ *District of Columbia v. Iron Works*, 181 U. S. 453; affirming 15 App. D. C. 198.

effect. Evidence of conditions precedent to the taking effect of a written contract is therefore admissible.¹ This is merely the rule that an instrument may be delivered to the adversary party to take effect on the happening of a future event, restated in terms of the parol evidence rule.² Thus extrinsic evidence may be used to show that a note in the custody of the payee was to take effect only on the happening of some event which never has happened, as between the parties and all but *bona fide* holders.³ Thus evidence is admissible to show that such note was to take effect only if the horse for whose price it was given should be warranted,⁴ or if the policy of insurance for which it was given should prove satisfactory to the maker of the note;⁵

¹ *Pym v. Campbell*, 6 El. & Bl. 370; *Wallis v. Littell*, 11 C. B. N. S. 369; *Burke v. Dulaney*, 153 U. S. 228; *Ware v. Allen*, 128 U. S. 590; *Tug River, etc., Co. v. Brigel*, 86 Fed. 818; 30 C. C. A. 415; *Hurlburt v. Dusenbery*, 26 Colo. 240; 57 Pac. 860; *Bourke v. Van Keuren*, 20 Colo. 95; 36 Pac. 882; *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111; 7 Atl. 408; *Price v. Hudson*, 125 Ill. 284; 17 N. E. 817; *McCormick Harvesting Machine Co. v. Morlan*, 121 Ia. 451; 96 N. W. 976; *Riechart v. Wilhelm*, 83 Ia. 510; 50 N. W. 19; *Beall v. Poole*, 27 Md. 645; *Adams v. Morgan*, 150 Mass. 143; 22 N. E. 708; *Wilson v. Powers*, 131 Mass. 539; *Fulton v. Priddy*, 123 Mich. 298; 81 Am. St. Rep. 201; 82 N. W. 65; *Westman v. Krumweide*, 30 Minn. 313; 15 N. W. 255; *Harnickell v. Ins. Co.*, 111 N. Y. 390; 2 L. R. A. 150; 18 N. E. 632; *Reynolds v. Robinson*, 110 N. Y. 654; 18 N. E. 127; *Benton v. Martin*, 52 N. Y. 570; *Sweet v. Stevens*, 7 R. I. 375; *Bissenger v. Guiteman*, 6 Heisk. (Tenn.) 277; *Gilman v. Williams*, 74 Vt. 327; 52 Atl. 428; *Catt v. Olivier*, 98 Va. 580; 36 S. E. 980; *Reiner v. Craw-*

ford, 23 Wash. 669; 83 Am. St. Rep. 848; 63 Pac. 516; *Curry v. Colburn*, 99 Wis. 319; 67 Am. St. Rep. 860; 74 N. W. 778; *Nutting v. Ins. Co.*, 98 Wis. 26; 73 N. W. 432. "The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory. In such case it does not become operative as a contract until the performance on happening of the condition precedent." *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 239; 73 N. W. 239; citing *Ware v. Allen*, 128 U. S. 590; *Phelps v. Abbott*, 114 Mich. 88.

² See § 595.

³ *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111; 7 Atl. 408; *Gilman v. Williams*, 74 Vt. 327; 52 Atl. 428; *Catt v. Olivier*, 98 Va. 580; 36 S. E. 980.

⁴ *Trumbull v. O'Hara*, 71 Conn. 172; 41 Atl. 546.

⁵ *Parker v. Bond*, 121 Ala. 529; 25 So. 898. See also *Mehlin v. Life Association*, 2 Ind. Ter. 396; 51 S. W. 1063.

that the note was to take effect only if negotiated at a specified place;⁶ that it was to take effect only if the maker did not demand by a certain day that it should be redelivered;⁷ that a written guaranty was conditioned upon the purchase of a certain amount of leather by the party whose credit was guaranteed;⁸ that an insurance policy was not to take effect until the insured had canceled another policy on the same property in a different company;⁹ that a written order for goods was to take effect only if the vendee succeeded in canceling a written order previously given to another person;¹⁰ that a lease of a mining claim was to take effect only if the lessees should be able to obtain a certain amount of money from a third person;¹¹ that a contract to sell mining stock was to take effect only on condition that the vendor's agent in another town had not already sold the same stock;¹² that a note should take effect only if the transaction as part of which it was given was approved by the attorney of the maker;¹³ that a written contract of sale should take effect only if the purchase were approved by the engineer of the vendee;¹⁴ that a note is not to take effect until the maker has an opportunity to examine the property purchased and accepts such property;¹⁵ or that an insurance policy, temporarily placed in the possession of the insured, but afterwards withdrawn by the agent, is not to take effect unless approved by the insurance company.¹⁶ Thus evidence is admissible to show that one signed as surety with the understanding that he was to be

⁶ *United States National Bank v. Ewing*, 131 N. Y. 506; 27 Am. St. Rep. 615; 30 N. E. 501.

⁷ *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111; 7 Atl. 408. And see to the same effect, in a written contract of subscription for stock, *Ada Dairy Association v. Mears*, 123 Mich. 470; 82 N. W. 258.

⁸ *Lennox v. Murphy*, 171 Mass. 370; 50 N. E. 644.

⁹ *Moore v. Insurance Association*, 107 Ga. 199; 33 S. E. 65.

¹⁰ *Cleveland Refining Co. v. Dunning*, 115 Mich. 238; 73 N. W. 239.

¹¹ *Hurlburt v. Dusenbery*, 26 Colo. 240; 57 Pac. 860.

¹² *Reiner v. Crawford*, 23 Wash. 669; 83 Am. St. Rep. 848; 63 Pac. 516.

¹³ *Ware v. Allen*, 128 U. S. 590.

¹⁴ *Pym v. Campbell*, 6 El. & B. 370.

¹⁵ *Burke v. Dulaney*, 153 U. S. 228.

¹⁶ *Nutting v. Ins. Co.*, 98 Wis. 26; 73 N. W. 432.

liable only if others signed with him.¹⁷ In some jurisdictions where the maker has voluntarily put the instrument into the possession of the adversary party he cannot show that it was not to take effect until some other party had signed it, on the theory that an escrow cannot be deposited with the adversary party.¹⁸ Thus where a deed¹⁹ or a mortgage²⁰ has been voluntarily surrendered to the grantee or mortgagee, it cannot be shown that it was to be inoperative until the happening of a specified event. So evidence is admissible to show that a written subscription for stock in a corporation was not to go into effect until a certain number of persons had signed.²¹ If the payee does not know that the surety does not intend to be bound unless others sign the contract, the surety cannot avoid liability to the payee even if the principal debtor delivered the instrument to the payee in violation of his agreement with his surety. This principle applies equally to negotiable notes²² and to non-negotiable bonds.²³ This is not because of the parol evidence rule, however, but because such facts do not constitute a defense. This principle has been carried so far that a written instrument, purporting to be a

¹⁷ *Dair v. United States*, 16 Wall. (U. S.) 1; *Guild v. Thomas*, 54 Ala. 414; 25 Am. Rep. 703; *Hudspeth's Administrator v. Tyler*, 108 Ky. 520; 56 S. W. 973; *Inhabitants of Readfield v. Shaver*, 50 Me. 36; 79 Am. Dec. 592; *Hessell v. Johnson*, 63 Mich. 623; 6 Am. St. Rep. 334; 30 N. W. 209; *Hall v. Parker*, 37 Mich. 590; 26 Am. Rep. 540; *Cutler v. Roberts*, 7 Neb. 4; 29 Am. Rep. 371.

¹⁸ *Findley v. Means*, 71 Ark. 289; 73 S. W. 101; *Clanin v. Machine Co.*, 118 Ind. 372; 3 L. R. A. 863; 21 N. E. 35. See § 596.

¹⁹ *Hubbard v. Greeley*, 84 Me. 340; 17 L. R. A. 511.

²⁰ *Sargent v. Cooley*, — N. D. —; 94 N. W. 576.

²¹ *Gilman v. Gross*, 97 Wis. 224; 72 N. W. 885.

²² *Clark v. Bryce*, 64 Ga. 486; *Whitcomb v. Miller*, 90 Ind. 384; *Micklewait v. Noel*, 69 Ia. 344; 28 N. W. 630; *Smith v. Moberly*, 10 B. Mon. (Ky.) 266; 52 Am. Dec. 543; *Wylie v. Bank*, 63 S. C. 406; 41 S. E. 504; *Lookout Bank v. Aull*, 93 Tenn. 645; 42 Am. St. Rep. 934; 27 S. W. 1014; *Farmers', etc., Bank v. Humphrey*, 36 Vt. 554; 86 Am. Dec. 671.

²³ *Carroll County v. Ruggles*, 69 Ia. 269; 58 Am. Rep. 223; 28 N. W. 590. "A surety on a bond cannot defeat his liability thereon by showing that it was delivered in violation of agreements between himself and the principal or any other co-maker, unknown to the party for whose benefit it was given." *Richardson v. Bank*, 57 O. S. 299, 314; 48 N. E. 1100.

contract of sale, deposited with a third person, has been explained orally as a mere memorandum of the terms on which the vendee could exercise an option to purchase.²⁴

§1210. Extrinsic evidence to annex condition subsequent.

If the party against whom relief is sought concedes that the contract has taken effect, but seeks to add a condition thereto by extrinsic evidence, he is seeking to add to a written contract by extrinsic evidence of the intention of the parties direct. If the contract is complete and is therefore one within the parol evidence rule, such evidence is inadmissible.¹ The acceptor of a bill of exchange cannot show that the acceptance was made upon an oral condition.² But if "executor" is added to the signature of the acceptor, an oral contract that he should be liable only out of the funds of the estate has been held enforceable.³ If a promissory note is executed and delivered, extrinsic evidence is inadmissible to show a condition subsequent,⁴ as that it is to be void if the machinery, in payment of which it is given, does not do a specified amount of work in a specified time,⁵ that the note is given simply to show the amount of unsold goods in the possession of the makers of the note belonging to the payee, and that the note was not to be paid unless the goods were sold,⁶ or that its payment is con-

²⁴ *Adams v. Morgan*, 150 Mass. 143; 22 N. E. 708.

¹ *Levy, etc., Co. v. Kauffman*, 114 Fed. 170; 52 C. C. A. 126; *Mackey v. Magnon*, 28 Colo. 100; 62 Pac. 945; affirming 54 Pac. 907; *Bass Dry Goods Co. v. Mfg. Co.*, 119 Ga. 124; 45 S. E. 980; *Stapleton v. Munroe*, 111 Ga. 848; 36 S. E. 428; *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340; 78 N. W. 33; *Gathright v. Improvement Co.* (Ky.), 56 S. W. 163; *Feld v. Stewart*, 78 Miss. 187; 28 So. 819; *Triplett v. Woodward's Admr.*, 98 Va. 187; 35 S. E. 455; *Hyde v. Bank*, 115 Wis. 170; 91 N. W. 230.

² *Burns, etc., Co. v. Doyle*, 71 Conn. 712; 71 Am. St. Rep. 235; 43 Atl. 483.

³ *Schmittler v. Simon*, 114 N. Y. 176; 11 Am. St. Rep. 621; 21 N. E. 162.

⁴ *Aultman v. Hawk* (Neb.), 95 N. W. 695.

⁵ *Lunsford v. Malsby*, 101 Ga. 39; 28 S. E. 496.

⁶ *Western Mfg. Co. v. Rogers*, 54 Neb. 456; 74 N. W. 849. But while inadmissible as a defense, such a contract has been held available for a counter-claim, as a collateral contract. *Clement Bane & Co. v. Houck*, 113 Ia. 504; 85 N. W. 765.

tingent on the existence of an endowment fund;⁷ or that the maker of a note is to have an option of surrendering the policy for which the note was given, taking out another policy at a lower rate, and having the note canceled;⁸ or that it is not to be paid if the maker of another note for which this is given should become bankrupt.⁹ A executed a note payable to B, a business college, and B executed a certificate that A had purchased a scholarship which in terms was assignable and would enter college at a specified date. It was held by a divided court that an oral contract that such note should not be paid if the maker did not attend and could not sell the scholarship could not be shown to defeat recovery upon such note.¹⁰ So a bond to secure an agent's performance of duty can not be shown to be upon oral condition that the obligee of the bond should give immediate notice of the surety of any default by the agent.¹¹ So a written contract for the sale of hops, cannot be avoided by showing an oral agreement that there should be no sale if the market was not as represented by the vendor.¹² So a written contract for the sale of the business, and the payment of a certain sum of money therefor, cannot be avoided by showing an oral agreement that this money should be paid only if the business was successful.¹³ So a written contract of sale cannot be avoided by showing a contemporaneous oral contract giving the vendee the option to cancel his order in certain contingencies.¹⁴ So a contract for procuring a right of way for a railroad cannot be avoided by showing that the contract was to be defeasible if the railroad

⁷ Trustees of Christian University v. Hoffman, 95 Mo. App. 488; 69 S. W. 474.

⁸ Middleton v. Griffith, 57 N. J. L. 442; 51 Am. St. Rep. 617; 31 Atl. 405.

⁹ Central Savings Bank v. O'Connor, — Mich. —; 94 N. W. 11.

¹⁰ Jamestown Business College Association v. Allen, 172 N. Y. 291; 92 Am. St. Rep. 741; 64 N. E. 952.

¹¹ Mason, etc., Co. v. Gage, 119 Mich. 361; 78 N. W. 130.

¹² Lilienthal v. Brewing Co., 154 Mass. 185; 26 Am. St. Rep. 234; 12 L. R. A. 821; 28 N. E. 151.

¹³ Van Arsdale v. Brown, 18 Ohio C. C. 52; 9 Ohio C. D. 488.

¹⁴ Houck v. Wright (Miss.), 23 So. 422; Hanrahan v. Association, 66 N. J. L. 80; s. c., 67 N. J. L. 526; s. c., 68 N. J. L. 730; 48 Atl. 517.

company did not bridge a certain river.¹⁵ So a written contract guaranteeing capacity of a heater cannot be shown by extrinsic evidence to be conditioned on the vendee's building a stone wall under the house where the heater was to be used.¹⁶ So a written contract of guaranty cannot be shown to be defeasible if mortgage security for the debt were given.¹⁷ So if a grantee assumes a mortgage debt in the deed to him, he cannot show that this was conditioned on the payment of a certain sum by the grantor to the grantee.¹⁸ In all these cases the condition is nothing more than an oral term sought to be incorporated in a complete written contract, or invoked to contradict that part of the contract which has been reduced to writing. It is clearly unenforceable under the parol evidence rule.

§1211. Want of consideration, mistake and fraud.

Even if the written instrument has been delivered, either party has the right to show any facts which prevent the writing from constituting a valid contract. If this were not so, a written contract would be free from all defenses and outside of all rules which determine the validity of contracts. At the same time, the party who is seeking to uphold the contract has the right to introduce evidence to contradict that offered by the adversary party and to show that the contract is valid. Thus evidence that the contract,¹ as a note not in the hands of a *bona fide* holder;² or a note and mortgage;³ or a sealed instrument in equity⁴ is without consideration; or that the contract was entered into by mistake,⁵ either

¹⁵ Stanton v R. R., 59 Conn. 272;
21 Am. St. Rep. 110; 22 Atl. 300.

¹⁶ Mouat v. Montague, 122 Mich.
334; 81 N. W. 112.

¹⁷ Faulkner v. Gilbert, 61 Neb.
602; 85 N. W. 843; rehearing re-
fused, 62 Neb. 126.

¹⁸ Woodcock v. Bostic, 128 N. C.
243; 38 S. E. 881.

¹ Brown v. Smedley, — Mich. —;
98 N. W. 856.

² Hawkins v. Collier, 101 Ga. 145;

28 S. E. 632; Beaty v. Carr, 109 Ia.
183; 80 N. W. 326; First National
Bank v. Felt, 100 Ia. 680; 69 N. W.
1057; Bigelow v. Bigelow, 93 Me.
439; 45 Atl. 513.

³ Baird v. Baird, 145 Ill. 659; 28
L. R. A. 375; Anderson v. Lee, 73
Minn. 397; 76 N. W. 24.

⁴ Hale v. Dressen, 73 Minn. 277;
76 N. W. 31.

⁵ Greer v. Caldwell, 14 Ga. 207;
Blanchard v. Kenton, 4 Bibb. (Ky.)

as to its terms⁶ or subject-matter,⁷ such as prevents the contract from taking effect, or that the contract was entered into because of fraud,⁸ either in the execution,⁹ or the inducement,¹⁰ does not violate the parol evidence rule and is admissible. However, a breach of contract is not fraud;¹¹ and hence no relief on the ground of fraud can be given against one who breaks an oral term of a contract which, except such term, has been put in the form of a complete written contract.¹² Thus under a written contract to carry mails according to a certain schedule, an oral promise to procure a change in such schedule

451; *Lindley v. Sharp*, 7 T. B. Mon. (Ky.) 248; *Murphy v. Trigg*, 1 T. B. Mon. (Ky.) 72; *Butler v. State*, 81 Miss. 734; 33 So. 847; *Bryce v. Lorrillard F. Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249; *Welles v. Yates*, 44 N. Y. 525; *Coles v. Bowne*, 10 Paige (N. Y.) 526.

⁶ *Barrie v. Frost*, 105 Ill. App. 187; *Atwater v. Cardwell* (Ky.), 54 S. W. 960; *Gwaltney v. Assurance Society*, 132 N. C. 925; 44 S. E. 659; *Lord v. Accident Association*, 89 Wis. 19; 46 Am. St. Rep. 815; 26 L. R. A. 741; 61 N. W. 293.

⁷ *Bedell v. Wilder*, 65 Vt. 406; 36 Am. St. Rep. 871; 26 Atl. 589.

⁸ *Amer v. Hightower*, 70 Cal. 440; *McCrary v. Pritchard*, 119 Ga. 876; 47 S. E. 341; *Barrie v. Miller*, 104 Ga. 312; 69 Am. St. Rep. 171; 30 S. E. 840; *Race v. Weston*, 86 Ill. 91; *Vilett v. Moler*, 82 Minn. 12; 84 N. W. 452; *Howie v. Pratt*, — Miss. —; 35 So. 216; *Anderson v. Scott*, 70 N. H. 350; 47 Atl. 607; *Cass v. Brown*, 68 N. H. 85; 44 Atl. 86; *Hoitt v. Holcomb*, 23 N. H. 535; *Mayer v. Dean*, 115 N. Y. 556; 5 L. R. A. 540; 22 N. E. 261; *Fine v. Stuart* (Tenn. Ch. App.), 48 S. W. 371; *Griffith v. Strand*, 19 Wash. 686; 54 Pac. 613.

⁹ *Gore v. Malsby*, 110 Ga. 893; 36 S. E. 315; *McBride v. Publishing*

Co., 102 Ga. 422; 30 S. E. 999; *Cutler v. Lumber Co.*, 128 N. C. 477; 39 S. E. 30; *Cameron v. Estabrooks*, 73 Vt. 73; 50 Atl. 638. Where the party signing a release was unable to understand its contents because of pain. *Girard v. Wheel Co.*, 123 Mo. 358; 45 Am. St. Rep. 556; 25 L. R. A. 514; 27 S. W. 648. As to the existence of the subject-matter. *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241; 90 N. W. 392.

¹⁰ *Barrie v. Miller*, 104 Ga. 312; 69 Am. St. Rep. 171; 30 S. E. 840; *Dowagiac Mfg. Co. v. Gibson*, 73 Ia. 525; 5 Am. St. Rep. 697; 35 N. W. 603; *Sisson v. Kaper*, 105 Ia. 599; 75 N. W. 490; *Marston v. Ins. Co.*, 89 Me. 266; 56 Am. St. Rep. 412; 36 Atl. 389; *Rambo v. Patterson*, — Mich. —; 95 N. W. 722; *Bauer v. Taylor* (Neb.), 96 N. W. 268; *Mayer v. Dean*, 115 N. Y. 556; 5 L. R. A. 540; 22 N. E. 261; *Maute v. Gross*, 56 Pa. St. 250; 94 Am. Dec. 62. Contracts within the statute of Frauds: Sale of realty. *Gustafson v. Rustemeyer*, 70 Conn. 125; 66 Am. St. Rep. 92; 39 L. R. A. 644; 39 Atl. 104.

¹¹ See § 99.

¹² *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; 15 N. E. 127.

cannot be treated as fraud.¹³ The parol evidence rule has, of course, no application to mistake in the expression where reformation is sought.¹⁴ If it did, reformation could never be had under any circumstances. The courts are careful, however, to limit reformation to cases of mistake, fraud and the like, since if by reformation any oral term could be added to the written contract the sole effect of the parol evidence rule would be to drive the parties to equity.¹⁵

§1212. Illegality.

Illegal contracts are unenforceable not because of any desire on the part of the courts to aid either party thereto, but because public interests require that they be not enforced. If the parties thereto could make them enforceable by the simple device of putting them in writing, using such words as would conceal or omit the illegal objects intended by them to be accomplished, the rules on the subject of illegality would be of but little use. Accordingly, evidence that tends to show that the written contract is illegal,¹ as to show that the contract is tainted with usury,² or is given to compound a felony,³ or that a lease⁴ is in aid of prostitution, or that a contract is intended to create a

¹³ Knowlton v. Keenan, 146 Mass. 86; 4 Am. St. Rep. 282; 15 N. E. 127.

¹⁴ Lawrence County Bank v. Arndt, 69 Ark. 406; 65 S. W. 1052; Southern, etc., Co. v. Ozment, 132 N. C. 839; 44 S. E. 681. See Ch. LVII.

¹⁵ Krueger v. Nicola, 205 Pa. St. 38; 54 Atl. 494.

¹ McMullen v. Hoffman, 174 U. S. 639; affirming 83 Fed. 372; 45 L. R. A. 410; 28 C. C. A. 178, which reversed 75 Fed. 547; Peed v. McKee, 42 Ia. 689; 20 Am. Rep. 631; Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397; Wilhite v. Roberts, 4 Dana (Ky.) 172; Gould v. Leavitt, 92 Me. 416; 43 Atl. 17;

Sherman v. Wilder, 106 Mass. 537; Detroit Salt Co. v. Salt Co., — Mich. —; 96 N. W. 1; Martin v. Clarke, 8 R. I. 389; 5 Am. Rep. 586.

² Roe v. Kiser, 62 Ark. 92; 54 Am. St. Rep. 288; 34 S. W. 534; Dwelle v. Blackwood, 106 Ga. 486; 32 S. E. 593; Koehler v. Dodge, 31 Neb. 328; 28 Am. St. Rep. 518; 47 N. W. 913; Cotton States Building Co. v. Rawlins (Tex. Civ. App.), 62 S. W. 805.

³ Friend v. Miller, 52 Kan. 139; 39 Am. St. Rep. 340; 34 Pac. 397.

⁴ Sprague v. Rooney, 104 Mo. 349; 16 S. W. 505; overruling Sprague v. Rooney, 82 Mo. 493, 52 Am. Rep. 383.

monopoly,⁵ or is in violation of the anti-trust statutes,⁶ that a contract to lease a railroad is illegal,⁷ or that a chattel mortgage⁸ is given to defraud creditors, does not violate the parol evidence rule and is admissible. However, it has been held that it cannot be shown that a note given by a husband to his wife for her release of dower was a part of an oral contract for a collusive divorce.⁹

§1213. Non-compliance with the statute of frauds.

If the contract is within the statute of frauds, extrinsic evidence is admissible to show that other terms than those reduced to writing have in fact been agreed upon, and thus to show that the memorandum does not satisfy the statute.¹ Such a contract, proved partly in writing and partly by oral evidence cannot be enforced.² If, however, a written offer is accepted orally with modifications, the entire writing never took effect as a contract. The parties are, therefore, free to show the contract actually made between them.³ Thus a written offer to furnish material and to do work for a lump sum may be shown to have been accepted with the oral modification, assented to by the adversary party, that payment should be made in installments.⁴

§1214. Breach and performance.

Performance and breach of a contract are questions which necessarily arise after the contract has been entered into. Accordingly, the parol evidence rule does not prevent a party to a contract from showing such breach as amounts to a dis

⁵ *Harding v. Glucose Co.*, 182 Ill. 551; 74 Am. St. Rep. 189; 55 N. E. 577.

⁶ *Detroit Salt Co. v. Salt Co.*, — Mich. —; 96 N. W. 1.

⁷ *Clemons Electrical Mfg. Co. v. Walton*, 173 Mass. 286; 52 N. E. 132; 53 N. E. 820.

⁸ *Hangen v. Hachemeister*, 114 N. Y. 566; 11 Am. St. Rep. 691; 5 L. R. A. 137; 21 N. E. 1046.

⁹ *Irvin v. Irvin*, 169 Pa. St. 529; 29 L. R. A. 292.

¹ *Fisher v. Andrews*, 94 Md. 46; 50 Atl. 407.

² *Beyerstedt v. Mill Co.*, 49 Minn. 1; 51 N. W. 619.

³ *Bruce v. Pearsall*, 59 N. J. L. 62; 34 Atl. 982.

⁴ *Bruce v. Pearsall*, 59 N. J. L. 62; 34 Atl. 982.

charge; such as failure of consideration,¹ as of a promissory note not in the hands of a *bona fide* holder.² So the parol evidence rule has no application to evidence tending to show payment.³

§1215. Secondary evidence.

The parol evidence rule does not prevent the introduction of secondary evidence to prove the contents of a lost instrument in writing.¹ Oral evidence is admissible to contradict such secondary evidence as to the contents of the lost written instrument.² However, such evidence must always be limited to the contents of the written instrument. Other extrinsic evidence is governed by the rules that would be applicable if the written instrument were in evidence. If the written instrument supposed to be lost is found during trial, further evidence of its contents is inadmissible even if some evidence has already been introduced.³

III. USE OF EXTRINSIC EVIDENCE IN CASES WITHIN THE RULE.

§1216. Identification of parties.

If the written contract shows that some particular parties were intended, but does not show with sufficient accuracy who such parties are, extrinsic evidence is admissible to identify such parties,¹ and as will be seen from the cases given evidence of the intention direct may be resorted to. So under a written contract to pay money to a "railroad," extrinsic evidence can

¹ *Sargent v. Cooley*, — N. D. —; 515; 25 Pac. 187; *Magie v. Herman*, 94 N. W. 576. 50 Minn. 424; 36 Am. St. Rep. 660;

² *Kelley v. Guy*, 116 Mich. 43; 74 N. W. 291; *Warner v. Shulz*, 74 Minn. 252; 77 N. W. 25. 52 N. W. 909.

³ Payment of promissory note. *G. Ober & Sons Co. v. Drane*, 106 Ga. 406; 32 S. E. 371. ² *Strain v. Fitzgerald*, 130 N. C. 600; 41 S. E. 872.

³ *Grand Isle v. Kinney*, 70 Vt. 381; 41 Atl. 130. ¹ *Morrison v. Baechtold*, 93 Md. 319; 48 Atl. 926.

¹ *Western Union Telegraph Co. v. Collins*, 45 Kan. 88; 10 L. R. A.

be used to show what railroad corporation was intended.² So where a written contract purporting on its face to be made between A and B is signed by A, C, D and B in the order given, it may be shown that C and D sign as sureties for B.³ Where a note is signed by A at the right, and by B at the left, of the instrument, opposite A's signature, B may show that he signed as witness.⁴ So under an instrument "I. O. U. the sum of one hundred sixty dollars which I shall pay on demand to you," the real party intended by "you" may be shown.⁵ So where a note omits payee's name but recites "value received of him," the payee may be shown.⁶ So under a note "we promise to pay to the order of myself," signed by two persons, the real maker and payee may be shown.⁷ If the name set forth in the contract is shown not to be the name of the person therein described, extrinsic evidence may be admitted to show who such person is. Thus A took out a policy payable to "Mrs. Kate Hogan, his wife." Evidence was admitted to show that he had a wife, Ellen B. Hogan, and a married sister, Kate Wallace, formerly Kate Hogan; that the insured could not write and asked a physician to make out the application, and that the latter thought that the insured's wife was named Kate.⁸ Parties may be identified by extrinsic evidence even if the contract is one required to be proved in writing, or is required to be in writing. Thus extrinsic evidence is admissible to show that in a promise to pay A's debt to "your concern," addressed to "Friend Geo.," the latter was the agent of A's

² *Mansfield, etc., R. R. v. Brown*, 26 O. S. 223.

³ *Thompson v. Coffman*, 15 Or. 631; 16 Pac. 713.

⁴ *Aultman, etc., Co. v. Gunder-son*, 6 S. D. 226; 55 Am. St. Rep. 837; 60 N. W. 859.

⁵ *Kinney v. Flynn*, 2 R. I. 319.

⁶ *Barkley v. Tarrant*, 20 S. C. 574; 47 Am. Rep. 853 (even where the note was under seal).

⁷ *Jenkins v. Bass*, 88 Ky. 397; 21 Am. St. Rep. 344; 11 S. W. 293.

⁸ *Hogan v. Wallace*, 166 Ill. 328; 46 N. E. 1136. (From these facts the supreme court found that the wife was the beneficiary intended. They rejected, not as inadmissible but as improbable, further evidence of the physician that the insured named the beneficiary "Kate Hogan," that the physician asked if that was the insured's wife, that insured remained silent, and that the physician added "his wife.")

creditor, the "concern."⁹ Thus extrinsic evidence is admissible to show to whom a mortgage was to be paid.¹⁰ So where a deed was made to "John Elliott and Amanda Elliott, his wife," evidence is admissible to show that Amanda Elliott, the grantee, was a woman with whom John Elliott was living in unlawful relations, though he had a lawful wife living, named Amanda.¹¹ Where a deed was made to a woman after her marriage, and her maiden name was inserted as that of grantee, extrinsic evidence was admissible to show that she was intended as the grantee, and that the grantor did not know of her marriage.¹² Where the Christian name of a grantee is omitted from a deed, extrinsic evidence is admissible to show who the grantee is.¹³ Under a deed to "Jarrett, Moon & Co.," extrinsic evidence was admissible to show whether Jarrett was one grantee and Moon another; or whether Jarrett Moon was the name of the sole grantee.¹⁴ Under a grant to A "as trustee," extrinsic evidence is admissible to show for whom he was acting as trustee.¹⁵

§1217. Identification of subject-matter.

If the written contract is ambiguous in indicating the subject-matter of the contract, extrinsic evidence is admissible to identify it.¹ Thus extrinsic evidence is admissible to show

⁹ *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500.

¹⁰ *Morgan v. Lake View Co.*, 97 Wis. 275; 72 N. W. 872.

¹¹ *Wolff v. Elliott*, 68 Ark. 326; 57 S. W. 1111.

¹² *Scanlan v. Wright*, 13 Pick. (Mass.) 523; 25 Am. Dec. 344.

¹³ *Leach v. Dodson*, 64 Tex. 185.

¹⁴ *Holmes v. Jarrett*, 7 Heisk. (Tenn.) 506. (In either case, the grantee would take in trust for the partnership.)

¹⁵ *Union Pacific R. R. v. Durant*, 95 U. S. 576.

¹ *Cowen v. Truefitt* (1898), 2 Ch.

551; affirmed (1899), 2 Ch. 309; *Reed v. Ins. Co.*, 95 U. S. 23; *Bradley v. Packet Co.*, 13 Pet. (U. S.) 89; *Edwards v. Bender*, 121 Ala. 77; 25 So. 1010; *Moore v. Paving Co.*, 118 Ala. 563; 23 So. 798; *Follendore v. Follendore*, 110 Ga. 359; 35 S. E. 676; *Barrett v. Stow*, 15 Ill. 423; *Baldwin v. Boyce*, 152 Ind. 46; 51 N. E. 334; *Stoops v. Smith*, 100 Mass. 63; 1 Am. Rep. 85; 97 Am. Dec. 76; *Swett v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471; *Stoddard Mfg. Co. v. Miller*, 107 Mich. 51; 64 N. W. 948; *J. G. Shaw, etc., Co. v. Maybell*, 86 Minn. 241; 90 N. W. 392; *Reeves v. Cress*,

what is included by the words "entire estate."² It may be shown what "et cetera" includes.³ Thus extrinsic evidence is admissible to identify a debt,⁴ or a note.⁵ So in a contract to return a "due-bill," if the company did not issue a policy applied for, evidence is admissible to show that the "due-bill" was a note given for the premium of such policy.⁶ So in a contract to assume and pay the "debts" of a firm, it is permitted to show what are the debts of the firm,⁷ and to show that a debt appearing on the books of the firm is in fact the individual debt of one of the partners.⁸ So in a contract to assume and pay "claims of all persons who have performed labor upon, or furnished materials for us, in or on said property," evidence is admissible to show that claims are included.⁹ Even in a contract required to be proved by writing, oral evidence can be used to identify "the bills" guaranteed,¹⁰ or an "account" guaranteed.¹¹ So where a deed is given as security for "money owing," extrinsic evidence is admissible to show what money was owing when the deed was delivered, and that this

80 Minn. 466; 83 N. W. 443; Field v. Munson, 47 N. Y. 221; Harlan County v. Whitney, 65 Neb. 105; 90 N. W. 993; Drexel v. Murphy, 59 Neb. 210; 80 N. W. 813; Hurd v. Robinson, 11 O. S. 232; Dougherty v. Chestnutt, 86 Tenn. 1; 5 S. W. 444; Brown v. Markland, 16 Utah 360; 67 Am. St. Rep. 629; 52 Pac. 597; Noyes v. Canfield, 27 Vt. 79; Hart v. Hammett, 18 Vt. 127; Lynch v. Henry, 75 Wis. 631; 44 N. W. 837.

² Miles v. Miles, 78 Miss. 904; 30 So. 2.

³ Bagley v. Sugar Co., — La. —; 35 So. 539.

⁴ Payson v. Lamson, 134 Mass. 593; 45 Am. Rep. 348; Manchester v. Bradner, 107 N. Y. 346; 1 Am. St. Rep. 829; 14 N. E. 405; Fitzpatrick v. Commissioners, 7 Humph. (Tenn.) 224; 46 Am. Dec. 76; Fosha v. Prosser — Wis. —; 97 N. W. 924.

⁵ McConaughy v. Wilsey, 115 Ia. 589; 88 N. W. 1101; Robbins v. Klein, 60 O. S. 199; 54 N. E. 94; Hancock v. Melloy, 189 Pa. St. 569; 42 Atl. 292.

⁶ Andrews v. Robertson, 111 Wis. 234; 87 Am. St. Rep. 870; 54 L. R. A. 673; 87 N. W. 190.

⁷ Cannon v. Moody, 78 Minn. 68; 80 N. W. 842.

⁸ Hanks v. Flynn, 108 Ia. 165; 78 N. W. 839. (Even under a contract to assume debts of the firm "as shown by the books and invoices of the firm this day.")

⁹ Brown v. Markland, 16 Utah 360; 67 Am. St. Rep. 629; 52 Pac. 597.

¹⁰ Haskell v. Tukesbury, 92 Me. 551; 69 Am. St. Rep. 529; 43 Atl. 500.

¹¹ Waldheim v. Miller, 97 Wis. 300; 72 N. W. 869. (As to show that it was for future advances.)

debt was intended even if incurred after the date of the deed.¹² So where two writs of replevin issued for the same property and two replevin bonds are given, evidence is admissible to show which bond was given for which writ.¹³ So in a sale of peaches to be grown in "sundry orchards," in two counties named,¹⁴ or a contract to sell all the timber on "their lands,"¹⁵ evidence is admissible to show what land the parties intended. So in a sale of a certain lot of logs, evidence is admissible to show what logs were intended, and hence that the amount of lumber was overestimated.¹⁶ So evidence is admissible to identify "nine walnut trees."¹⁷ So extrinsic evidence is admissible to identify the property referred to in an insurance policy, as to show what was meant by "shed and additions attached,"¹⁸ or in a policy insuring a "cold storage warehouse," to show that a shed was part of the warehouse.¹⁹ Extrinsic evidence is not admissible to show that the property insured was a different piece of property from that described in the policy, if the action is brought on the policy.²⁰ In a contract for the sale of realty, extrinsic evidence is admissible to show what realty conforms to the description in the written contract, and thus to show what realty the parties intended to contract for.²¹ Ex-

¹² Swedish American National Bank v. Bank, 76 Minn. 409; 79 N. W. 399. (But evidence to show that the deed was intended to secure advances made after its delivery is inadmissible.)

¹³ McManus v. Donohoe, 175 Mass. 308; 56 N. E. 291.

¹⁴ Ontario, etc., Association v. Fruit Packing Co., 134 Cal. 21; 86 Am. St. Rep. 231; 53 L. R. A. 681; 66 Pac. 28. And see Reinstein v. Roberts, 34 Or. 87; 75 Am. St. Rep. 564; 55 Pac. 90.

¹⁵ Dorris v. King (Tenn. Ch. App.), 54 S. W. 683.

¹⁶ Rib River Lumber Co. v. Ogilvie, 113 Wis. 482; 89 N. W. 483.

¹⁷ Carpenter v. Medford, 99 N. C. 495; 6 Am. St. Rep. 535; 6 S. E. 785.

¹⁸ Cummins v. Ins. Co., 197 Pa. St. 61; 46 Atl. 902.

¹⁹ Boak Fish Co. v. Assurance Co., 84 Minn. 419; 87 N. W. 932.

²⁰ Sanders v. Cooper, 115 N. Y. 279; 12 Am. St. Rep. 801; 5 L. R. A. 638; *sub nomine*, Landers v. Cooper, 22 N. E. 212. *Contra*, where the agent wrote the application, describing other property than that insured. Alabama, etc., Ins. Co. v. Minchener, 133 Ala. 632; 32 So. 225.

²¹ Tumlin v. Perry, 108 Ga. 520; 34 S. E. 171; Ainslie v. Eason, 107 Ga. 747; 33 S. E. 711; Powers v. Scharling, 64 Kan. 339; 67 Pac. 820; Murphy v. Robinson, 50 La. Ann. 213; 23 So. 323; Hurley v. Brown, 98 Mass. 545; 96 Am. Dec. 671; Waring v. Ayres, 40 N. Y.

trinsic evidence is admissible to show the actual boundaries of the tract in question,²² as to show what is meant by the "point" of a cliff, and "thence with the cliff."²³ So in a contract to sell "coal in the northern hill as far as the center," extrinsic evidence is admissible to show the hill on grantor's land intended by this contract.²⁴ So, if land is described by its ownership, and approximate, though not exact, location,²⁵ as where in a contract of sale the name of the owner is given and it is said to front on Waters Road,²⁶ or by its popular name,²⁷ extrinsic evidence is admissible to show what land was intended. Thus under a contract for the sale of a half interest in "Linn Grove Mills and the land thereunto belonging," extrinsic evidence is admissible to identify the land.²⁸ Under a mortgage of "the quartz mill and lode, formerly owned by" a specified person, extrinsic evidence is admissible to show what property answering to such description was owned by such person.²⁹ So in a contract to lease a house described by its ownership, and the street on which it is located, extrinsic evidence is admissible to supply the house number.³⁰ So in a contract whereby A authorized B to sell certain lots, agreeing that when B had sold enough lots to realize five thousand five hundred dollars A would convey to B the remainder of the lots, B could introduce parol evidence to show what lots he had sold, in order to show what the remaining lots were.³¹ So under a contract to divert the waters of a given brook, it may be shown that both branches thereof were intended, neither having a name.³² If the descrip-

357; *Lee v. Stone*, 21 R. I. 123; 42 Atl. 717.

²² *Hereford v. Hereford*, 131 Ala. 573; 32 So. 620, 651; *Stamphill v. Bullen*, 121 Ala. 250; 25 So. 928; *McMaster v. Morse*, 18 Utah 21; 55 Pac. 70.

²³ *Hall v. Conlee (Ky.)*, 62 S. W. 899.

²⁴ *Lulay v. Barnes*, 172 Pa. St. 331; 34 Atl. 52.

²⁵ *Cottingham v. Hill*, 119 Ala. 353; 72 Am. St. Rep. 923; 24 So. 552; *Edwards v. Deans*, 125 N. C. 59; 34 S. E. 105.

²⁶ *Mohr v. Dillon*, 80 Ga. 572; 5 S. E. 770. (Decided under the Georgia statute.)

²⁷ *Garvey v. Parkhurst*, 127 Mich. 368; 86 N. W. 802.

²⁸ *Brown v. Ward*, 110 Ia. 123; 81 N. W. 247.

²⁹ *Hancock v. Watson*, 18 Cal. 137.

³⁰ *Bulkley v. Devine*, 127 Ill. 406; 3 L. R. A. 330; 20 N. E. 16.

³¹ *Stamets v. Deniston*, 193 Pa. St. 548; 44 Atl. 575.

³² *Petrie v. Hamilton College*, 158 N. Y. 458; 53 N. E. 216.

tion in the contract is not sufficient when considered in connection with evidence of the ownership and location of the land to identify it, extrinsic evidence is not admissible to show what land the parties intended to contract for.³³ Such a contract is incomplete on its face, and the identification of the subject-matter does not therefore violate the parol evidence rule. The contract, however, is one controlled by the statute of frauds, which forbids such use of oral evidence. Still less can it be shown that a different tract was intended.³⁴ Identification cannot be made the means of contradiction.³⁵

§1218. Identification cannot be made means of contradiction.

Under a claim of identifying subject-matter, the parties to a contract cannot show by extrinsic evidence that they intended to contract for other and different property from that described in their contract, for this would be a contradiction of the written contract.¹ Nor can the parties show that in addition to the property described in the contract, the other and different property was also contracted for. If the contract concerns personalty, the parol evidence rule forbids such addition. Hence, if a bill of sale is complete on its face, the parties cannot show that by oral contemporaneous agreement other property was included.² If the contract concerns realty, such addition would violate not only the parol evidence rule but also the statute of frauds.³ Hence, under a lease, it cannot be shown

³³ *Gatins v. Angier*, 104 Ga. 386; 30 S. E. 876; *Ferguson v. Blackwell*, 8 Okla. 489; 58 Pac. 617.

³⁴ *Griffin v. Hall*, 115 Ala. 482; 22 So. 162.

³⁵ See § 1218.

¹ *Town of Kane v. Farrelly*, 192 Ill. 521; 61 N. E. 648. Chattel mortgage. *Johnson v. Whitfield*, 124 Ala. 508; 82 Am. St. Rep. 196; 27 So. 406. (Ox described as "one red spotted ox"; as against levy, held inadmissible to show that a black ox

was intended.) Contract for sale of realty. *Duggan v. Uppendahl*, 197 Ill. 179; 64 N. E. 289. Insurance policy. *Sanders v. Cooper*, 115 N. Y. 279; 12 Am. St. Rep. 801; 5 L. R. A. 638; *sub nomine*, *Landers v. Cooper*, 22 N. E. 212.

² *Becker v. Dalby* (Ia.), 86 N. W. 314; *McEnergy v. McEnergy* (Ia.), 80 N. W. 1071; *Drexel v. Murphy*, 59 Neb. 210; 80 N. W. 813.

³ See § 747.

that premises omitted from the description were included by the prior agreement of the parties.⁴

Furthermore, the legal effect of the contract cannot be contradicted⁵ under guise of identifying the subject-matter. If the contract, by its terms, is a contract which can be performed by furnishing any property of the grade and quality described in the contract, extrinsic evidence is inadmissible to show that the parties were really contracting for a specific lot of property. Thus in a contract for "one hundred bales of lint cotton," it is not permitted to show that cotton raised by the seller was intended.⁶ So under a contract for the sale of "one hundred head of good fat merchantable hogs,"⁷ or "eight thousand bushels of ear-corn,"⁸ extrinsic evidence is inadmissible to show that specific property was contracted for. So in a contract to pay "any and all of the grantor's notes," extrinsic evidence is inadmissible to show that only certain specific notes were intended.⁹ So if land is conveyed to a railroad "for all legitimate railroad purposes," extrinsic evidence is inadmissible to show that certain specific purposes were agreed upon.¹⁰ So a written contract whereby an actress agrees to "render services at any theaters" for a specified time, cannot be modified by showing an oral agreement that the services were to be in one specified part only.¹¹ There is some apparent lack of harmony in judicial decision on this question. Thus A agreed to deliver a certain amount of hay to the United States at a certain point. The contract was for hay generally, but both parties knew that the only way that A could obtain hay to furnish at that price was by cutting it in the Yellowstone valley. The United States had all the hay in that valley cut by others. It was

⁴ Haycock v. Johnston, 81 Minn. 49; 83 N. W. 494.

⁵ See § 1195.

⁶ Forsythe Mfg. Co. v. Castlen, 112 Ga. 199; 81 Am. St. Rep. 28; 37 S. E. 485.

⁷ Johnson v. Pierce, 16 O. S. 472.

⁸ Ormsbee v. Machir, 20 O. S. 295.

⁹ Mead v. Peabody, 183 Ill. 126;

55 N. E. 719; affirming 83 Ill. App. 297.

¹⁰ Abraham v. R. R., 37 Or. 495;

82 Am. St. Rep. 779; 60 Pac. 899.

¹¹ Violette v. Rice, 173 Mass. 82; 53 N. E. 144 (citing Grimston v. Cuninghame (1894), 1 Q. B. 125; Drumond v. Atty. Gen., 2 H. L. Cas. 837; Nichol v. Godts, 10 Exch. 191).

held that A was discharged.¹² The admission of these facts was placed on the theory of the admissibility of surrounding circumstances, and not on identification of subject-matter. Contradiction is not permitted under guise of identification of parties. Thus a guaranty addressed to "Crane Bros. Co.," a partnership cannot be shown to be intended for a corporation of similar name.¹³

§1219. Collateral consistent contracts.

The rule that a written contract merges all prior and contemporaneous oral negotiations, applies only to such oral negotiations as concern the subject-matter embraced in the written contract.¹ Accordingly, a contract collateral to a written complete contract may be shown by extrinsic evidence if not contradictory.² Thus an oral contract by an actress for the fall and winter may be enforced, though she had made a contemporaneous written contract for the summer.³ So an oral contract to pay commissions on a sale of realty in addition to the price fixed in the written contract,⁴ an oral contract not to sell other lots at less than a given price,⁵ an oral contract that the vendor shall keep the realty contracted for insured for the benefit of the vendee,⁶ an oral contract made when a note is given to a bank to allow a deposit in the bank to be credited thereon,⁷ and an oral contract that the vendee of stone should have a derrick ready to receive the stone and should settle any controversy over the amount of stone furnished, as shown by

¹² *United States v. Peck*, 102 U. S. 64.

¹³ *Crane Co. v. Specht*, 39 Neb. 123; 42 Am. St. Rep. 562; 57 N. W. 1015.

¹ *Grand Forks, etc., Co. v. Tourtelot*, 7 N. D. 587; 75 N. W. 901.

² *Savings Bank v. Asbury*, 117 Cal. 96; 48 Pac. 1081; *King v. Dahl*, 82 Minn. 240; 84 N. W. 737; *Germania Bank v. Osborne*, 81 Minn. 272; 83 N. W. 1084; *Brown v. Bowen*, 90 Mo. 184; 2 S. W. 398; *Huffman v. Ellis*, 64 Neb. 623; 90 N. W.

552; *Quigley v. Shedd*, 104 Tenn. 560; 58 S. W. 266.

³ *Drake v. Allen*, 179 Mass. 197; 60 N. E. 477.

⁴ *Hall v. McNally*, 23 Utah 606; 65 Pac. 724.

⁵ *Rackemann v. Improvement Co.*, 167 Mass. 1; 57 Am. St. Rep. 427; 44 N. E. 990.

⁶ *Keefer v. Ins. Co.*, 29 Ont. 394; *Parcell v. Grosser*, 109 Pa. St. 617; 1 Atl. 909.

⁷ *Roe v. Bank*, 167 Mo. 406; 67 S. W. 303.

the tickets given by vendor before using the stone,⁸ are all of them so far collateral to the written contract as to be enforceable. So an oral contract to extend a lease under certain contingencies has been held so far collateral to the lease as to be enforceable.⁹ So in an action on a note the whole transaction under which the note was given may be shown, and a counterclaim may be based on an oral contract collateral to the note, as on an oral contract to repurchase the stock for which the note was given,¹⁰ or to redeem in gold the bank-notes for which the note was given,¹¹ or to place certain claims in the hands of the maker of the note to collect on commission.¹² Where a note was deposited with A as collateral under a written contract, an oral agreement that A should not collect it could not be enforced; but an agreement that the payee should collect it as agent for A, was held to be a collateral consistent contract, and enforceable.¹³ Where A had given B a promissory note, an oral contract whereby B was to collect certain rent for A, and credit upon A's debt, is enforceable.¹⁴ Where a note is given,¹⁵ or a bill of exchange drawn,¹⁶ an oral contract that a set-off existing in favor of the maker or bearer was not waived, may be enforced. So, where A bought a draft from B, intending to use it in the purchase of cattle, an oral agreement that if A did not make such use of the draft he could return it to B, and receive credit therefor on his account with B, can be enforced.¹⁷ Where certain securities are deposited under a written contract and

⁸ *Mt. Vernon Stone Co. v. Sheely*, 114 Ia. 313; 86 N. W. 301.

⁹ *Armington v. Stelle*, 27 Mont. 13; 94 Am. St. Rep. 811; 69 Pac. 115 (under § 2186 of the statutes of Montana).

¹⁰ *Germania Bank v. Osborne*, 81 Minn. 272; 83 N. W. 1084.

¹¹ *Racine County Bank v. Keep*, 13 Wis. 209.

¹² *Singer Mfg. Co. v. Potts*, 59 Minn. 240; 61 N. W. 23.

¹³ *Jenkins v. Shinn*, 55 Ark. 347; 18 S. W. 240.

¹⁴ *Stebbins v. Lardner*, 2 S. D.

127; 48 N. W. 847; *Jones v. Keyes*, 16 Wis. 562.

¹⁵ *Bennett v. Tillmon*, 18 Mont. 28; 44 Pac. 80.

¹⁶ *Bohn Mfg. Co. v. Harrison*, 13 Mont. 293; 34 Pac. 313.

¹⁷ *Collingwood v. Bank*, 15 Neb. 118; 17 N. W. 359. (In this case, however, while such contract was enforceable, A had delayed the return of the draft an unreasonable time, and the drawee had become insolvent in the meantime. A was therefor not allowed to recover.)

receipt, an oral contract, under which other securities are deposited, is enforceable.¹⁸ The cases in which the action was based on a note may however be explained on the theory that the note was not a complete contract.¹⁹ Where a written bond has been given for the purchase of realty, an oral contract has been enforced giving the vendee the right to rescind the contract and receive back his bond and mortgage given therefor.²⁰ An oral contract that a building erected by a lessee upon the leased premises, shall be the personal property of the lessee, is so far collateral to a written lease that it can be enforced.²¹ Under a contract between two co-owners of realty, whereby one of them agreed to sell his interest in such realty to the other for a specified consideration, an oral agreement that outstanding partnership accounts between them should be settled, and the balance due from the vendor to the vendee should be applied upon the purchase price, has been held enforceable.²²

§1220. What contracts are collateral.

To enforce the oral contract, even if not inconsistent, it must be collateral to the written contract and not merely a term thereof. The difficulty lies in the application of this rule. Under cover of enforcing collateral consistent contracts the attempt is often made to add oral terms to a complete written contract. Courts which recognize the parol evidence rule and the rule as to the collateral consistent contract in language which in the abstract would indicate that they were in perfect harmony, will show remarkable differences of opinion in deciding whether the term in question is a collateral contract or a mere term of the written contract. The true test of a collateral contract seems to be that it must be so far unconnected with the written contract that the court must be able to hold that the parties could have concluded their negotiations as embodied in the written contract without reference to or consideration of

¹⁸ Blackwood v. Brown, 34 Mich. 4.

¹⁹ See § 1197.

²⁰ Cloud v. Markle, 186 Pa. St. 614; 40 Atl. 811.

²¹ Ryder v. Faxon, 171 Mass. 206;

68 Am. St. Rep. 417; 50 N. E. 631.

²² Redfield v. Gleason, 61 Vt. 220;

15 Am. St. Rep. 889; 17 Atl. 1075.

the terms of the oral contract. "Oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction with respect to which the parties are contracting, as to be part and parcel of the transaction itself, without an adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract."¹ Thus in an action on a note and mortgage, extrinsic evidence was inadmissible to show a contract whereby the mortgagee was to receive board from the mortgagor for life, and at his death the note and mortgage were to be canceled though such contract might be available as a counterclaim,² and in deciding the case the court pointed out a test for determining whether the contract was collateral or not. "A very satisfactory test of the question under consideration will be to suppose this action to have been by defendant against plaintiff for his board as a right independent of the note, and that Kracke had pleaded as a defense the obligation of Homeyer to board him because of the stipulation in the note. The effect would be to so change the note as to make it not only an obligation for the payment of the amount therein stipulated, but an obligation against Homeyer to board the payee of the note during his life or until the note was paid. The right to make such a change in a written contract by averments sustained only by verbal proofs, is not open to reasonable discussion."³ One of the English cases that is often cited as a leading case, as recognizing the theory of collateral contracts, and as enforcing an oral contract to repair as collateral to a written lease, is in reality directly opposed to the latter rule.⁴ When this case first came before the court, it did not appear whether a written lease had been given or not, and the only question decided was whether an oral contract to repair could be enforced or whether the statute of frauds made it

¹ Naumberg v. Young, 44 N. J. L. 331, 342; 43 Am. Rep. 380; cited and followed in *McTague v. Finnegan*, 54 N. J. Eq. 454; 35 Atl. 542.

² *Kracke v. Homeyer*, 91 Ia. 51; 58 N. W. 1056.

³ *Kracke v. Homeyer*, 91 Ia. 51, 53; 58 N. W. 1056.

⁴ *Angell v. Duke*, L. R. 10 Q. B. 174.

unenforceable. The court very properly held that the statute of frauds did not affect the contract.⁵ When the case was finally heard on its merits, it appeared from the evidence, that a written lease had been given. The oral contract to repair was held unenforceable under the parol evidence rule.⁶ The rule allowing collateral oral contracts to be enforced is unfortunately sometimes confused with the rule allowing oral terms of a contract, part only of which has been reduced to writing by the parties; and which is on its face not complete to be enforced, and oral terms which are properly enforced under the latter rule have been ascribed to the former. If the distinction between the two rules is noted, cases apparently in conflict may be reconciled. Thus where the contract for the sale of a drug business is complete on its face extrinsic evidence is inadmissible to show an oral contract whereby the seller agreed not to engage in such business thereafter.⁷ A deed has been held not to merge an oral agreement by the vendor to construct a street if the vendee bought the land conveyed by such deed.⁸ Where a written lease has been given, an oral agreement whereby the lessor binds himself not to compete with the lessee, can be enforced⁹ on the theory that the lease is not complete on its face. Accordingly, the better rule is that if the written contract is incomplete on its face, then by the operation of a different principle, any oral term consistent with the writing may be enforced, while if the contract is complete on its face, and the principle of the collateral consistent contract is invoked, only such contracts as are really collateral to the written contract can be enforced.

§1221. Examples of contracts held not to be collateral.

Illustrations of oral contracts offered in evidence as collateral to a written contract, but held unenforceable as being really terms of the written contract are by no means uncommon.

⁵ Angell v. Duke, L. R. 10 Q. B. 174.

⁶ Angell v. Duke, 32 L. T. 320.

⁷ Slaughter v. Smither, 97 Va. 202; 33 S. E. 544.

⁸ Drew v. Wiswall, 183 Mass. 554; 67 N. E. 666.

⁹ Welz v. Rhodius, 87 Ind. 1; 44 Am. Rep. 747; Leineau v. Smart, 11 Humph. (Tenn.) 308.

Thus an oral contract to repair a house leased by a written lease,¹ or to ditch the farm leased,² or not to build within a certain distance of a rented building,³ are so closely connected with a written lease that they cannot be enforced. The courts are not harmonious on these questions, however. Thus in some jurisdictions an oral contract whereby the lessor agrees to put the premises into safe condition or to make certain repairs,⁴ or to destroy rabbits which were overrunning the farm,⁵ or to erect a kitchen on the property leased,⁶ has in each case been held enforceable though a written lease was given. So a contract to have the front street graded and water-mains put in has been held so far collateral to a deed for the land as to be proved by parol.⁷ So an oral contract that the grantor should not have a right of way over the land conveyed is so far collateral to a deed that it may be used to rebut an implied right of way from necessity.⁸ So an oral contract to repair has been held enforceable though a written contract for the sale of the property had been entered into.⁹ Under an oral contract between A and a railroad corporation, whereby the railroad was to construct two convenient and necessary crossings over its tracks on A's land, an oral agreement between A and the railroad as to the kind of crossing to be constructed, was unenforceable.¹⁰ An oral contract was made for distributing the estate of one of the parties among the other parties, his children. Subsequently, two branches of this contract were put in writ-

¹ *Gulliver v. Fowler*, 64 Conn. 556; 30 Atl. 852; *Roehrs v. Timmons*, 28 Ind. App. 578; 63 N. E. 481; *Lerch v. Times Co.*, 91 Ia. 750; 60 N. W. 611; *Grashaw v. Wilson*, 123 Mich. 364; 82 N. W. 73; *Howard v. Thomas*, 12 O. S. 201.

² *Diven v. Johnson*, 117 Ind. 512; 3 L. R. A. 308; 20 N. E. 428.

³ *Haycock v. Johnston*, 81 Minn. 49; 83 N. W. 494, 1118.

⁴ *Hines v. Wilcox*, 96 Tenn. 148; 54 Am. St. Rep. 823; 34 L. R. A. 824; 33 S. W. 914.

⁵ *Erschine v. Adeane*, L. R. 8 Ch.

App. 756; *Morgan v. Griffith*, L. R. 6 Ex. 70.

⁶ *Betts v. Demumbrane*, Cooke (Tenn.) 39.

⁷ *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436; 17 L. R. A. 270; 30 N. E. 474.

⁸ *Lebus v. Boston*, 107 Ky. 98; 47 L. R. A. 79; 51 S. W. 609; 52 S. W. 956.

⁹ *Manning v. Jones*, Busb. (N. C.) 368.

¹⁰ *Martin v. R. R.*, 48 W. Va. 542; 37 S. E. 563.

ing, and the written contract appeared upon its face to be complete. The remaining oral terms were held to be unenforceable.¹¹ A written contract was entered into to compromise a judgment for \$17,000 upon payment of \$5,000, the consideration for the reduction being expressed in the written contract to be one dollar "and for the further consideration of the relation of myself and family to P. Rehill and Elizabeth Rehill his wife," Rehill being the judgment debtor. A collateral oral contract that in consideration of such settlement the judgment creditor's wife, who had been brought up by the Rehills, should be their heir and devisee at their death, was unenforceable.¹² Where A had made a contract with B to cut certain timber growing on B's land, and to haul it to a certain stream at a distance from B's land, A could not show an oral agreement whereby B was to furnish a right of way for a tramway from his land to the stream.¹³ Thus, where an inventor makes a written assignment of his patents to the government, in consideration of one dollar and other considerations, a collateral oral contract that the assignor shall be employed by the government as long as his invention is used, and that the government shall pay a reasonable compensation for the use of his patent, cannot be enforced.¹⁴ So under a written contract for the sale of a business an oral contract not to compete cannot be shown.¹⁵ So under a contract of insurance, an oral provision for arbitration cannot be shown.¹⁶ So under a written contract of adoption, complete on its face, an oral contract to devise or bequeath property to the child adopted cannot be shown.¹⁷

§1222. Collateral inconsistent contracts.

If the collateral contract is inconsistent with the written contract, it cannot be enforced even if it is really collateral, and

¹¹ *McEnergy v. McEnergy*, 110 Ia. 718; 80 N. W. 1071.

¹² *McTague v. Finnegan*, 54 N. J. Eq. 454; 35 Atl. 542.

¹³ *Sutton v. Lumber Co. (Ky.)*, 44 S. W. 86.

¹⁴ *McAleer v. United States*, 150 U. S. 424.

¹⁵ *Zanturjian v. Boornazian*, — R. I. —; 55 Atl. 199.

¹⁶ *Rutter v. Ins. Co.*, 138 Ala. 202; 35 So. 33.

¹⁷ *Brantingham v. Huff*, 174 N. Y. 53; 95 Am. St. Rep. 545; 66 N. E. 620.

hence otherwise enforceable.¹ Thus an oral contract, collateral to a written contract and changing the time fixed therein for performance, is unenforceable, as an oral contract to pay to the vendor of realty two hundred dollars on the execution of the written contract,² an oral contract changing the time for making repairs where the written contract provided for making repairs and delivering possession at a specified time,³ an oral contract that a note, on its face payable generally, should be paid out of certain specified funds,⁴ or to credit on a note given, a sum in the event of the breach of another contract,⁵ or an oral contract to conform to usage as to payment under a written building contract, where, no time for payment being specified, the payment was in legal effect due only on completion of the building.⁶ So one who signs a note as surety cannot show an oral contract whereby the maker agreed to take a mortgage from the principal debtor as further security and to enforce such mortgage before proceeding against the surety.⁷ So an oral agreement that the vendor will procure and file for record a patent for certain land which he has contracted to sell by written contract, within sixty days from the date of such contract, cannot be enforced where the contract merely requires the vendor to furnish a good abstract and a warranty deed.⁸ An alleged collateral contract is as unenforceable when inconsistent with the legal effect of the written provisions as when it is inconsistent with express provisions. Under a written contract of sale, the legal effect of which was to pass title upon delivery, a collateral oral contract that the vendee should test

¹ Keith v. Parker, 115 Fed. 397; Adams v. Turner, 73 Conn. 38; 46 Atl. 247; Younie v. Walrod, 104 Ia. 475; 73 N. W. 1021; Kracke v. Homeyer, 91 Ia. 51; 58 N. W. 1056; Tripp v. Smith, 180 Mass. 122; 61 N. E. 804; Phelps v. Abbott, 114 Mich. 88; 72 N. W. 3; Rooney v. Koenig, 80 Minn. 483; 83 N. W. 399; Daggett v. Johnson, 49 Vt. 345; Hunter v. Hathaway, 108 Wis. 620; 84 N. W. 996.

² Walker v. Mack, 129 Mich. 527; 89 N. W. 338.

³ Tripp v. Smith, 180 Mass. 122; 61 N. E. 804.

⁴ Keith v. Parker, 115 Fed. 397.

⁵ Phelps v. Abbott, 114 Mich. 88; 72 N. W. 3.

⁶ Riddell v. Ventilating Co., 27 Mont. 44; 69 Pac. 241.

⁷ Anderson v. Matheny, — S. D. —; 95 N. W. 911.

⁸ Younie v. Walrod, 104 Ia. 475; 73 N. W. 1021.

the property sold before accepting it, and before acquiring the title, was unenforceable.⁹ So under a written contract the effect of which is to make a separate complete sale of each installment as delivered, an oral contract providing for redelivery in the event of failure to pay for subsequent installments cannot be enforced.¹⁰ Where A made a contract with B, whereby A was to make application for, and if possible obtain, letters patent for "certain new and useful improvements in hat pouncing, or finishing machines," in certain countries, in consideration of five thousand five hundred dollars to be paid by B to A, B could not show an oral agreement that future improvements were included in addition to those already made by A, nor could he show that the money was to be paid by him only if the improvements made the machines able to pounce hats in the English method.¹¹

IV. APPLICATION OF FOREGOING PRINCIPLES.

§1223. Method of performance.

It is sometimes said in very general language that extrinsic evidence is always admissible to show contemporaneous oral agreements as to the method of performing a written contract as long as the evidence does not contradict the terms thereof. The application of this rule in its most general form would go a long way toward annulling the parol evidence rule. In certain cases, its operation is clear. The case in which it undoubtedly applies is where the written contract is incomplete on its face. Thus if a contract is on its face incomplete, extrinsic evidence is admissible to show the manner of payment,¹ or the character,² size,³ or quality,⁴ of material to be fur-

⁹ Van Winkle v. Crowell, 146 U. S. 42.

¹⁰ Hardwick v. McClurg. — Colo. App. —; 65 Pac. 405.

¹¹ Adams v. Turner, 73 Conn. 38; 46 Atl. 247.

¹ Block Queensware Co. v. Metzger, 70 Ark. 232; 65 S. W. 929. Even if the contract is within the statute of frauds. See v. Butler.

167 Mass. 426; 57 Am. St. Rep. 466; 46 N. E. 52.

² Whatley v. Reese, 128 Ala. 500; 29 So. 606.

³ Meader v. Allen, 110 Ia. 588; 81 N. W. 799.

⁴ Aultman v. Clifford, 55 Minn. 159; 43 Am. St. Rep. 478; 56 N. W. 593.

nished, or to show how and by whom logs sold are to be measured,⁵ or where railroad ties are to be inspected,⁶ or to show where a furnace whose erection is contracted for is to be placed.⁷ So where a furnace is sold under a guaranty that it will save a certain per cent of fuel, extrinsic evidence is admissible to show what kind of test is to be made.⁸ So if the written contract is incomplete, extrinsic evidence is admissible to show the time of performance,⁹ as the time of payment.¹⁰ If the contract shows that some credit is to be given, evidence is admissible to show for what length of time it was given,¹¹ as the time of paying an agent commissions,¹² or the length of time for which the contract is to run,¹³ as that it is a contract at will.¹⁴ So if no time is fixed in the contract for passing title, extrinsic evidence is admissible to show that title is to be retained until the property is paid for.¹⁵ If the contract is incomplete, evidence is admissible to show the place of payment.¹⁶ In some cases this principle has been applied to notes which did not provide for the place of payment, and extrinsic evidence has been admitted to show an oral agreement fixing the place of payment.¹⁷ In other cases it has been held that in the absence of a provision in the note fixing a place of payment, the law would draw inferences as to such place, which inferences could not be contradicted by extrinsic evidence.¹⁸ Another class of cases, elsewhere discussed, exists where a consistent collateral contract is entered into between the parties

⁵ Gould v. Excelsior Co., 91 Me. 214; 64 Am. St. Rep. 221; 39 Atl. 554.

⁶ Havana, etc., Ry. v. Walsh, 85 Ill. 58.

⁷ Kumberger v. Spring Co., 158 N. Y. 339; 53 N. E. 3.

⁸ Hawley, etc., Co. v. Hooper, 90 Md. 390; 45 Atl. 456.

⁹ Whatley v. Reese, 128 Ala. 500; 29 So. 606; Richter v. Stock Co., 129 Cal. 367; 62 Pac. 39.

¹⁰ Schaeppi v. Glade, 195 Ill. 62; 62 N. E. 874.

¹¹ Crowley v. Langdon, 127 Mich. 51; 86 N. W. 391.

¹² Walters v. King, 119 Cal. 172; 51 Pac. 35.

¹³ Bankers' Accident Ins. Co. v. Rogers, 73 Minn. 12; 75 N. W. 747.

¹⁴ Real Estate Title Co.'s Appeal, 125 Pa. St. 549; 11 Am. St. Rep. 920; 17 Atl. 450.

¹⁵ Myers v. Taylor, 107 Tenn. 364; 64 S. W. 719.

¹⁶ Ebert v. Arends, 190 Ill. 221; 60 N. E. 211.

¹⁷ Cox v. Bank, 100 U. S. 704; Blackerly v. Ins. Co., 83 Ky. 574.

¹⁸ Moore v. Davidson, 18 Ala. 209.

whereby they provide a means for the performance of their written contract. Thus where A gave B his note, an oral agreement whereby B was to collect certain rents belonging to A and apply them on such note was enforceable.¹⁹ So where a note under seal was given, the maker was allowed to show that it was not to be paid until another note given therewith had been collected.²⁰ Beyond these classes of cases the courts should not go. It must be admitted, however, that some authorities permit oral terms to be added to a complete written contract, and in some cases even allow the written terms to be contradicted under guise of showing the method of performance. Thus where A had given a note to B, it was held that A could show that A and B had sold to X land owned by A and B, that X had given therefor his note to A, and that the note in litigation, given by A to B and for one half the amount of X's note to A, was to be paid only out of X's note.²¹ This case, however, is, on this point, contrary to the weight of authority, as such evidence is generally held to contradict the written contract. Where A had bought land from B and had given his note therefor, it was held that A could show that the note was payable only after the land was surveyed and that a reduction in the price was to be made proportional to the deficiency in acreage below the estimated amount.²² This case may be sustained on the theory that a partial failure of consideration was shown. So an oral contract for the payment of a note by sawing lumber has been enforced.²³ So a written contract to deliver a quantity of peaches ranging from a maximum to a minimum quantity at vendor's option, to be grown in "sundry orchards" in certain specified county, may be shown by oral evidence to be a contract for the product of certain specific orchards and to be conditioned on the fact of producing a crop on such orchards.²⁴

¹⁹ *Stebbins v. Lardner*, 2 S. D. 127; 48 N. W. 847.

²⁰ *Quin v. Sexton*, 125 N. C. 447; 34 S. E. 542.

²¹ *Quin v. Sexton*, 125 N. C. 447; 34 S. E. 542.

²² *McGee v. Craven*, 106 N. C. 351; 11 S. E. 375.

²³ *Ramsay v. Capshaw*, 71 Ark. 408; 75 S. W. 479.

²⁴ *Ontario, etc., Association v. Cutting*, 134 Cal. 21; 86 Am. St. Rep. 231; 53 L. R. A. 681; 66 Pac. 28.

§1224. Agreement as to performance contradicting written contract.

An oral contemporaneous contract which changes the time of performance from that fixed by a complete written contract, cannot be enforced.¹ Thus an oral contract contemporaneous with the execution of a promissory note, providing for an extension thereof, is unenforceable.² So, if a note by its terms matures at a certain time, extrinsic evidence of a contemporaneous contract to renew until the maker's business is in such condition that he does not need the payee's financial assistance, is inadmissible.³ So a prior oral agreement not to foreclose a chattel mortgage at maturity is unenforceable.⁴ So a contemporaneous oral contract to renew a bill of exchange cannot be enforced.⁵ So where a contract does not fix the time for payment, and accordingly payment is to be made when the contract is performed, an oral contract for payment in advance is unenforceable.⁶ So where a certificate of deposit, payable in twelve months was given, extrinsic evidence is inadmissible to show that the holder had agreed to present the certificate for payment at the end of six months.⁷ So a continuing guarantee "until further notice" cannot be shown to be limited to a period of one year.⁸ So a written contract of guaranty for consignments made to another during one year, cannot be shown to be limited to the first shipment.⁹ So under a chattel mortgage an oral agreement that the mortgagor may retain possession of the property until a future time, is inadmissible where,

¹ Harloe v. Lambie, 132 Cal. 133; 64 Pac. 88; Allen v. Thompson, 108 Ky. 476; 56 S. W. 823; Tallmadge v. Hooper, 37 Or. 503, 61 Pac. 349; rehearing denied 37 Or. 514; 61 Pac. 1127; Edgar v. Golden, 36 Or. 448; 60 Pac. 2; 48 Pac. 1118.

² Thomas v. Plow Co., 56 Neb. 383; 76 N. W. 876; Homewood People's Bank v. Heckert, 207 Pa. St. 231; 56 Atl. 431.

³ Hall v. Bank, 173 Mass. 16; 73 Am. St. Rep. 255; 44 L. R. A. 319; 53 N. E. 154.

⁴ Moore v. Howe, 115 Ia. 62; 87 N. W. 750.

⁵ New London Credit Syndicate v. Neale (1898), 2 Q. B. 487.

⁶ Langley v. Rodriguez, 122 Cal. 580; 68 Am. St. Rep. 70; 55 Pac. 406; Kistler v. McBride (N. J. Eq.), 48 Atl. 558.

⁷ Citizens' Bank v. Jones, 121 Cal. 30; 53 Pac. 354.

⁸ Indiana Bicycle Co. v. Tuttle, 74 Conn. 489; 51 Atl. 538.

⁹ Braun v. Woollacott, 129 Cal. 107; 61 Pac. 801.

by the terms of the mortgage, the mortgagee is entitled to the immediate possession.¹⁰ If a written contract for sawing logs shows the method of delivery agreed upon, a contemporaneous oral contract for another method of delivery cannot be enforced.¹¹

§1225. Warranties.

A complete written contract cannot be added to by showing a prior or contemporaneous oral warranty.¹ Thus, where there was an express warranty that an engine is made of good material, an oral warranty that it had power to run a certain separator could not be enforced.² So where there is an express written warranty against breakage, evidence of an oral warranty against defective working is inadmissible.³ So where a written order is given for a fire-proof safe, evidence of a contemporaneous oral warranty is inadmissible, and the language of the order itself does not imply a warranty that the safe is fire proof.⁴ The parties cannot introduce evidence of facts from which a warranty could be implied, where the contract is in writing. Thus they cannot show that the sale was by sample,⁵ or that an apparatus was sold for a specific purpose.⁶ The rule forbidding the addition of oral warranties to complete

¹⁰ Robieson v. Royce, 63 Kan. 886; 66 Pac. 646. (No opinion in official report.)

¹¹ Mead v. Dunlevie, 174 N. Y. 108; 66 N. E. 658.

¹ Seitz v. Machine Co., 141 U. S. 510; Wilson v. Cattle-Ranch Co., 73 Fed. 994; 20 C. C. A. 244; McCormick Harvesting Machine Co. v. Yoeman, 26 Ind. App. 415; 59 N. E. 1069; Ehram v. Brown, 64 Kan. 466; 67 Pac. 867; Diebold, etc., Lock Co. v. Huston, 55 Kan. 104; 28 L. R. A. 53; 39 Pac. 1035; D. M. Osborne & Co. v. Wigent, 127 Mich. 624; 86 N. W. 1022; Hallwood Cash Register Co. v. Millard, 127 Mich. 316; 86 N. W. 833; Thompson v. Libby, 34 Minn. 374; 26 N. W. 1;

Milwaukee Boiler Co. v. Duncan, 87 Wis. 120; 41 Am. St. Rep. 33; 58 N. W. 232. *Contra*, Puget Sound, etc., Works v. Clemmons, 32 Wash. 36; 72 Pac. 465.

² Nichols v. Crandall, 77 Mich. 401; 6 L. R. A. 412; 43 N. W. 875.

³ Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473; 86 N. W. 954; rehearing denied 87 N. W. 886.

⁴ Diebold Safe and Lock Co. v. Huston, 55 Kan. 104; 28 L. R. A. 53; 39 Pac. 1035.

⁵ Wiener v. Whipple, 53 Wis. 298; 40 Am. Rep. 775; 10 N. W. 433.

⁶ McCray, etc., Co. v. Woods, 99 Mich. 269; 41 Am. St. Rep. 599; 58 N. W. 320.

written contracts, applies to other contracts beside those of sale. Thus in a contract for employing a life insurance agent, and paying him commissions on renewals, an oral guaranty as to the amount of renewals is unenforceable.⁷ So in an assignment of a mortgage, an oral guaranty that the mortgage was a valid lien on the property is unenforceable.⁸ So in a written contract for the sale of land, an oral warranty as to the location of an electric railway cannot be enforced.⁹ So where a written lease has been given, evidence of an oral warranty as to the condition of the property leased, cannot be enforced.¹⁰ So an oral warranty that a boiler and engine situated on leased property is in good condition, is unenforceable where a written lease has been given.¹¹ The admission of evidence of an express oral warranty, which is the same as that which would be implied without such evidence, is not, however, prejudicial error.¹²

§1226. Surety.

A surety who signs as a joint-maker may show his relation to the instrument in an action thereon between himself and the payee.¹ Showing such relationship does not contradict the instrument on which action is brought. However, as such relationship is usually important as between the surety and the payee when the surety has been released by the payee's giving an extension of time to the principal without the consent of the

⁷ *Montgomery v. Ins. Co.*, 97 Fed. 913; 38 C. C. A. 553.

⁸ *Nally v. Long*, 71 Md. 585; 17 Am. St. Rep. 547; 18 Atl. 811.

⁹ *Baker v. Flick*, 200 Pa. St. 13; 49 Atl. 349.

¹⁰ *Stevens v. Pierce*, 151 Mass. 207; 23 N. E. 1006; *McLean v. Nicol*, 43 Minn. 169; 45 N. W. 15; *York v. Steward*, 21 Mont. 515; 43 L. R. A. 125; 55 Pac. 29; *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380.

¹¹ *Naumberg v. Young*, 44 N. J. L. 331; 43 Am. Rep. 380; citing *Dutton v. Gerrish*, 9 Cush. (Mass.) 89.

¹² *Tufts v. Verkuyl*, 124 Mich. 242; 82 N. W. 891.

¹ *Compton v. Smith*, 120 Ala. 233; 25 So. 300; *Buck v. Bank*, 104 Ga. 660; 30 S. E. 872; *Daneri v. Gazzola*, 139 Cal. 416; 73 Pac. 179; *Cradock v. Lee* (Ky.), 61 S. W. 22; *Youtsey v. Kutz* (Ky.), 60 S. W. 857; *Weeks v. Parsons*, 176 Mass. 570; 58 N. E. 157; *Hitchcock v. Frackleton*, 116 Mich. 487; 74 N. W. 720; *Stovall v. Adair*, 9 Okla. 620; 60 Pac. 282; *Faulkner v. Thomas*, 48 W. Va., 148; 35 S. E. 915; *Breitengross v. Farr*, 100 Wis. 215; 75 N. W. 893.

surety,² or when the jurisdiction of the court is affected by the question of suretyship, the effect of such evidence is to change the legal rights of the parties, though not the legal effect of the contract. Thus where A the real surety signed as maker, B the real borrower appeared as payee, and B endorsed to C the real lender, these facts may be shown where by reason of citizenship in different states, the United States courts would not have jurisdiction otherwise.³ So the makers of a note may show that they are all sureties for a principal who never signed at all, and thus show that they are discharged because the payee has released other security.⁴ So a wife who gives a mortgage on her own realty to secure her husband's debt can show that she was surety for him.⁵ In an action between sureties for contribution even greater latitude is allowed, since the contract between the sureties is scarcely ever in writing, and the action is therefore not between the parties to the written contract. Thus where a note was signed by A, B, C and D, and the word "surety" was added to D's signature, C may show that he, too, was a surety, and, having paid the note, is entitled to contribution against C.⁶

§1227. Drawer.

The drawer of a bill of exchange is not protected by a contemporaneous oral agreement with the payee, exonerating him from liability if the drawee does not honor the draft.¹ But where the original draft was lost and the payee so delayed through his agent's negligence as to release the drawer, it was held that the drawer's giving a duplicate draft, to enable the

² Buck v. Bank, 104 Ga. 660; 30 S. E. 872.

³ Goldsmith v. Holmes, 36 Fed. 484; 13 Sawyer 526; 1 L. R. A. 816.

⁴ Hoffman v. Habighorst, 38 Or. 261; 53 L. R. A. 908; 63 Pac. 610.

⁵ Price v. Cooper, 123 Ala. 392; 26 So. 238. The Alabama Code § 2529 prohibiting a wife from becoming surety for her husband.

⁶ Bulkeley v. House, 62 Conn. 459; 21 L. R. A. 247; 26 Atl. 352.

¹ Leadbitter v. Farrow, 5 Maule & S. 345; Citizens' Bank v. Millett, 103 Ky. 1; 82 Am. St. Rep. 546; 44 L. R. A. 664; 44 S. W. 366; Pentz v. Stanton, 10 Wend. (N. Y.) 270; 25 Am. Dec. 558; Bryan v. Duff, 12 Wash. 233; 50 Am. St. Rep. 889; 40 Pac. 936.

payee to collect if possible from the drawee, did not revive his liability. Accordingly, an oral contract that the drawer should not be liable on such duplicate draft is enforceable.²

§1228. Indorsement.—Regular indorsement held to be complete contract.

Whether a contract of indorsement can be varied by contemporaneous parol agreement depends on whether it is looked upon as a complete contract. A regular indorsement, that is, an indorsement by one in the chain of title is held in many jurisdictions to be a complete contract, and hence within the parol evidence rule.¹ Where this view obtains a parol agreement that an indorsement was without recourse,² that indorsement was made only to pass title,³ that the indorser was merely a guarantor,⁴ or a witness,⁵ or that he indorsed for identification only,⁶ or that he only guaranteed a deficiency after applying

² *Bank v. Farnsworth*, 7 N. D. 6; 38 L. R. A. 843; 72 N. W. 901.

¹ *Martin v. Cole*, 104 U. S. 30; *United States Bank v. Dunn*, 6 Pet. (U. S.) 51; *Citizens' Bank v. Jones*, 121 Cal. 30; 53 Pac. 354; *Hately v. Pike*, 162 Ill. 241; 53 Am. St. Rep. 304; 44 N. E. 441; *Skelton v. Dustin*, 92 Ill. 49; *Shaw v. Jacobs*, 89 Ia. 713, 719; 48 Am. St. Rep. 411; 21 L. R. A. 440; 55 N. W. 333; 56 N. W. 684; *Porter v. Grain Co.*, 78 Minn. 210; 80 N. W. 965; *Farwell v. Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742; 48 N. W. 326; *Kern v. Von Phul*, 7 Minn. 426; 82 Am. Dec. 105; *Chaddock v. Vanness*, 35 N. J. L. 517; 10 Am. Rep. 256; *Fassin v. Hubbard*, 55 N. Y. 465; *River-view Land Co. v. Dance*, 98 Va. 239; 35 S. E. 720; *Citizens' National Bank v. Walton*, 96 Va. 435; 31 S. E. 890.

² *Martin v. Cole*, 104 U. S. 30; *United States Bank v. Dunn*, 6 Pet. (U. S.) 51; *Citizens' Bank v. Jones*,

121 Cal. 30; 53 Pac. 354; *Randle v. Coke Co.*, 15 App. D. C. 357; *Courtney v. Hogan*, 93 Ill. 101; *Clarke v. Patrick*, 60 Minn. 269; 62 N. W. 284; *Lewis v. Dunlap*, 72 Mo. 174; *Fassin v. Hubbard*, 55 N. Y. 465; *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383.

³ *Iowa Valley State Bank v. Sigstad*, 96 Ia. 491; 65 N. W. 407.

⁴ *Hately v. Pike*, 162 Ill. 241; 53 Am. St. Rep. 304; 44 N. E. 441; *Howe v. Merrill*, 5 Cush. (Mass.) 80; *Youngberg v. Nelson*, 51 Minn. 172; 38 Am. St. Rep. 497; 53 N. W. 629.

⁵ *Stack v. Beach*, 74 Ind. 571; 39 Am. Rep. 113; *Cochran v. Atchison*, 27 Kan. 728; *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217; 66 Am. Dec. 473; *Bowler v. Braun*, 63 Minn. 32; 56 Am. St. Rep. 449; 65 N. W. 124.

⁶ *Alabama National Bank v. Rivers*, 116 Ala. 1; 67 Am. St. Rep. 95; 22 So. 580.

certain securities,⁷ or that he entered into an oral contract of guaranty,⁸ or that he was a maker,⁹ is in each case unenforceable. Even in jurisdictions which hold that a regular indorsement is a complete contract, there is a conflict as to whether a contemporaneous oral waiver of demand and notice is enforceable.¹⁰ If waiver of demand and notice is stamped on the back of a note above the signatures of the indorsers, evidence of an oral agreement that demand and notice should not be waived is unenforceable.¹¹ Even in jurisdictions which hold that a blank indorsement is complete, a memorandum over the indorser's signature may show that some special contract was entered into and that this contract was not completely set forth. Thus a memorandum, "Sold one half this note to A," above the signature of the alleged indorser, may show that the contract was not one of indorsement, but a mere memorandum of A's interest.¹² If the note is non-negotiable the oral agreement under which the promisee who signs as a first indorser would, had the note been negotiable, and another person who signs as a second indorser would, may be enforced.¹³

§1229. Regular indorsement held to be incomplete.

In other jurisdictions a regular indorsement is treated as an incomplete contract, or as some courts express it, only evidence that some contract has been entered into. Where such view obtains extrinsic evidence is admissible to show the terms of

⁷ *Adams v. Wallace*, 119 Cal. 67; 51 Pac. 14.

⁸ *Johnson v. Glover*, 121 Ill. 283; 12 N. E. 257; overruling *Worden v. Salter*, 90 Ill. 160.

⁹ *Finley v. Green*, 85 Ill. 535; *Vore v. Hurst*, 13 Ind. 551; 74 Am. Dec. 268; *Porter v. Grain Co.*, 78 Minn. 210; 80 N. W. 965.

¹⁰ That it is. *Markland v. McDaniel*, 51 Kan. 350; 20 L. R. A. 96; 32 Pac. 1114; *Taunton Bank v. Richardson*, 5 Pick. (Mass.) 436; *Dye v. Scott*, 35 O. S. 194; 35 Am. Rep. 604; *Annville National*

Bank v. Kettering, 106 Pa. St. 531; 51 Am. Rep. 536. That it is not enforceable. *Goldman v. Davis*, 23 Cal. 256; *Farwell v. Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742; 48 N. W. 326; *Rodney v. Wilson*, 67 Mo. 125; 29 Am. Rep. 499.

¹¹ *Farmers' Exchange Bank v. Mining Co.*, 129 Cal. 263; 61 Pac. 1077.

¹² *Hathaway v. Rogers*, 112 Ia. 638; 84 N. W. 674.

¹³ *Young v. Sehon*, 53 W. Va. 127; 62 L. R. A. 499; 44 S. E. 136.

the contract.¹ Thus a parol contract that the indorsement was without recourse,² or that the indorser was a joint maker,³ is enforceable where this rule obtains. Even where a blank indorsement is held to be incomplete a memorandum over the signature may show a complete written contract. Extrinsic evidence of the terms of the contract is then inadmissible.⁴

§1230. Indorsement without recourse.

An indorsement without recourse has been held not to be a complete contract.¹ Hence, an oral contract relieving the indorser for liability even for forgery is enforceable.² In other jurisdictions an indorsement "without recourse" constitutes a complete contract, and an oral guaranty cannot be shown.³ Under either theory an oral agreement that an indorsement without recourse should have the legal effect of an unconditional indorsement contradicts the terms of the writing and is unenforceable.⁴

§1231. Irregular indorsers.

An irregular indorsement, that is an indorsement by one not in the chain of title, may be explained by parol in many juris-

¹ First National Bank v. Crabtree, 86 Ia. 731; 62 N. W. 559; Ragsdale v. Ragsdale, 105 La. 405; 29 So. 906; Roads v. Webb, 91 Me. 406; 64 Am. St. Rep. 246; 40 Atl. 128; Jaster v. Currie, — Neb. —; 94 N. W. 995; Corbett v. Fetzer, 47 Neb. 269; 66 N. W. 417; Holmes v. Bank, 38 Neb. 326; 41 Am. St. Rep. 733; 56 N. W. 1011; Coffin v. Smith, 128 N. C. 252; 38 S. E. 864; Taylor v. French, 2 Lea (Tenn.) 257; 31 Am. Rep. 609.

² Pritchett v. Hape (Ky.), 51 S. W. 608. (By statute.) Dickinson v. Burke, 8 N. D. 118; 77 N. W. 279; Cake v. Bank, 116 Pa. St. 264; 2 Am. St. Rep. 600; 9 Atl. 302.

³ Barger v. Farnham, 130 Mich. 487; 90 N. W. 281.

⁴ Harrison v. McKim, 18 Ia. 485; Leary v. Blanchard, 48 Me. 269; United States National Bank v. Geer, 55 Neb. 462; 70 Am. St. Rep. 390; 41 L. R. A. 441; 75 N. W. 1088; (reversing on rehearing, 53 Neb. 67; 41 L. R. A. 439; 73 N. W. 266).

¹ Carroll v. Nodine, 41 Or. 412; 93 Am. St. Rep. 743; 61 Pac. 51.

² Carroll v. Nodine, 41 Or. 412; 93 Am. St. Rep. 743; 69 Pac. 51.

³ Youngberg v. Nelson, 51 Minn. 172; 38 Am. St. Rep. 497; 53 N. W. 629.

⁴ Cross v. Hollister, 47 Kan. 652; 28 Pac. 693.

dictions.¹ Thus such indorser may be shown to be a joint-maker,² or the real debtor,³ or that a new note secured by mortgage was to have been given when the first note was half paid,⁴ or that successive blank indorsers were co-indorsers.⁵ In other jurisdictions the law regards the liability of an irregular indorser as so clear and certain that oral evidence of the real contract is inadmissible, though there is no harmony among the different jurisdictions as to what that liability is.⁶

§1232. Purpose of indorsement.

As in the case of other assignments of title, the purpose for which the indorsement is given may be shown as long as the legal effect of the indorsement is not contradicted.¹ Thus an

¹ *Carter v. Long*, 125 Ala. 280; 28 So. 74; *Kingsland v. Koepper*, 137 Ill. 344; 13 L. R. A. 649; 28 N. E. 48; *Fullerton v. Hill*, 48 Kan. 558; 18 L. R. A. 33; 29 Pac. 583; *Herndon v. Lewis*, 175 Mo. 116; 74 S. W. 976; *Elliott v. Moreland*, — N. J. L. —; 54 Atl. 224; *Ewan v. Brooks-Waterfield Co.*, 55 O. S. 596; 60 Am. St. Rep. 719; 35 L. R. A. 786; 45 N. E. 1094.

² *Commercial National Bank v. Atkinson*, 62 Kan. 775; 64 Pac. 617; *Richardson v. Foster*, 73 Miss. 12; 55 Am. St. Rep. 481; 18 So. 573; *Young v. Schon*, 53 W. Va. 127; 97 Am. St. Rep. 970; 44 S. E. 136.

³ *Witherow v. Slayback*, 158 N. Y. 649; 70 Am. St. Rep. 507; 53 N. E. 681. (So the directors of the indorsing corporation are liable by statute for not including such note in their report filed after the note was given but before it fell due.)

⁴ *Fullerton v. Hill*, 48 Kan. 558; 18 L. R. A. 33; 29 Pac. 583.

⁵ *Sloan v. Gibbes*, 56 S. C. 480; 76 Am. St. Rep. 559; 35 S. E. 408; [citing *Phillips v. Preston*, 5 How. (U. S.) 278; *Graves v. Johnson*, 48

Conn. 160; 40 Am. Rep. 162; *Holmes v. Bank*, 38 Neb. 326; 41 Am. St. Rep. 733; 56 N. W. 1011; *Taylor v. French*, 2 Lea (Tenn.) 257; 31 Am. Rep. 609]; *Brewer v. Woodward*, 54 Vt. 581; 41 Am. Rep. 857.

⁶ Indorser — by statute. *Spencer v. Allerton*, 60 Conn. 410; 13 L. R. A. 806; 13 L. R. A. 806; 22 Atl. 778; (cannot be shown to be guarantor). Second indorser. *Temple v. Baker*, 125 Pa. St. 634; 11 Am. St. Rep. 926; 3 L. R. A. 709; 17 Atl. 516. (Oral evidence inadmissible to show a guarantor and hence liable to payee). Comaker, if indorsement before delivery. *Dennis v. Jackson*, 57 Minn. 286; 47 Am. St. Rep. 603; 59 N. W. 198. (Cannot be shown to be indorser.)

¹ The last qualification of course applies in jurisdictions where an indorsement is held to be a complete contract, or else to indorsements in full which show the purpose for which they were given. *Lawrence v. Bank*, 6 Conn. 521. *Hazzard v. Duke*, 64 Ind. 220; *Barker v. Prentiss*, 6 Mass. 430.

indorsement in blank may be shown to be for collection only,² or as collateral security.³ However, a blank indorsement to a bank, credit for the amount of the instrument being given to the indorser, cannot be shown to be for collection only.⁴ If the indorsement shows the purpose of the instrument, however, extrinsic evidence is not admissible to contradict the purpose therein expressed. Thus an indorsement for collection cannot be shown by parol to have been intended as an absolute indorsement.⁵ So "Pay to the order of R. C. O., cashier, for account" of a given bank, shows an indorsement for collection only. Extrinsic evidence is inadmissible to show that the indorsement was an absolute transfer.⁶

§1233. Contract signed by agent.—Evidence to relieve agent from liability.

If a written contract with B, executed by A on behalf of X, is signed by A in such form as to bind him personally, the question of the right of the parties to the contract to show that A was the agent of X and that such contract was intended to bind X, depends on the nature of the contract and the purpose for which A's agency is to be shown. If B sues on the contract and A seeks to show that he was agent and X was principal in order to avoid liability, such evidence is inadmissible.¹ If A signs his own name, without any addition thereto suggesting agency, the only effect of evidence showing A's agency and thereby relieving A from liability would be to contradict the

² *McPherson v. Weston*, 85 Cal. 90; 24 Pac. 733; *Scammon v. Adams*, 11 Ill. 575; *Armstrong v. Bank*, 90 Ky. 431; 9 L. R. A. 553; 14 S. W. 411.

³ *Hazzard v. Duke*, 64 Ind. 220.

⁴ *Shaw v. Jacobs*, 89 Ia. 713, 719; 48 Am. St. Rep. 411; 21 L. R. A. 440; 55 N. W. 333; 56 N. W. 684.

⁵ *Syracuse Third National Bank v. Clark*, 23 Minn. 263; *United States National Bank v. Geer*, 55 Neb. 462; 70 Am. St. Rep. 390; 41 L. R. A.

444; 75 N. W. 1088; reversing on rehearing, 53 Neb. 67; 41 L. R. A. 439; 73 N. W. 266.

⁶ *United States National Bank v. Geer*, 55 Neb. 462; 70 Am. St. Rep. 390; 41 L. R. A. 444; 75 N. W. 1088; reversing on rehearing 53 Neb. 67; 41 L. R. A. 439; 73 N. W. 266.

¹ *American Alkali Co. v. Bean*, 125 Fed. 823; *Vail v. Ins. Co.*, 192 Ill. 567; 61 N. E. 651; *Hancock v. Fairfield*, 30 Me. 299.

terms of the contract. This rule applies alike to negotiable contracts such as notes² and drafts, so that the agency of an indorser who signs his individual name cannot be shown to relieve him,³ and to non-negotiable contracts,⁴ such as a contract of sale,⁵ a contract of warranty,⁶ or a contract on behalf of corporation to be formed, signed so as to bind the promoters individually.⁷

§1234. Addition of word "agent" held not to make contract ambiguous.

If a contract is signed by A, with the addition to his signature of the word "agent" or some other word importing agency, but the language of the contract is such as to bind A personally, A is held personally liable in many jurisdictions, and the contract is not looked upon as ambiguous. Where this view prevails, A cannot introduce extrinsic evidence that he was acting solely on behalf of his principal to relieve himself from liability.¹ This rule applies to negotiable contracts. Thus where a note was signed "Mattress Co., John Knapp. Pt.," and begins "we promise,"² or where a note begins "we promise," and is signed, "Canning Co., H. Wessel Sec'y., Hartman Pres.,"³ or begins "I promise," and is signed "A, agent,"⁴ or begins "we jointly and severally promise to pay to X in official capacity," and is signed by the individual names of the makers with the

² Sparks v. Despatch Co., 104 Mo. 531; 24 Am. St. Rep. 351; 12 L. R. A. 714; 15 S. W. 417; Shuey v. Adair, 18 Wash. 188; 63 Am. St. Rep. 879; 39 L. R. A. 473; 51 Pac. 388.

³ Condon v. Pearce, 43 Md. 83.

⁴ Chandler v. Coe, 54 N. H. 561.

⁵ Bulwinkle v. Cramer, 27 S. C. 376; 13 Am. St. Rep. 645; 3 S. E. 776.

⁶ Cream City Glass Co. v. Friedlander, 84 Wis. 53; 36 Am. St. Rep. 895; 21 L. R. A. 135, 54 N. W. 28.

⁷ De Remer v. Brown, 165 N. Y. 410; 59 N. E. 129.

¹ Moragne v. Machine Works, 124 Ala. 537; 27 So. 240; Lawrence County Bank v. Arndt, 69 Ark. 406; 65 S. W. 1052.

² Matthews v. Mattress Co., 87 Ia. 246; 19 L. R. A. 676; 54 N. W. 225.

³ McCandless v. Canning Co., 78 Ia. 161; 16 Am. St. Rep. 429; 4 L. R. A. 396; 42 N. W. 635. For a similar note signed by the name of the company, A. "Mnger.," B, "Pres." See Albany Furniture Co. v. Bank, 17 Ind. App. 531; 60 Am. St. Rep. 178; 47 N. E. 227.

⁴ Collins v. Ins. Co., 17 O. S. 215; 93 Am. Dec. 612.

addition "Whitfield Road Committee,"⁵ or is signed "O. O. Prescott, Pres.," of a given corporation,⁶ or is signed by several who add "Board of Business Managers"⁷ or "as stockholders,"⁸ or where a draft is drawn by "A, Treas.,"⁹ or by "A, agent for B,"¹⁰ or is indorsed "A, agent,"¹¹ or where a draft is accepted "H. P. Eells, Treasurer,"¹² or by "A, agent K. & O. C. Co.,"¹³ extrinsic evidence is inadmissible to relieve the party so signing from personal liability.

§1235. Addition of word "agent" held to make contract ambiguous.

In other jurisdictions the addition of "agent" or some similar word to the signature is held to make it ambiguous whether personal liability is intended or not, and to make extrinsic evidence of the intention of the parties admissible.¹ Thus the addition "Sec'y Enid Town Co.,"² "Pt.,"³ "agt.,"⁴ or "executor,"⁵ have been held to make extrinsic evidence admissible. So where a note is signed "U. M. Benham, President Odd Fellows' Hall Association; A. T. Lea, Secretary," it is held proper to admit evidence to show that the note is the note of the association.⁶ So where a note given by a corporation was signed on the bank by the individual names of the directors

⁵ *Savage v. Rix*, 9 N. H. 263.

⁶ *Prescott v. Hixon*, 22 Ind. App. 139; 72 Am. St. Rep. 291; 53 N. E. 391.

⁷ *Richmond, etc., Works v. Moragne*, 119 Ala. 80; 24 So. 834.

⁸ *Savings Bank v. Market Co.*, 122 Cal. 28; 54 Pac. 273.

⁹ *Bank v. Cook*, 38 O. S. 442.

¹⁰ *Tannatt v. Bank*, 1 Colo. 278; 9 Am. Rep. 156; *Sturdivant v. Hull*, 59 Me. 172; 8 Am. Rep. 409.

¹¹ *Barnhisel v. Bank*, 14 Ohio C. C. 124. *Contra*, *Babcock v. Beman*, 11 N. Y. 200.

¹² *Eells v. Shea*, 20 Ohio C. C. 527; 11 Ohio C. D. 304.

¹³ *Robinson v. Bank*, 44 O. S. 441; 58 Am. Rep. 829; 8 N. E. 583.

¹ *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925; 13 S. W. 691; *Heffron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764; 11 S. W. 165.

² *Janes v. Bank*, 9 Okla. 546; 60 Pac. 290; expressly overruling *Keokuk, etc., Co. v. Mfg. Co.*, 5 Okla. 32; 47 Pac. 484.

³ *Small v. Elliott*, 12 S. D. 570; 76 Am. St. Rep. 630; 82 N. W. 92.

⁴ *Keidan v. Winegar*, 95 Mich. 430; 20 L. R. A. 705; 54 N. W. 901.

⁵ *Schmittler v. Simon*, 114 N. Y. 176; 11 Am. St. Rep. 621; 21 N. E. 162.

⁶ *Benham v. Smith*, 53 Kan. 495; 36 Pac. 997.

with the addition "Board of Directors," extrinsic evidence is admissible.⁷ A signature "H. H. Gardner, Cashier," has been held to import a personal liability, but open to so much doubt that extrinsic evidence was admissible.⁸ In some jurisdictions an instrument in which the official character of the promisor is set forth in the instrument, and individual signature is affixed is so far ambiguous as to make extrinsic evidence admissible to relieve the party so signing from personal liability.⁹ Thus where the instrument began "We, the president and directors" of a designated company, and was signed individually, extrinsic evidence was admitted to show that no personal liability was intended, but only the liability of the corporation of which such persons were officials.¹⁰ The heading or contents of the instrument may help to make the question of personal liability ambiguous. Thus a note headed "Midland Steel Co." and signed "R. J. Beatty, Pres.," is so ambiguous that extrinsic evidence is admissible.¹¹ But in Indiana, while a note signed by the name of the corporation followed by the name of one officer imports signature as agent only, a signature of the corporate name followed by the names of two officials, imports personal liability so clearly that extrinsic evidence is inadmissible, even if "Mngr." and "Pres." are added to the names.¹² A contract consisting of writings on two pieces of paper, each headed, "Neubauer Decorating Company," one signed "D. E. L., Mfg. Agt. & Supt. of Contracts," and the other "Neubauer Decorating Company, D. E. L. Supt. of Contracts," may be explained by extrinsic evidence to show that no personal liability was intended.¹³

⁷ Kline v. Bank, 50 Kan. 91; 34 Am. St. Rep. 107; 18 L. R. A. 533; 31 Pac. 688.

⁸ Gardner v. Cooper, 9 Kan. App. 587; 60 Pac. 540; affirming on rehearing, 58 Pac. 230; (citing Benham v. Smith, 53 Kan. 495; 36 Pac. 997; Kline v. Bank, 50 Kan. 91; 18 L. R. A. 533; 31 Pac. 688; Bank v. Boardman, 46 Minn. 293; 48 N. W. 1116; Rowell v. Alsen, 32 Minn. 288; 20 N. W. 227).

⁹ Armstrong v. Andrews, 109 Mich. 537; 67 N. W. 567.

¹⁰ Haile v. Peirce, 32 Md. 327; 3 Am. Rep. 139.

¹¹ Second National Bank v. Steel Co., 155 Ind. 581; 52 L. R. A. 307; 58 N. E. 833.

¹² Albany Furniture Co. v. Bank, 17 Ind. App. 531; 60 Am. St. Rep. 178; 47 N. E. 227.

But extrinsic evidence was admitted under a similar form of signature in Holt v. Sweetzer, 23 Ind. App. 237; 55 N. E. 254.

¹³ Keeley Brewing Co. v. Decorating Co., 194 Ill. 580; 62 N. E. 923.

§1236. Extrinsic evidence to enable principal to sue.

If the real principal X wishes to sue upon the contract, the parol evidence rule does not prevent him from showing that A was his agent and that X is the real party adversary to B.¹ The fact that the contract is one of those required by law to be proved in writing does not prevent the principal from showing that he is the real party in interest, and enforcing the contract in his own right.² A different principle applies if the contract is one of those which by law must be in writing.³ Questions involving the right of the adversary party to go outside the writing and hold the real principal thereon have been discussed elsewhere.⁴ The name of an individual signed to a contract may be shown to be the name of a partnership,⁵ but a contract signed by the names of two individuals cannot be shown to be the contract of a partnership composed of those individuals and others.⁶

¹ New Jersey, etc., Co. v. Bank,

² See § 695.

6 How. (U. S.) 344; Conklin v. Leeds, 58 Ill. 178; Harrington v. Foley, 108 Ia. 287; 79 N. W. 64; Tauton, etc., Turnpike v. Whiting, 10 Mass. 328; Elkins v. Ry., 19 N. H. 337; 51 Am. Dec. 184; Beebe v. Robert, 12 Wend. (N. Y.) 413; 27 Am. Dec. 132; Elkinton v. Newman, 20 Pa. St. 281; Belt v. Water Power Co., 24 Wash. 387; 64 Pac. 525; Coulter v. Blatchley, 51 W. Va. 163; 41 S. E. 133.

³ See § 761.

⁴ As to contracts which are in writing, see §§ 606, 607. As to contracts which must be proved in writing, see § 695. As to contracts which must be in writing, see § 761.

⁵ Butterfield v. Hemsley, 12 Gray (Mass.) 226.

⁶ New England Dredging Co. v. Granite Co., 149 Mass. 381; 21 N. E. 947.

CHAPTER LVII.

REFORMATION.

§1237. Relation of reformation to the parol evidence rule.

From the preceding discussion of the parol evidence rule,¹ it appears that at law, and in most cases in equity, the real agreement between the parties, if differing in terms from the written contract, can never be enforced. Extrinsic evidence may overthrow the contract as a whole,² or it may be used to show some form of subsequent discharge,³ but no method has thus far been considered by which the real agreement which is often back of the written contract can be enforced. Accordingly, a discussion of some of the general principles of Reformation is necessary, since by means of this form of relief, equity can in proper cases and under proper limitations, unhampered by the parol evidence rule, enforce the oral contract which the parties, through mistake in the expression, have not reduced to writing correctly.⁴

§1238. Mutuality of mistake in reformation.

Reformation is given either (a) when the mistake is mutual or (b) when there is mistake on the one side and fraud or unfair dealing on the other. By mutual mistake is meant that the parties must have come to an actual oral agreement before they have attempted to reduce it to writing, which attempt fails

¹ See Ch. LVI.

² See §§ 1207-1213.

³ See § 1214.

⁴ *Newton v. Wooley*, 105 Fed. 541; *Brown v. Meserve*, 91 Fed. 229; 33 C. C. A. 472; *Kentucky, etc., Association v. Lawrence*, 106

Ky. 88; 49 S. W. 1059; *Lindley v. Sharp*, 7 T. B. Mon. (Ky.) 248; *Conner v. Groh*, 90 Md. 674; 45 Atl. 1024; *Sidney School-Furniture Co. v. School District*, 130 Pa. St. 76; 18 Atl. 604.

by reason of mistake, and reformation enforces the original contract. The rule that mistake in expression must be mutual means therefore that to obtain reformation the parties must show that there was a valid contract between them, which contract is not correctly set forth in the writing to be reformed.¹ In granting reformation, therefore, equity is not making a new contract for the parties, but is establishing and perpetuating the real contract between the parties which, under the technical rules of law, could not be enforced but for such reformation.² On the other hand, reformation is often sought where A intends to have a certain stipulation in the contract, but this intent has not been communicated to B, or B has not assented thereto. In such case, whether or not A can have rescission,³ he cannot have the contract reformed so as to express his own uncommunicated intention, or to express his proposition to which B has not assented, even if A thought that such term was incorporated in the written contract.⁴ Thus where the grantee assumes a

¹ Henkle v. Assurance Co., 1 Ves. Sr. 317; Townshend v. Stangroom, 6 Ves. Jr. 328; Shelburne v. Inchi-quin, 1 Bro. Ch. 338; Stone v. Godfrey, 5 DeG. M. & G. 76; Haddon v. Neighbarger, 9 Kan. App. 529; 58 Pac. 568; Wheel Co. v. Miller (Ky.), 50 S. W. 62; Conner v. Groh, 90 Md. 674; 45 Atl. 1024; Ludington v. Ford, 33 Mich. 123; Benn v. Pritchett, 163 Mo. 560; 63 S. W. 1103; Scheer v. Scheer, 148 Mo. 447; 50 S. W. 111; affirming 67 Mo. App. 371; Nebraska, etc., Co. v. Ignowski, 54 Neb. 398; 74 N. W. 852; Wilson v. Wilson, 23 Nev. 267; 45 Pac. 1009; Green v. Stone, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing 32 Atl. 706; Ray v. Durham County, 110 N. C. 169; 14 S. E. 646; Diman v. R. R. Co., 5 R. I. 130; Deseret National Bank v. Dinwoodey, 17 Utah 43; 53 Pac. 215; Robinson v. Braidon, 44 W. Va. 183; 28 S. E. 798.

² Roszell v. Roszell, 109 Ind. 354; 10 N. E. 114; Welshbillig v. Dienhart, 65 Ind. 94.

³ See § 71 *et seq.*

⁴ Hearne v. Ins. Co., 20 Wall (U. S.) 488; Tyson v. Chestnut, 100 Ala. 571; 13 So. 763; McGuigan v. Gaines, 71 Ark. 614; 77 S. W. 52; Ward v. Yorba, 123 Cal. 447; 56 Pac. 58; Loftus v. Fischer, 106 Cal. 616; 39 Pac. 1064; Crane v. McCormick, 92 Cal. 176; 28 Pac. 222; Bowman v. Besley, 122 Ia. 42; 97 N. W. 60; Williams v. Hamilton, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; Bigelow v. Wilson, 99 Ia. 456; 68 N. W. 798; Simpson v. Kane, 98 Ia. 271; 67 N. W. 247; Breja v. Pryne, 94 Ia. 755; 64 N. W. 669; Buckley v. Frankfort (Ky.), 44 S. W. 139; J. G. Mattingly Co. v. Mattingly, 96 Ky. 430; 27 S. W. 985; rehearing denied 31 S. W. 279; Byrne v. Gunning, 75 Md. 30; 23 Atl. 1; Whitworth v. Lowell, 178 Mass. 43; 59

specific mortgage, and a second mortgage exists of which the grantor was in ignorance when he executed the conveyance, the deed will not be reformed so as to require the grantee to assume such second mortgage.⁵ Thus where A intended that a clause should be inserted in a contract allowing him to draw certain additional funds,⁶ or providing for a mortgage on land sold,⁷ or that a certain clause in the printed form of the contract should be stricken out,⁸ or where A meant to have an assignment made to B and himself jointly and by inadvertence had it made to B alone,⁹ or where A thinks that the price fixed in the contract is for a part of the buildings contracted for, when in fact it is for all the buildings,¹⁰ or thinks that certain goods are to be invoiced at the actual wholesale cost, when the contract provides for invoice "at wholesale cost as shown by cost marks on the goods,"¹¹ or that the area of a lot, which he offers for sale, is less than it really is, so that he offers it for sale for less than it is worth,¹² or that land conveyed by a mortgage does not include certain lots actually covered by it,¹³ or that the amount of goods covered by his order is different from that

N. E. 760; *Chute v. Quincy*, 156 Mass. 189; 30 N. E. 550; *Page v. Higgins*, 150 Mass. 27; 5 L. R. A. 152; 22 N. E. 63; *Ocean Beach Association v. Trust Co. (N. J. Eq.)*, 48 Atl. 559; *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing 32 Atl. 706; *Miller v. Ins. Co.*, 42 N. J. Eq. 459; 7 Atl. 895; *Atkinson v. Farrington Co. (N. J. Eq.)*, 28 Atl. 315; *Harbeck v. Pupin*, 145 N. Y. 70; 39 N. E. 722; *Syns v. New York*, 105 N. Y. 153; 11 N. E. 369; *Mitchell v. Holman*, 30 Or. 280; 47 Pac. 616; (citing *Kleinsorge v. Rohse*, 25 Or. 51; 34 Pac. 874; *Epstein v. Ins. Co.*, 21 Or. 179; 27 Pac. 1045; *Stephens v. Murton*, 6 Or. 193; *Lewis v. Lewis*, 5 Or. 169); *Phillips v. Port Townsend Lodge*, 8 Wash. 529; 36 Pac. 476;

Kropp v. Kropp, 97 Wis. 137; 72 N. W. 381; *Coates v. Buck*, 93 Wis. 128; 67 N. W. 23.

⁵ *Moore v. Graves*, 97 Ia. 4; 65 N. W. 1008.

⁶ *Mitchell v. Holman*, 30 Or. 280; 47 Pac. 616.

⁷ *Breja v. Pryne*, 94 Ia. 755; 64 N. W. 669.

⁸ *Crane v. McCormick*, 92 Cal. 176; 28 Pac. 222.

⁹ *Kropp v. Kropp*, 97 Wis. 137; 72 N. W. 381.

¹⁰ *Whitworth v. Lowell*, 178 Mass. 43; 59 N. E. 760.

¹¹ *Simpson v. Kane*, 98 Ia. 271; 67 N. W. 247.

¹² *Chute v. Quincy*, 156 Mass. 189; 30 N. E. 550.

¹³ *Ocean Beach Association v. Safe Deposit Co. (N. J. Eq.)*, 48 Atl. 559.

expressed therein,¹⁴ or that a deed to him does not contain a clause whereby he assumes a mortgage, the grantor not knowing of such mistake,¹⁵ or where A thinks that he is buying from B a larger tract than B thinks he is selling,¹⁶ he cannot have the contract reformed to express his intention if B did not acquiesce therein. So a term to which B did not assent and which was inadvertently omitted from the written contract cannot be inserted by reformation though A had offered such term and it was accepted by B's attorney, since the attorney had no authority to do anything but advise B, and he did not in fact, communicate such offer to B.¹⁷ So if there is a mistake as to the identity of the realty conveyed,¹⁸ or leased,¹⁹ rescission may be had in a proper case but not reformation. Reformation is even more clearly denied where one party believes that he will receive more than the contract provides for and the adversary party does not know of such mistake. Thus A agreed to convey to B, four acres along a section line. B assumed that this excluded the area of a highway along such line, though there was nothing in the contract or negotiations to warrant such belief. Reformation was denied.²⁰ Even if each party had intended that certain realty should be included in a given conveyance,

¹⁴ *Coates v. Buck*, 93 Wis. 128; 67 N. W. 23.

¹⁵ *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing 32 Atl. 706; distinguishing *Bull v. Titsworth*, 29 N. J. Eq. 73, on the ground that in the earlier case the grantee had demanded rescission promptly.

¹⁶ *Page v. Higgins*, 150 Mass. 27; 5 L. R. A. 152; 22 N. E. 63. The court said that this was "not one and the same mistake . . . but two different mistakes." In this case A and B owned tracts near each other but not adjoining, and A thought that B owned an intermediate tract, while B thought C owned it. Hence in their negotiations both referred to B tract as beginning at A's boundary. A drew

the deed and inserted the description and B, being illiterate thought that the land conveyed was what he had agreed to sell, namely "what he owned" east of a given wall.

¹⁷ *Ward v. Yorba*, 123 Cal. 447; 56 Pac. 58.

¹⁸ *Page v. Higgins*, 150 Mass. 27; 5 L. R. A. 152; 22 N. E. 63; *Stewart v. Gordon*, 60 O. S. 170; 53 N. E. 797.

¹⁹ *Morris v. Kettle*, 56 N. J. Eq. 826; 34 Atl. 376.

²⁰ *Clark v. Mossman*, 58 Neb. 87; 78 N. W. 399; (citing *Huyck v. Andrews*, 113 N. Y. 81; 10 Am. St. Rep. 432; 3 L. R. A. 789; 20 N. E. 581; *Wilson v. Cochran*, 46 Pa. 229; *Scribner v. Holmes*, 16 Ind. 142; *Kutz v. McCune*, 22 Wis. 628; 99 Am. Dec. 85).

reformation will not be given if such intention was not communicated by each to the other.²¹ Still less can the erroneous understanding of the parties after the execution of a contract, as to the legal effect thereof, give the right to reformation.²²

§1239. Mistake on one side — inequitable conduct on the other.

Where A is entering into a contract under mistake and the circumstances are such that if B, too, were mistaken, reformation would be given on A's application, a still clearer case for reformation exists where B knew of A's mistake and took advantage of it, or by his own conduct or representations led him into such mistake.¹ The difference between this class of cases and the general types of cases where reformation is allowed is that there is no valid oral prior agreement to which the written contract is to be reformed to conform. By a principle analogous to estoppel, however, the party who led the other into mistake or took advantage of the mistake, is not allowed to deny that the contract which he induced the adversary party to think he was making is not in force as it would have been had the mistake not been made. It is in cases of this sort that equity comes the nearest to making a new contract for the

²¹ *Citizens' National Bank v. Judy*, 146 Ind. 322; 43 N. E. 259.

²² *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13; 52 Pac. 561.

¹ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Home Ins. Co. v. Chemical Co.*, 109 Fed. 681; *Bowers v. Ins. Co.*, 68 Fed. 785; *Higgins v. Parsons*, 65 Cal. 280; 3 Pac. 881; *Deischer v. Price*, 148 Ill. 383; 36 N. E. 105; *Roszell v. Roszell*, 109 Ind. 354; *Sutton v. Risser*, 104 Ia. 631; 74 N. W. 23; *Williams v. Hamilton*, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; *Winans v. Huyck*, 71 Ia. 459; 32 N. W. 422; *Goodenow v. Curtis*, 18 Mich. 298; *Stanek v. Libera*, 73 Minn. 171; 75 N. W. 1124; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St.

Rep. 612; 59 N. W. 294; *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Sanford v. Gates*, 21 Mont. 277; 53 Pac. 749; *Husted v. Van Ness*, 158 N. Y. 104; 52 N. E. 645; *Welles v. Yates*, 44 N. Y. 525; *Jones v. Warren*, 134 N. C. 390; 46 S. E. 740; *Day v. Day*, 84 N. C. 408; *Archer v. Lumber Co.*, 24 Or. 341; 33 Pac. 526; *McCormick, etc., Co. v. Woulph*, 11 S. D. 252; 76 N. W. 939; *McCormick v. Ratcliffe* (Tenn. Ch. App.), 64 S. W. 332; *Graham v. Guinn* (Tenn. Ch. App.), 43 S. W. 749; *Kyle v. Fehley*, 81 Wis. 67; 29 Am. St. Rep. 866; 51 N. W. 257; *James v. Cutler*, 54 Wis. 172; 10 N. W. 147; *Dane v. Derber*, 28 Wis. 216.

parties. Thus where B misleads A as to the description of the specific property contracted for,² or as to the amount to be paid,³ or where A is a member of a firm which has made an oral contract with B, and on reducing it to writing B inserts a term and falsely represents to A that his co-partner has assented thereto,⁴ A may have the mistake corrected and the contract, as reformed, enforced with the mistake eliminated, though B did not intend to be bound thereby. Reformation may be given for a mistake caused by an innocent misrepresentation by the adversary party.⁵ Reformation may also be given where A understands that he is contracting for a given subject-matter and the adversary party B knows that A will not receive such property by the terms of the contract as executed.⁶ So where the grantee knows that the grantor believes that a coal vein under the realty conveyed is excepted from the operation of such conveyance, when in fact it is not and grantee knows that it is not, reformation will be granted.⁷

If from the entire contract it can be seen that a certain clause does not express the real intention of the parties, reformation can be had without showing specifically that the parties had a mutual understanding of what the term in question should really be. Thus where A took thirteen shares in a building and loan association, the by-laws of which, being a part of the contract, required a payment of one dollar per share per month, a clause in the note requiring a payment of twenty-six dollars per month on such shares may be corrected.⁸ This is really a question of construction, not reformation, and involves the principle that the paramount general intent prevails over an inconsistent subordinate particular intent.⁹

² McCormick, etc., Co. v. Woulph, 11 S. D. 252; 76 N. W. 939; McCormick v. Ratcliffe (Tenn. Ch. App.), 64 S. W. 332.

³ Sanford v. Gates, 21 Mont. 277; 53 Pac. 749; Graham v. Guinn (Tenn. Ch. App.), 43 S. W. 749.

⁴ Sutton v. Risser, 104 Ia. 631; 74 N. W. 23.

⁵ Bush v. Merriman, 87 Mich. 260; 49 N. W. 567.

⁶ Stevens v. Holman, 112 Cal. 345; 53 Am. St. Rep. 216; 44 Pac. 670.

⁷ Cook v. Liston, 192 Pa. St. 19; 43 Atl. 389.

⁸ Abbott v. Loan Association, 86 Tex. 467; 25 S. W. 620; reversing 23 S. W. 629.

⁹ See § 1113.

§1240. Mistake in expression.—Mistake as to words used.

The typical form of mistake in expression is found where the parties have agreed orally upon the terms of a contract, have then attempted to express these terms in writing and have, through inadvertence, omitted or misstated terms, or inserted some stipulation which was not agreed upon. Mistake of this sort does not affect the validity of the contract. The question presented to the courts is whether upon these facts the original contract can be enforced or whether the parties are bound by the written stipulations. This question is answered at law by the rule that oral evidence of prior or contemporaneous negotiations cannot contradict the terms of a written contract. This is really a rule of substantive law, though stated as a rule of evidence.¹ Hence there can be no reformation at law.² In equity, subject to proper limitations to be discussed hereafter,³ a contract of the type under discussion may be reformed so as to express the actual agreement of the parties.⁴

¹ See § 1189 *et seq.*

² *American, etc., Ins. Co. v. Simpson*, 43 Ill. App. 98; *Nance v. Metcalf*, 19 Mo. App. 183; *Winnipeg Paper Co. v. Eaton*, 64 N. H. 234; 9 Atl. 221.

³ See § 1241 *et seq.*

⁴ *Adams v. Henderson*, 168 U. S. 573; *Equitable Ins. Co. v. Hearne*, 20 Wall. (U. S.) 494; *Hearne v. Ins. Co.*, 20 Wall. (U. S.) 488; *Bradford v. Bank*, 13 How. (U. S.) 57; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63; 30 C. C. A. 532; *Western Assurance Co. v. Ward*, 75 Fed. 338; *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *West v. Suda*, 69 Conn. 60; 36 Atl. 1015; *Newell v. Smith*, 53 Conn. 72; 3 Atl. 674; *Franklin v. Jones*, 22 Fla. 526; *Jackson v. Magbee*, 21 Fla. 622; *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526; 14 N. E. 684; *Lindsay v. Davenport*, 18 Ill. 375; *Roszell v. Roszell*, 109 Ind.

354; 10 N. E. 114; *Zenor v. Johnson*, 107 Ind. 69; 7 N. E. 751; *Green v. Mfg. Co. (Ia.)*, 82 N. W. 483; *Huston v. Fumas*, 31 Ia. 154; *Stiles v. Willis*, 66 Md. 552; 8 Atl. 353; *Page v. Higgins*, 150 Mass. 27; 5 L. R. A. 152; 22 N. E. 63; *Griffith v. Townley*, 69 Mo. 13; 33 Am. Rep. 476; *Beall v. Martin*, 48 Neb. 479; 67 N. W. 433; *Searles v. Churchill*, 69 N. H. 530; 43 Atl. 184; *Minot v. Tilton*, 64 N. H. 371; 10 Atl. 682; *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; 34 Atl. 1099; *Whittemore v. Farrington*, 76 N. Y. 452; *Moran v. McLarty*, 75 N. Y. 25; *Jackson v. Andrews*, 59 N. Y. 244; *Bryce v. Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249; *Welles v. Yates*, 44 N. Y. 525; *Nevins v. Dunlap*, 33 N. Y. 676; *Rider v. Powell*, 28 N. Y. 310; *Curtis v. Leavitt*, 15 N. Y. 1; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; 7 Am. Dec. 559; *Botsford*

§1241. Mistake as to legal effect of words used.

A form of mistake, which involves different principles from the form already discussed, exists where the parties to a written contract know the very words which they insert in the contract, but do not intend that it shall have the legal effect which it actually has. This form of mistake is of course due to ignorance or mistake of law. The question of the right of either party to reformation in such cases depends in the first instance on whether the parties had a prior valid oral contract which they have attempted to reduce to writing, differing from the written contract. If there has been no prior valid oral contract, differing from the written contract, one party cannot have reformation to make the contract express **his intention**, since this would be to substitute his intention for the contract between the two parties.¹ Illustrations of mistake of this sort where reformation has been refused are as follows: Where the parties execute an irrevocable power of attorney, thinking it

v. McLean, 45 Barb. (N. Y.) 478; Kent v. Manchester, 29 Barb. (N. Y.) 595; Hall v. Reed, 2 Barb. Ch. (N. Y.) 500; McHugh v. Ins. Co., 48 How. Pr. (N. Y.) 230; Lyman v. Ins. Co., 17 Johns. (N. Y.) 373; Jones v. Warren, 134 N. C. 390; 46 S. E. 740; Neining v. State, 50 O. S. 394; 40 Am. St. Rep. 674; 34 N. E. 633; Evans v. Strode, 11 Ohio 480; 38 Am. Dec. 744; Warner v. Lundis, 137 Pa. St. 61; 20 Atl. 950; Graham v. Guinn (Tenn. Ch. App.), 43 S. W. 749; Kelley v. Ward, 94 Tex. 289; 60 S. W. 311; affirming 58 S. W. 207; Griffin v. Salt Lake City, 18 Utah 132; 55 Pac. 383; Pennybacker v. Laidley, 33 W. Va. 624; 11 S. E. 39.

¹ Snell v. Ins. Co., 98 U. S. 85; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174; Hunt v. Rousmanier, 1 Pet. (U. S.) 1; Bank v. Daniel, 12 Pet. (U. S.) 33; Travelers' Ins. Co. v. Henderson, 69 Fed. 762; 16

C. C. A. 390; Illingworth v. Spaulding, 43 Fed. 827; Tyson v. Chestnut, 100 Ala. 571; 13 So. 763; Ohlander v. Dexter, 97 Ala. 476; 12 So. 51; Hershey v. Luce, 56 Ark. 320, 323; 19 S. W. 963; 20 S. W. 6; Loftus v. Fischer, 106 Cal. 616; 39 Pac. 1064; Goodenow v. Ewer, 16 Cal. 461; 76 Am. Dec. 540; Hackemack v. Wiebrock, 172 Ill. 98; 49 N. E. 984; affirming 71 Ill. App. 170; Wolsey v. Neeley, 46 Ill. App. 387; Calverly v. Harper, 40 Ill. App. 96; Marshall v. Westrope, 98 Ia. 324; 67 N. W. 257; Jurgensen v. Carlsen, 97 Ia. 627; 66 N. W. 877; Brintnall v. Briggs, 87 Ia. 538; 54 N. W. 531; Bellande's Succession, 42 La. Ann. 241; 7 So. 535; Taylor v. Buttrick, 165 Mass. 547; 52 Am. St. Rep. 530; 43 N. E. 507; Canedy v. Marcy, 13 Gray (Mass.) 373; Renard v. Clink, 91 Mich. 1; 30 Am. St. Rep. 458; 51 N. W. 692; Benson v. Markoe, 37 Minn. 30;

will operate as a mortgage;² or a bill of sale, thinking that it will operate as a chattel mortgage;³ or a contract for the surrender of a lease, thinking that it will operate as an option, to be accepted at the election of one party;⁴ where an insurance policy is taken in the name of a mortgagee, who applies for it, thinking that it will operate as if taken out by the owner of the building with a clause making the loss payable to the mortgagee;⁵ or in the name of the husband who effects it, thinking that it will protect the interest of his wife, the real owner of the building;⁶ or payable to the owner who takes it, thinking that it will protect the interest of the contractor who is erecting the building;⁷ or a contract which a party to it executes, believing that it does not make him liable as partner.⁸ So if the parties know and intend the very words used, the fact that such words do not pass the estate intended owing to mistake of law does not justify reformation. Thus where a deed is made to A and his "minor heirs," under the belief that "heirs" is equivalent to "children,"⁹ or A deeds land to B, his daughter, and C, her husband, "and their bodily heirs," thinking that this includes all the heirs of her body,¹⁰ no relief can be given. Rescission is also refused in cases of this sort. Thus

5 Am. St. Rep. 816; 33 N. W. 38; Gaffney Mercantile Co. v. Hopkins, 21 Mont. 13; 52 Pac. 561; Mullin v. Eaton (N. H.), 19 Atl. 371; Ordway v. Chace, 57 N. J. Eq. 478; 42 Atl. 149; Berry v. Ins. Co., 132 N. Y. 49; 28 Am St. Rep. 548; 30 N. E. 254; King v. Holbrook, 38 Or. 452; 63 Pac. 651; Mitchell v. Holman, 30 Or. 280; 47 Pac. 616; Kleinsorge v. Rohse, 25 Or. 51; 34 Pac. 874; Archer v. Lumber Co., 24 Or. 341; 33 Pac. 526; Cochran v. Pew, 159 Pa. St. 184; 28 Atl. 219; Schmid v. Ins. Co. (Tenn. Ch. App.), 37 S. W. 1013; Deseret National Bank v. Dinwoodey, 17 Utah 43; 53 Pac. 215; Phillips v. Port Townsend Lodge, 8 Wash. 529; 36 Pac. 476; St. Clara Female Acade-

my v. Ins. Co., 93 Wis. 57; 66 N. W. 1140.

² Hunt v. Rousmanier, 8 Wheat. (U. S.) 174.

³ Hershey v. Luce, 56 Ark. 320, 323; 19 S. W. 963; 20 S. W. 6.

⁴ Ohlander v. Dexter, 97 Ala. 476; 12 So. 51.

⁵ Ordway v. Chace, 57 N. J. Eq. 478; 42 Atl. 149.

⁶ Schmid v. Ins. Co. (Tenn. Ch. App.), 37 S. W. 1013.

⁷ St. Clara Female Academy v. Ins. Co., 93 Wis. 57; 66 N. W. 1140.

⁸ Woolworth v. McPherson, 55 Fed. 558.

⁹ Seymour v. Bowles, 172 Ill. 521; 50 N. E. 122.

¹⁰ Atherton v. Roche, 192 Ill. 252; 55 L. R. A. 591; 61 N. E. 357.

where A deeded a right of way to a railroad not knowing that it would prevent him from recovering damages inflicted on the rest of his property by the operation of the railroad, he cannot avoid his contract, at least where the railroad company did not know of his mistake and take advantage of it.¹¹

If, on the other hand, there has been a valid oral contract prior to the written contract which the parties have failed to reduce to writing correctly because of mistake as to the legal effect of the words used in the written contract, reformation can be had, and the written contract thus made to conform to the oral agreement.¹² Thus where A and B agreed that a certain debt should bear interest, but omitted reference thereto from the note given for such debt, thinking it would bear interest without a provision therefor;¹³ or agreed orally that B would accept such amount of tool steel prior to January 1, 1890, as he needed in his work, not to exceed fifteen tons, and by mistake as to the effect of the written contract worded it so that B was to take fifteen tons of tool steel prior to January 1, 1890,¹⁴ reformation may be had to make the written contract express the oral agreement. So if the contract provides for a

¹¹ Eldridge v. R. R., 88 Me. 191; 43 Atl. 974.

¹² Hunt v. Rousmanier, 1 Pet. (U. S.) 1; Park v. Blodgett, 64 Conn. 28; 29 Atl. 133; Palmer v. Ins. Co., 54 Conn. 488; 9 Atl. 248; Loudermilk v. Loudermilk, 98 Ga. 780; 25 S. E. 927; Pierce v. Houghton, 122 Ia. 477; *sub nomine*, Fierce v. Houghton, 98 N. W. 306; Bonbright v. Bonbright, — Ia. —, 98 N. W. 784; Turpin v. Gresham, 106 Ia. 187; 76 N. W. 680; Williams v. Hamilton, 104 Ia. 423; 65 Am. St. Rep. 475; 73 N. W. 1029; Williams v. Everham, 90 Ia. 420; 57 N. W. 901; Lee v. Percival, 85 Ia. 639; 52 N. W. 543; Reed v. Root, 59 Ia. 359; 13 N. W. 323; Stafford v. Fettes, 55 Ia. 484; 8 N. W. 322; Holdsworth v. Tucker, 143 Mass. 369; 9 N. E. 764; Sparks

v. Pittman, 51 Mass. 511; Corrigan v. Tiernay, 100 Mo. 276; 13 S. W. 401; Michigan Buggy Co. v. Woodson, 59 Mo. App. 550; Eastman v. Provident, etc., Association, 65 N. H. 176; 23 Am. St. Rep. 29; 5 L. R. A. 712; 18 Atl. 745; Avery v. Society, 117 N. Y. 451; 23 N. E. 3; Maher v. Ins. Co., 67 N. Y. 283; Kornegay v. Everett, 99 N. C. 30; 5 S. E. 418; Lutz v. Thompson, 87 N. C. 334; Sprague v. Thurber, 17 R. I. 454; 22 Atl. 1057; Beardsley v. Knight, 10 Vt. 185; 33 Am. Dec. 193; Wisconsin, etc., Bank v. Mann, 100 Wis. 596; 76 N. W. 777; (questioning Neff v. Rains, 33 Wis. 689).

¹³ Loudermilk v. Loudermilk, 98 Ga. 780; 25 S. E. 927.

¹⁴ Park v. Blodgett, 64 Conn. 28; 29 Atl. 133.

conveyance to A and B, and by mistake as to the legal effect of the deed conveyance is made to A only,¹⁵ or if the contract requires a conveyance of an undivided four fifths interest in certain realty and by mistake as to its legal effect the grantee accepts a deed which conveys only "three fifths" thereof,¹⁶ reformation may be had. Where an instrument intended as a receipt for an advancement has by mistake as to the legal effect thereof been drawn in the form of a note, reformation may be given.¹⁷ Where specific property is agreed upon, a misdescription thereof may be reformed even if the parties know the very form of expression which they have used to describe it.¹⁸ Reformation will be given where a mortgage is drawn covering "fixtures and furniture" under the belief that such description includes property which in law comes under neither of these terms.¹⁹ So where the parties agreed on specific property to be covered by insurance a mistake in describing it, due to a mistake as to the effect of the terms used in describing it may be corrected by reformation.²⁰ Where a husband and wife have agreed to convey a homestead and by mistake as to the legal effect of the conveyance the husband alone executes it, reformation may be had.²¹ There are, however, cases in which reformation has been denied where the parties have deliberately chosen language which does not express their intention as embodied in their oral contract, and where the mistake is not as to the words used, but only as to their legal effect. Reformation has been denied where a guardian under these circumstances executes a mortgage intended to bind his ward's property only, and instead makes himself personally liable.²²

¹⁵ *Corrigan v. Tiernay*, 100 Mo. 276; 13 S. W. 401.

¹⁶ *Parish v. Camplin*, 139 Ind. 1; 37 N. E. 607.

¹⁷ *Hausbrandt v. Hofler*, 117 Ia. 103; 94 Am. St. Rep. 289; 90 N. W. 494.

¹⁸ *Walden v. Skinner*, 101 U. S. 577; *Eberle v. Heaton*, 124 Mich. 205; 82 N. W. 820; *State v. Lorenz*, 22 Wash. 289; 60 Pac. 644; *Jenkins v. Jenkins University*, 17

Wash. 173; 50 Pac. 785; modifying on rehearing 17 Wash. 160; 49 Pac. 247.

¹⁹ *Ryder v. Ryder*, 19 R. I. 188; 32 Atl. 919.

²⁰ *Maher v. Ins. Co.*, 67 N. Y. 283.

²¹ *Whitmore v. Hay*, 85 Wis. 240; 39 Am. St. Rep. 838; 55 N. W. 708.

²² *Andrus v. Blazzard*, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

So if the parties intend to convey a fee, but deliberately select words which pass a lesser estate, reformation has been denied.²³

§1242. Intentional omission of term from written contract.

If the parties purposely omitted a part of their oral agreement from their written contract, no mistake exists except possibly in their belief that they can prove the oral contract and enforce it as well as the written one. In cases of this sort equity does not grant reformation.¹ Elementary as this proposition may seem in view of the so-called parol evidence rule,² there is some authority for allowing an oral term of a contract agreed upon before the rest of the contract was reduced to writing and executed, to be added thereto by reformation.³

A written contract cannot be reformed by adding a provision agreed upon by the parties orally after the written contract was made.⁴

§1243. Controlling effect of paramount intent.

In reformation as in construction,¹ the question is sometimes presented as to the effect of a contract containing inconsistent provisions, where the predominant general intent is apparently contradicted by some subordinate particular intent. When this question is presented in reformation, the general intent if clear is enforced and reformation is given by disregarding the incon-

²³ *Wilson v. Watkins*, 48 S. C. 341; 26 S. E. 663.

¹ *Ware v. Cowles*, 24 Ala. 446; 60 Am. Dec. 482; *Dunham v. New Britain*, 55 Conn. 378; 11 Atl. 354; *Dwight v. Pomeroy*, 17 Mass. 303; 9 Am. Dec. 148; *Martin v. Hamlin*, 18 Mich. 354; 100 Am. Dec. 181; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190; 46 Atl. 535; *Meade v. Ry.*, 89 Va. 296; 15 S. E. 497; *Braun v. Rendering Co.*, 92 Wis. 245; 66 N. W. 196. "It was a mere simultaneous parol agreement

which cannot be resorted to to vary or control the written contract." *Braun v. Rendering Co.*, 92 Wis. 245, 249; 66 N. W. 196.

² See Ch. LVI.

³ *Quinn v. Roath*, 37 Conn. 16; *Coger v. McGee*, 2 Bibb. (Ky.) 321; 5 Am. Dec. 610; *Taylor v. Gilman*, 25 Vt. 411.

⁴ *Wilson v. Moriarty*, 88 Cal. 207; 26 Pac. 85; (apparently ignoring *Murray v. Dake*, 46 Cal. 644).

¹ See § 1113.

sistent subordinate intent when due to mistake.² Thus where A intended to sell and B to buy one half of A's tract which they think is lot 4, A owning lots 4 and 5, but lot 4 is much larger than lot 5, a contract to sell lot 4 will be reformed to transfer one half of the entire tract.³ Where A agrees to mortgage to B all his land, not exempt, and by mistake of law both parties believe that A has an exempt homestead in a certain tract, and accordingly omit such tract from the description of the realty mortgaged,⁴ or where A agrees to pay B a certain sum per yard for excavation, but in reducing the contract to writing the total amount was incorrectly stated because of a mistake in computing the number of yards,⁵ reformation may be had and the real intention of the parties expressed and enforced. In applying this principle care must be taken not to make a new contract for the parties under guise of enforcing the predominant intent. Thus where the parties agreed on a specific boundary line, thinking it the true one, the court will not assume that their paramount intent was to locate the boundary at the true line and reform the contract so as to show that intention.⁶

§1244. Illustrations of mistake in expression.—Property conveyed.

Among the many forms of mistake in expression of the type referred to the following are given as illustrations:

Where the parties have agreed for the sale, lease or mortgage of a specific tract of realty, and by mistake such property is erroneously described in the written contract or conveyance, equity will reform such instrument.¹ Mistake of this sort

² Thompson v. Ladd, 169 Ill. 73; 48 N. E. 174; Dunn v. O'Mara, 70 Ill. App. 609; Lear v. Prather, 89 Ky. 501; 12 S. W. 946.

³ Thompson v. Ladd, 169 Ill. 73; 48 N. E. 174.

⁴ Lear v. Prather, 89 Ky. 501; 12 S. W. 946.

⁵ Dunn v. O'Mara, 70 Ill. App. 609.

⁶ Phillip Zorn Brewing Co. v.

Malott, 151 Ind. 371; 51 N. E. 471; reversing 46 N. E. 23.

¹ Adams v. Henderson, 168 U. S. 573; Wasatch Mining Co. v. Mining Co., 148 U. S. 293; Walden v. Skinner, 101 U. S. 577; Hill v. Kuhlman, 87 Fed. 498; Green v. Dickson, 119 Ala. 346; 24 So. 422; Fields v. Clayton, 117 Ala. 538; 67 Am. St. Rep. 189; 23 So. 530; Parker v. Parker, 88 Ala. 362; 16 Am.

may be made in countless ways. Land which was to have been conveyed may be omitted;² land which was not to be conveyed may be included;³ field-notes may be reversed;⁴ the quarter-

St. Rep. 52; 6 So. 740; Busey v. Moraga, 130 Cal. 586; 62 Pac. 1081; Stonesifer v. Kilburn, 122 Cal. 659; 55 Pac. 587; Sullivan v. Moorhead, 99 Cal. 157; 33 Pac. 796; Blakeman v. Blakeman, 39 Conn. 320; Manogue v. Bryant, 15 App. D. C. 245; Phillips v. Roquemore, 96 Ga. 719; 23 S. E. 855; Allen v. Elder, 76 Ga. 674; 2 Am. St. Rep. 63; Kelly v. Galbraith, 186 Ill. 593; 58 N. E. 431; affirming 87 Ill. App. 63; Henderson v. McKernan, 151 Ill. 273; 37 N. E. 867; Halliday v. Hess, 147 Ill. 588; 35 N. E. 380; Merchants' etc., Association v. Scanlan, 144 Ind. 11; 42 N. E. 1008; Herring v. Peaslee, 92 Ia. 391; 60 N. W. 650; Reed v. Root, 59 Ia. 359; 13 N. W. 323; Burton, etc., Co. v. Handy, 54 Kan. 13; 37 Pac. 108; Wilson v. Jasper, 90 Ky. 211; 13 S. W. 885; Tichenor v. Yankey, 89 Ky. 508; 12 S. W. 947; Moye v. Lane (Ky.), 12 S. W. 154; Perry v. Knight, 85 Me. 184; 27 Atl. 96; Goode v. Riley, 153 Mass. 585; 28 N. E. 228; Eberle v. Heaton, 124 Mich. 205; 82 N. W. 820; Perkins v. Canine, 113 Mich. 72; 71 N. W. 457; Judson v. Miller, 106 Mich. 140; 63 N. W. 965; Metropolitan Lumber Co. v. Iron Co., 101 Mich. 577; 60 N. W. 278; Conlin v. Masecar, 80 Mich. 139; 45 N. W. 67; Burke v. Clixby, 75 Mich. 311; 42 N. W. 1135; Layman v. Realty Co., 60 Minn. 136; 62 N. W. 113; Olson v. Erickson, 42 Minn. 440; 44 N. W. 317; Brinson v. Berry (Miss.), 7 So. 322; Epperson v. Epperson, 161 Mo. 577; 61 S. W. 853; Harding v. Wright, 138 Mo. 11; 39 S. W. 456; Henderson v.

Beasley, 137 Mo. 199; 38 S. W. 950; Ezell v. Peyton, 134 Mo. 484; 36 S. W. 35; Sellwood v. Henne- man, 36 Or. 575; 60 Pac. 12; Elder v. Bank, 91 Tex. 423; 44 S. W. 62; Avery v. Hunton, 23 Tex. Civ. App. 353; 56 S. W. 210; American, etc., Co. v. Pace, 23 Tex. Civ. App. 222; 56 S. W. 377; Land Mortgage Bank v. Nicholson, 24 Wash. 258; 64 Pac. 156; State v. Lorenz, 22 Wash. 289; 60 Pac. 644; Jenkins v. Jenkins University, 17 Wash. 160; 49 Pac. 247; modified on re- hearing, 17 Wash. 173; 50 Pac. 785; Baxter v. Tanner, 35 W. Va. 60; 12 S. E. 1094; Ingles v. Merri- man, 96 Wis. 400; 71 N. W. 368; Fischer v. Laack, 85 Wis. 280; 55 N. W. 398.

² Simmons Creek Coal Co. v. Do- ran, 142 U. S. 417; Stonesifer v. Kilburn, 122 Cal. 659; 55 Pac. 587; Stevens v. Holman, 112 Cal. 345; 53 Am. St. Rep. 216; 44 Pac. 670; Smith v. Schweigerer, 129 Ind. 363; 28 N. E. 696; Brinson v. Ber- ry (Miss.), 7 So. 322; Epperson v. Epperson, 161 Mo. 577; 61 S. W. 853; Ezell v. Peyton, 134 Mo. 484; 36 S. W. 35; Land Mortgage Bank v. Nicholson, 24 Wash. 258; 64 Pac. 156.

³ Thompson v. Ladd, 169 Ill. 73; 48 N. E. 174; Jordan v. Walters (Ia.), 80 N. W. 530; Conlin v. Masecar, 80 Mich. 139; 45 N. W. 67; Stites v. Widener, 35 O. S. 555; Elder v. Bank, 91 Tex. 423; 44 S. W. 62; American, etc., Co. v. Pace, 23 Tex. Civ. App. 222; 56 S. W. 377; Baxter v. Tanner, 35 W. Va. 60; 12 S. E. 1094.

⁴ Hill v. Kuhlman, 87 Fed. 498.

section may be misnamed;⁵ an erroneous number of the lot⁶ or block,⁷ or an erroneous street number⁸ may be inserted; the wrong point be taken as a corner;⁹ or the length of a boundary line may be misstated.¹⁰ So an easement may be omitted,¹¹ or only partially conveyed,¹² or a reservation, as of timber,¹³ coal,¹⁴ or growing crops,¹⁵ may be omitted; or a reservation may be inserted by mistake.¹⁶ So a release intended to cover only part of the realty mortgaged may by mistake be so drawn as to include all the realty.¹⁷

§1245. Mistake as to grantee.

Where by mistake an estate which by agreement should have passed to A alone is conveyed to A and B,¹ or one which should have passed to A and B is conveyed to A alone,² or where property was to be settled on a married woman to her separate use, and by mistake is so conveyed as to be part of her general property,³ reformation may be had. So if the name of the grantee corporation is erroneously stated reformation may be had.⁴

⁵ *Epperson v. Epperson*, 161 Mo. 577; 61 S. W. 853; *McCormick, etc., Co. v. Woulph*, 11 S. D. 252; 76 N. W. 939.

⁶ *Skerrett v. Society*, 41 O. S. 606; *Avery v. Hunton*, 23 Tex. Civ. App. 353; 56 S. W. 210.

⁷ *Busey v. Moraga*, 130 Cal. 586; 62 Pac. 1081.

⁸ *Kelly v. Galbraith*, 186 Ill. 593; 58 N. E. 431; affirming 87 Ill. App. 63.

⁹ *Moye v. Lane* (Ky.), 12 S. W. 154; *Eberle v. Heaton*, 124 Mich. 205; 82 N. W. 820.

¹⁰ *Manogue v. Bryant*, 15 App. D. C. 245.

¹¹ *Blakeman v. Blakeman*, 39 Conn. 320; *Schautz v. Keener*, 87 Ind. 258; *Howard v. Britton*, 67 N. H. 484; 41 Atl. 269.

¹² *State v. Lorenz*, 22 Wash. 289; 60 Pac. 644.

¹³ *Smith v. Wakeman*, 114 Mich. 611; 72 N. W. 599; *Fero v. Lumber*

Co., 101 Mich. 310; 59 N. W. 603.

¹⁴ *Cook v. Liston*, 192 Pa. St. 19; 43 Atl. 389.

¹⁵ *Warriek v. Smith*, 137 Ill. 504; 27 N. E. 709; *Hendrickson v. Ivins*, 1 N. J. Eq. 562.

¹⁶ *Stockbridge Iron Co. v. Iron Co.*, 107 Mass. 290.

¹⁷ *Kane v. Williams*, 99 Wis. 65; 74 N. W. 570.

¹ *Stedwell v. Anderson*, 21 Conn. 139; *McLeod v. Free*, 96 Mich. 57; 55 N. W. 685.

² *Corrigan v. Tierney*, 100 Mo. 276; 13 S. W. 401. So where notes and stock to be transferred to A and B are transferred to B alone. *Kropp v. Kropp*, 97 Wis. 137; 72 N. W. 381.

³ *Larkins v. Biddle*, 21 Ala. 252; *Stone v. Hill*, 17 Ala. 557; 52 Am. Dec. 185.

⁴ *Rosser v. Ry.*, 102 Ga. 164; 29 S. E. 171.

§1246. Mistake as to estate.

If by mistake words are omitted or inserted creating a greater¹ or less² estate than that agreed upon, reformation may be given. So where words creating a fee,³ such as "and their heirs forever,"⁴ are omitted; or where the phrase "their bodily heirs" was used by mistake for "their heirs,"⁵ or "successors" is used by mistake for "heirs,"⁶ or an instrument whereby a means to reserve to himself a life estate, passing the fee to B, is by mistake so worded as to constitute a will,⁷ or a deed meant to pass an undivided interest in realty is by mistake so drawn as to pass the entire realty,⁸ reformation can be had. So reformation may be given where by mistake a condition subsequent has been omitted.⁹

§1247. Mistake as to effect of signature.

If A, not meaning to bind himself personally, signs the contract in such a way as to bind himself, the question of his right to reformation depends on substantially the same principles as those governing a mistake as to the legal effect of the words employed.¹ If there has been a prior valid contract between

¹ *Dulo v. Miller*, 112 Ala. 687; 20 So. 981; *Cooke v. Husbands*, 11 Md. 492; *Clayton v. Freet*, 10 O. S. 544; as failing to reserve a life-estate as intended. *Purvines v. Harrison*, 151 Ill. 219; 37 N. E. 705.

² *Kyner v. Ball*, 182 Ill. 171; 54 N. E. 925; *Nicholson v. Caress*, 59 Ind. 39; *Holme v. Shinn*, 62 N. J. Eq. 1; 49 Atl. 151; *Vickers v. Leigh*, 104 N. C. 248; 10 S. E. 308; *Brock v. O'Dell*, 44 S. C. 22; 21 S. E. 976; *Lardner v. Williams*, 98 Wis. 514; 74 N. W. 346.

³ *Trusdell v. Lehman*, 47 N. J. Eq. 218; 20 Atl. 391; *Springs v. Harven*, 3 Jones Eq. (N. C.) 96; *Brock v. O'Dell*, 44 S. C. 22; 21 S. E. 976.

⁴ *Vickers v. Leigh*, 104 N. C. 248; 10 S. E. 308.

⁵ *Kyner v. Ball*, 182 Ill. 171; 54 N. E. 925. (Thus creating what at Common Law was a fee-tail but under the Illinois statutes was a life estate in the first taker and a fee in his descendants.)

⁶ *M. E. Church v. Town*, 47 N. J. Eq. 400; 20 Atl. 488.

⁷ *Pinkham v. Pinkham*, 60 Neb. 600; 83 N. W. 837; affirmed on rehearing 61 Neb. 336; 85 N. W. 285.

⁸ *Canedy v. Marcy*, 13 Gray (Mass) 373; *Green Bay, etc., Co. v. Hewitt*, 62 Wis. 316; 21 N. W. 216; 22 N. W. 588.

⁹ *Hamilton County v. Owens*, 138 Ind. 183; 37 N. E. 602.

¹ See § 1241.

the parties, by the terms of which no personal liability was fixed on A, and in attempting to reduce this to writing A by mistake as to the legal effect of the method of executing the contract employed by himself signs it so as to incur a personal liability, he may have reformation.² Thus where A is agent for X and signs "A, agent of X," he may have reformation so as to relieve himself from personal liability.³ Conversely in an action against X, reformation may be had so as to make him personally liable on the written contract.⁴ Thus where the name of the corporation was printed at the top of the contract, followed by the words "we promise" and signed "R. J. Beatty, President," reformation was allowed in a suit against the corporation.⁵ So where A signs as township trustee when he means to sign as trustee for the school township, the latter office being held by A *ex officio* as township trustee, reformation may be had to make the school township liable.⁶ Further, if A does not sign so as to assume the liability intended by the oral contract, reformation may be had against him on B's application. This rule has been applied where the parties meant to sign an injunction bond so as to make it valid, though probably they

² Fisher v. Barnett, 56 Ill. App. 649; Second National Bank v. Steel Co., 155 Ind. 581; 52 L. R. A. 307; 58 N. E. 833; Sparta School Township v. Mendell, 138 Ind. 188; 37 N. E. 604; Prescott v. Hixon, 22 Ind. App. 139; 72 Am. St. Rep. 291; 53 N. E. 391; Lee v. Percival, 85 Ia. 639; 52 N. W. 543; Richmond v. Ry., — Or. —; 74 Pac. 333; Moser v. Libenguth, 2 Rawle (Pa.) 428.

³ Western Wheeler Scraper Co. v. Stickleman, 122 Ia. 396; 98 N. W. 139; Western Wheeler Scraper Co. v. McMillen, — Neb. —; 99 N. W. 512. Thus a signature in the following form has been corrected by reformation: "O. O. Prescott, Pres. Mid. B. & Cheese Co.; M. A. Cordrey, Sec. Cr. & Cheese Co." Prescott v. Hixon, 22 Ind. App.

139; 72 Am. St. Rep. 291; 53 N. E. 391.

⁴ Second National Bank v. Steel Co., 155 Ind. 581; 52 L. R. A. 307; 58 N. E. 833; McNaughten v. Partridge, 11 Ohio 223; 38 Am. Dec. 731; Moser v. Libenguth, 2 Rawle (Pa.) 428.

⁵ Second National Bank v. Steel Co., 155 Ind. 581; 52 L. R. A. 307; 58 N. E. 833.

⁶ Sparta School Township v. Mendell, 138 Ind. 188; 37 N. E. 604. While in some of these cases the party signing the contract might be shown in an action at law on the contract to be the real principal (see §§ 606, 607, 695, 761, 1233-1236), reformation may be had in cases where the real principal could not be held in an action at law.

had no specific intention to seal, as they did not know that it was necessary, but the bond purported on its face to be a sealed instrument.⁷ Some authorities seem to deny the right of equity to reform so as to give relief against a mistake as to the legal effect of a signature.⁸ In these cases, however, though it is not always clear from the report, the decision is often based on the other branch of the principle under discussion; that if there is no prior oral contract, reformation cannot be given to a party who makes himself personally liable when he did not intend to. Thus where A signs a contract so as to bind himself personally, though he thinks he is liable as guardian only,⁹ or officers of a corporation, meaning to bind the corporation, sign a note so as to bind themselves personally,¹⁰ or A on depositing money in a bank accepts as security therefor the individual notes of the president and the cashier, thinking they were certificates of deposit,¹¹ reformation has been refused.

§1248. Other examples of mistake.

A mistake in the date,¹ in the rate of interest,² or in the amount on which interest is to be computed,³ or the mistaken

⁷ Henkleman v. Peterson, 154 Ill. 419; 40 N. E. 359; reversing 50 Ill. App. 601. Omission of a seal may be corrected. Probate Court v. May, 52 Vt. 182. So where a seal was omitted from a mortgage. Allen v. Elder, 76 Ga. 674; 2 Am. St. Rep. 63. (Possibly this may have been a mistake of fact.)

⁸ Mabb v. Merriam, 129 Cal. 663; 62 Pac. 212; San Bernardino National Bank v. Andreson (Cal.), 32 Pac. 168; Murphy v. Bank, 95 Ia. 325; 63 N. W. 702; Morehead Banking Co. v. Morehead, 124 N. C. 622; 32 S. E. 967; denying rehearing 122 N. C. 318; 30 S. E. 331; Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

⁹ Andrus v. Blazzard, 23 Utah 233; 54 L. R. A. 354; 63 Pac. 888.

¹⁰ San Bernardino National Bank v. Andreson (Cal.), 32 Pac. 168.

¹¹ Murphy v. Bank, 95 Ia. 325; 63 N. W. 702. A's belief was due to the fraud of the president and the cashier. A could read, however, and kept the notes until the president and cashier had become insolvent, before seeking relief.

¹ Lewiston v. Gagne, 89 Me. 395; 56 Am. St. Rep. 432; 36 Atl. 629; O'Donnell v. Harmon, 3 Daly (N. Y.) 424; First National Bank v. Pearson, 119 N. C. 494; 26 S. E. 46; Cameron v. White, 74 Wis. 425; 5 L. R. A. 493; 43 N. W. 155.

² Loudermilk v. Loudermilk, 98 Ga. 780; 25 S. E. 927; Greene v. Smith, 160 N. Y. 533; 55 N. E. 210.

³ Rider v. Powell, 28 N. Y. 310.

addition⁴ or omission⁵ of a clause whereby the grantee assumes a mortgage; the omission of a clause deducting the amount of the mortgage from the purchase price,⁶ or excepting the principal of a prior mortgage from the covenants of a second mortgage,⁷ or the omission of a clause providing for a vendor's lien,⁸ may be reformed in equity. So other omissions,⁹ as in a clause intended to provide that a bond "shall be and remain a special lien upon the said property above described, and for the payment" of the note in question the omission of "the said property above described;"¹⁰ the omission of the consideration¹¹ from a deed; the omission of a provision for ascertaining the amount of corn to be delivered as rent for the land lease;¹² an erroneous statement of a consideration in a deed as love and affection when in reality it is on a valuable consideration;¹³ an omission of the time for which a teacher is employed;¹⁴ an erroneous statement in a mortgage of the time at which the debt secured thereby matures;¹⁵ an omission of statutory requirements in a bill of sale of a vessel necessary to enable vendee to have it registered in his name as an American vessel;¹⁶ or the omission of some of the descriptive marks identifying some of the logs sold,¹⁷ are all mistakes for which reformation is allowed.

⁴ *Adams v. Wheeler*, 122 Ind. 251; 23 N. E. 760; *Jones v. Price* (Ia.), 86 N. W. 219.

⁵ *Williams v. Everham*, 90 Ia. 420; 57 N. W. 901. (Where the property was conveyed "subject" to a mortgage, the parties intending that the grantee should assume it.) *Stephenson v. Elliott*, 53 Kan. 550; 36 Pac. 980.

⁶ *Burns v. Caskey*, 100 Mich. 94; 58 N. W. 642.

⁷ *Allis v. Hall*, 76 Conn. 322; 56 Atl. 637.

⁸ *Worley v. Tuggle*, 4 Bush. (Ky.) 168.

⁹ *Viditz v. O'Hagan* (1899), 2 Ch. 569; *Rice v. Hall* (Ky.), 42 S. W. 99; *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Pitcher v. Hen-*

nessey, 48 N. Y. 415; *Young v. Miller*, 10 Ohio 85.

¹⁰ *Smith v. Brunk*, 14 Colo. 75; 23 Pac. 325.

¹¹ *Huss v. Morris*, 63 Pa. St. 367.

¹² *Reid v. Cook*, 88 Ia. 717; 54 N. W. 353.

¹³ *Orr v. Echols*, 119 Ala. 340; 24 So. 357.

¹⁴ *Marion School Township v. Carpenter*, 12 Ind. App. 191; 39 N. E. 878.

¹⁵ *Commercial National Bank v. Johnson*, 16 Wash. 536; 48 Pac. 267.

¹⁶ *Sprague v. Thurber*, 17 R. I. 454; 22 Atl. 1057.

¹⁷ *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232.

The contracts hitherto discussed have been chiefly contracts for conveying some interest in realty. Reformation, while more often needed in such contracts, is not confined to them. A contract of insurance may be reformed where there is a mistake in the expression,¹⁸ as where there is a mistake in the description of the property insured,¹⁹ or in the name of the beneficiary.²⁰ A contract executed by a surety may be reformed for mistake in expression, like any other contract.²¹ So the use of "heretofore" instead of "hereafter," referring to certain lots to be released from lien and mortgage upon payment,²² the insertion of the name of the holder of the legal title instead of that of the equitable owner in a clause imposing penalties for nonperformance,²³ a misstatement as to the kind of money in which the instrument is payable,²⁴ a covenant for "a semi-annual rent of three hundred dollars" instead of for an annual rent of three hundred dollars payable in semi-annual installments,²⁵ are all mistakes for which reformation can be had. Reformation may be given where by mistake an indorsement intended to be made without recourse is not so made.²⁶ An executor's bond which by mistake misstates the name of the decedent whose estate is being administered may be reformed to correct such mistake.²⁷

¹⁸ Equitable Safety Ins. Co. v. Hearne, 20 Wall. (U. S.) 494; Western Assurance Co. v. Ward, 75 Fed. 338.

¹⁹ German Fire Ins. Co. v. Gueck, 130 Ill. 345; 6 L. R. A. 835; 23 N. E. 112; Home Ins. Co. v. Myer, 93 Ill. 271; Maher v. Ins. Co., 67 N. Y. 283.

²⁰ Snell v. Ins. Co., 98 U. S. 85; Woodbury, etc., Association v. Ins. Co., 31 Conn. 517; German Ins. Co. v. Gueck, 130 Ill. 345; 6 L. R. A. 835; 23 N. E. 112; Keith v. Ins. Co., 52 Ill. 518; 4 Am. Rep. 624; Cook v. Ins. Co., 60 Neb. 127; 82 N. W. 315; Scott v. Association, 63 N. H. 556; 4 Atl. 792.

²¹ Henkleman v. Peterson, 154 Ill. 419; 40 N. E. 359; s. c., 50 Ill. App. 601; State v. Frank, 51 Mo. 98; Neining v. State, 50 O. S. 394; 40 Am. St. Rep. 674; 34 N. E. 633.

²² Johnson v. Wilson, 111 Mich. 114; 69 N. W. 149.

²³ Smith v. Watson, 88 Ia. 73; 55 N. W. 68.

²⁴ Burdett v. Sims, 3 J. J. Mar. (Ky.) 190; Talley v. Courtney, 1 Heisk. (Tenn.) 715.

²⁵ Snyder v. May, 19 Pa. St. 235.

²⁶ Stafford v. Fetters, 55 Ia. 484; 8 N. W. 322.

²⁷ Foley v. Hamilton, 89 Ia. 686; 57 N. W. 439.

§1249. What instruments may be reformed.

Reformation will not be given when the instrument as reformed would not be operative.¹ So a bond given to settle a balance due on mutual accounts, which had been kept so loosely that it was impracticable to ascertain the true balance will not be reformed to show such true balance.² Hence an instrument which does not purport to be a contract and was not meant as a contract cannot be reformed so as to be a contract. Thus a resolution by a council, directing the mayor to make a purchase from A, cannot be reformed at A's instance so as to stand as a contract between the city and A.³ So where a married woman can be bound only in compliance with statute, reformation will not be given for deeds of married women.⁴ This rule is in force only where a married woman has no power whatever to bind herself other than in the manner provided for by statute. If a married woman has a wider power of making contracts, her contracts and conveyances may be reformed for mutual mistake like those of persons of normal status.⁵ If the contract is one which is required by statute to be proved by writing, the attempt to reform such a contract in equity by the use of oral

¹ *Thompson v. Ins. Co.*, 25 Fed. 296; *East St. Louis v. Mfg. Co.*, 34 Ill. App. 458; *Williamson v. Hitner*, 79 Ind. 233; *Williams v. Cudd*, 26 S. C. 213; 4 Am. St. Rep. 714; 2 S. E. 14; *Persinger v. Chapman*, 93 Va. 349; 25 S. E. 5; (citing *Chapman v. Persinger*, 87 Va. 581; 13 S. E. 549; *Foster v. Ritson*, 17 Gratt. (Va.) 321).

² *Persinger v. Chapman*, 93 Va. 349; 25 S. E. 5.

³ *Car-kaddon v. South Bend*, 141 Ind. 596; 39 N. E. 667; affirmed on rehearing, 141 Ind. 601; 41 N. E. 1.

⁴ *Bowden v. Bland*, 53 Ark. 53; 22 Am. St. Rep. 179; 13 S. W. 420; *Leonis v. Lazzarovich*, 55 Cal. 52; *Stodolka v. Novatny*, 144 Ill. 125; 33 N. E. 534; *Heaton v. Fryberger*,

38 Ia. 185; *McReynolds v. Grubb*, 150 Mo. 352; 73 Am. St. Rep. 448; 51 S. W. 822; *Cannon v. Beatty*, 19 R. I. 524; 34 Atl. 1111.

⁵ *Tillis v. Smith*, 108 Ala. 264; 19 So. 374; *Stevens v. Holman*, 112 Cal. 345; 53 Am. St. Rep. 216; 44 Pac. 670; *Savings & Loan Society v. Meeks*, 66 Cal. 371; 5 Pac. 624; *Hayford v. Koche*, 65 Cal. 389; 4 Pac. 350; *Christensen v. Hollingsworth*, 6 Ida. 87; 53 Pac. 211; *Parish v. Camplin*, 139 Ind. 1; 37 N. E. 607; *Collins v. Cornwell*, 131 Ind. 20; 30 N. E. 796; *Carper v. Munger*, 62 Ind. 481; *Hamar v. Medsker*, 60 Ind. 413; *Tichenor v. Yankey*, 89 Ky. 508; 12 S. W. 947; *Murdoch v. Leonard*, 15 Wash. 142; 45 Pac. 751.

evidence presents a close and interesting question, on which there is a conflict of judicial opinion. On the one hand it is felt by many courts that, in view of the safeguards thrown about reformation by the amount of evidence required to obtain such relief, it would merely offer a shelter to fraud to deny reformation in such cases; and accordingly reformation is allowed.⁶ Thus where by mistake an option of purchase is omitted from a lease, such option may be inserted by reformation.⁷ A deed or mortgage may accordingly be reformed;⁸ and a mortgage may be reformed and foreclosed in one action.⁹ In other jurisdictions it is felt that "in case of an executory agreement, first to reform, then to decree an execution of it, would be virtually to repeal the statute of frauds."¹⁰ Accordingly reformation is denied.¹¹ Thus under a contract for the sale of realty, reformation of a defective description has been denied.¹² If reformation of a conveyance of realty can be given, as is often done,¹³ no good reason appears why reformation should be denied in case of executory contracts. If, by mistake, a seal is omitted from a contract which is required by law to be under seal, equity may grant relief by compelling a seal to be affixed.¹⁴

⁶ *Bradford v. Bank*, 13 How. (U. S.) 57; *Schwass v. Hershey*, 125 Ill. 653; 18 N. E. 272; *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Mosby v. Wall*, 23 Miss. 81; 55 Am. Dec. 71; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; 7 Am. Dec. 559; *Davenport v. Sovil*, 6 O. S. 459; *Caley v. R. R.*, 80 Pa. St. 363; *Redfield v. Gleason*, 61 Vt. 220; 15 Am. St. Rep. 889; 17 Atl. 1075; *Fishack v. Ball*, 34 W. Va. 644; 12 S. E. 856.

⁷ *Butler v. Threlkeld*, 117 Ia. 116; 90 N. W. 584.

⁸ *Tillis v. Smith*, 108 Ala. 264; 19 So. 374; *Fuller v. Hawkins*, 60 Ark. 304; 30 S. W. 34; *Burmeister v. Olson*, 102 Wis. 677; 79 N. W. 1127.

⁹ *Christensen v. Hollingsworth*, 6 Ida. 87; 96 Am. St. Rep. 256; 53

Pac. 211; *Fifth National Bank v. Pierce*, 117 Mich. 376; 75 N. W. 1058.

¹⁰ *Townshend v. Strangroom*, 6 Ves. Jr. 328.

¹¹ *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Elder v. Elder*, 10 Me. 80; 25 Am. Dec. 205; *Glass v. Hulbert*, 102 Mass. 24; 3 Am. Rep. 418; *Davis v. Ely*, 104 N. C. 16; 17 Am. St. Rep. 667; 5 L. R. A. 810; 10 S. E. 138; *Whiteaker v. Vanschoiack*, 5 Or. 113.

¹² *Davis v. Ely*, 104 N. C. 16; 17 Am. St. Rep. 667; 5 L. R. A. 810; 10 S. E. 138.

¹³ See § 1244 *et seq.*

¹⁴ *Bernard's Township v. Stebins*, 109 U. S. 341; *Gaylord v. Pelland*, 169 Mass. 356; 47 N. E. 1019; *Springfield Five Cents Sav. Bank v. South Congregational Soc.*, 127

§1250. Reformation of mistake which may be corrected by construction.

Whether a contract may be reformed for mistake in expression when such mistake is apparent from the entire contract and may be corrected by construction,¹ is a question upon which the authorities are not unanimous.

Some courts hold that any mistake in expression may be corrected in equity,² in analogy to a bill *quia timet*, the question of the absolute necessity of reformation being allowed to affect only costs. So a contract in which by mistake the date for performance is fixed at a time prior to the execution of the contract may be reformed even though the correct date might be inferred by persons familiar with that business.³ Other courts hold that equity will not interfere unless the reformation sought will modify the legal effect of the contract,⁴ on the ground that otherwise plaintiff has an adequate remedy at law. The answer to this may well be that while adequate the remedy may not always be clear.

In any event, if the reformation sought will change the legal effect of the contract, even slightly, it will be given if otherwise proper.⁵

§1251. Who may have reformation.

Only a party who is prejudiced by the mistake can maintain a suit for reformation.¹ Thus a married woman who joins in her husband's deed to release dower, cannot have the deed reformed to correct a covenant of warranty where she was not

Mass. 516; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322; 13 N. W. 145; Conover v. Brown, 49 N. J. Eq. 156; 23 Atl. 507; Chase v. Peck, 21 N. Y. 581; Bullock v. Whipp, 15 R. I. 195; 2 Atl. 309.

¹ See §§ 1113, 1125.

² Rich v. Trustee of Schools, 158 Ill. 242; 41 N. E. 924; Jenkins v. Davis, 141 Pa. St. 266; 21 Atl. 592.

³ Cameron v. White, 74 Wis. 425;

5 L. R. A. 493; 43 N. W. 155.

⁴ Harm v. Voss (Ia.), 82 N. W. 753; Shoemaker v. Smith, 80 Ia. 655; 45 N. W. 744; Rue v. Meirs, 43 N. J. Eq. 377; 12 Atl. 369.

⁵ Stevens v. Hertzler, 114 Ala. 563; 22 So. 121; Ward v. Waterman, 85 Cal. 488; 24 Pac. 930.

¹ Miller v. Morris, 123 Ala. 164; 27 So. 401; Mlnazek v. Libera, 78 Minn. 151; 80 N. W. 866.

bound by such warranty.² So one who sues as partner for reformation of a partnership contract must show that he has an interest in such partnership.³ On analagous principles an instrument not supported by a valuable consideration will not be reformed.⁴ Thus no reformation will be given of a mortgage intended to prefer creditors.⁵

§1252. Effect of rights of third parties on reformation.

If intervening rights of *bona fide* purchasers for value will be prejudiced by reformation it will not be allowed.¹ Rights of third persons acquired with actual² or constructive³ notice of the mistake, or rights of third persons not purchasers for value,⁴ especially if not prejudiced by the mistake,⁵ will not prevent reformation.

² Miller v. Morris, 123 Ala. 164; 27 So. 401.

³ Mlnazek v. Libera, 78 Minn. 151; 80 N. W. 866.

⁴ Strayer v. Dickerson, 205 Ill. 257; 68 N. E. 767; Shears v. Westover, 110 Mich. 505; 68 N. W. 266; Redding v. Rozell, 59 Mich. 476; 26 N. W. 677; Gwyer v. Spaulding, 33 Neb. 573; 50 N. W. 681; Miller v. Savage, 62 N. J. Eq. 746; 48 Atl. 1004; Powell v. Morisey, 98 N. C. 426; 2 Am. St. Rep. 343; 4 S. E. 185; Willey v. Hodge, 104 Wis. 81; 76 Am. St. Rep. 852; 80 N. W. 75.

⁵ Miller v. Savage, 62 N. J. Eq. 746; 48 Atl. 1004. A deed in part for love and affection and in part on valuable consideration may be reformed. Smith v. Barksdale, 110 Ga. 278; 34 S. E. 582.

¹ Macon v. Dasher, 90 Ga. 195; 16 S. E. 75; Harms v. Coryell, 177 Ill. 496; 53 N. E. 87; Roszell v. Roszell, 109 Ind. 354; 10 N. E. 114; Sentell v. Randolph, 52 La. Ann. 52; 26 So. 797; Dunham v. Provision Co., 100 Mich. 75; 58 N. W. 627; Cottrell v. Bank, 53 Minn. 201; 54 N. W. 1111; Seward v. Spurgeon, 9 Wash. 74;

37 Pac. 303. A lien holder has been treated as a purchaser for value. Lough v. Michael, 37 W. Va. 679; 17 S. E. 181, 470.

² Way v. Roth, 159 Ill. 162; 42 N. E. 321; Smith v. Schweigerer, 129 Ind. 363; 28 N. E. 696; Carpenter Paper Co. v. Wilcox, 50 Neb. 659; 70 N. W. 228.

³ Elwood v. Stewart, 5 Wash. 736; 32 Pac. 735, 1000. As where such third person acquired non-negotiable mortgage notes after maturity from a party to the original transaction. San Jose Ranch Co. v. Water Co., 132 Cal. 582; 64 Pac. 1097.

⁴ Such as creditors. Michigan Buggy Co. v. Woodson, 59 Mo. App. 550. Even if judgment creditors. Citizens' National Bank v. Judy, 146 Ind. 322; 43 N. E. 259. A grantee without consideration. Kraushaar v. Hauk, 27 Or. 92; 39 Pac. 539. A wife subsequently married by grantee, now claiming her dower. Hawkins v. Pearson, 96 Ala. 369; 11 So. 304.

⁵ Wright v. Bank (Tenn. Ch. App.), 60 S. W. 623.

§1253. Reformation not granted for mistake in the inducement.

Where the parties have through mistake as to some collateral fact, entered into a valid contract, the terms of which are reduced correctly to writing, equity cannot reform such contract so as to express what the court thinks the parties would have agreed upon but for such mistake.¹ Thus where two adjoining land owners, through mistake as to the true location of the boundary line, fix a line erroneously, and put this contract into writing, equity cannot reform the contract to fix the boundary at the true line,² nor can the lessee of certain mineral rights have reformation because he took the lease in ignorance of an ancient reservation in a deed, giving him the right to such minerals.³ So where an assignee in insolvency represented to A that a certain sum was due on a certain claim, and unknown to such assignee, a payment had been made thereon, leaving the amount due less than that represented, no reformation reducing the amount to be paid for such claim could be made since the contract of assignment was exactly what the parties had agreed upon and no fraud intervened.⁴ Where A agreed to buy the interest of his partner B and an invoice was made, in which a mistake of five hundred dollars was made, and a price was agreed upon, on the basis of such invoice, no reformation can be had.⁵ So where A expressly released all partners except B from liability and subsequently learned that X was a dormant partner, X being financially responsible, A cannot have the release reformed to exclude X.⁶ The reason underlying the rule last given is that equity will not make a new

¹ *Duke of Sutherland v. Heathcote* (1892), 1 Ch. 475; affirming (1891), 3 Ch. 504; *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371; 51 N. E. 471; reversing, 46 N. E. 23; *Dever v. Dever* (Ky.), 44 S. W. 986; *Wise v. Brooks*, 69 Miss. 891; 13 So. 836; *Curtis v. Albee*, 167 N. Y. 360; 60 N. E. 660; *De Voin v. De Voin*, 76 Wis. 66; 44 N. W. 839.

² *Phillip Zorn Brewing Co. v. Ma-*

lott, 151 Ind. 371; 51 N. E. 471; reversing, 46 N. E. 23.

³ *Duke of Sutherland v. Heathcote* (1892), 1 Ch. 475; affirming (1891), 3 Ch. 504.

⁴ *Curtis v. Albee*, 167 N. Y. 360; 60 N. E. 660.

⁵ *De Voin v. De Voin*, 76 Wis. 66; 44 N. W. 839.

⁶ *Harbeck v. Pupin*, 145 N. Y. 70; 39 N. E. 722.

contract for the parties imposing on one of them terms which he did not assume and did not intend to assume when he made the contract.⁷ It seems, however, that by some statutes equity may have power to reform a contract because of mistake in the inducement.⁸

§1254. Evidence necessary for reformation.

The so-called parol evidence rule has no application in actions to reform a written contract,¹ and extrinsic evidence is always admissible. The amount of evidence necessary to entitle the party seeking reformation to the relief sought is variously stated. It is always more than a mere preponderance. The evidence must be much clearer than a mere preponderance necessarily is to permit reformation.² The usual form of state-

⁷ *New York Life Ins. Co. v. McMaster*, 87 Fed. 63; 30 C. C. A. 532; *Whittemore v. Farrington*, 76 N. Y. 452; *Moran v. McLarty*, 75 N. Y. 25; *Jackson v. Andrews*, 59 N. Y. 244; *Welles v. Yates*, 44 N. Y. 525; *Nevins v. Dunlap*, 33 N. Y. 676; *Rider v. Powell*, 28 N. Y. 310. "The court could not make a new contract for the parties, but could only cause their actual agreement to be expressed according to its terms; nor could it reform the instrument according to the terms in which (A) understood it, unless it should be shown that (B) also had the same understanding of its terms." *Ward v. Yorba*, 123 Cal. 447, 449; 56 Pac. 58.

⁸ *Du Bois v. Waterworks Co.*, 176 Pa. St. 430; 53 Am. St. Rep. 678; 34 L. R. A. 92; 35 Atl. 248. The statute authorized the court on bill filed by any citizen who used the water, alleging impurity or deficiency to compel the water company to correct the evil complained of and to make "such order in the premises as may seem just and

equitable." Under this statute, the supreme court said the lower court might proceed "even to the reformation of the contract upon a basis just and equitable to both parties, where, as here, it was made in mutual mistake as to an essential fact, and a remedy for the difficulty may be found without violation of the main intent of both parties in the original instrument."

These remarks are obiter, as the question was as to the right of the borough to rescind the contract because the water supply was defective owing to a mistake in the capacity of the stipulated source of supply. Rescission was denied.

See also *United States Water Works Co. v. Du Bois*, 176 Pa. St. 439; 35 Atl. 251, to the effect that the borough cannot rescind by ordinance annulling such contract.

¹ See § 1237.

² *Bartlett v. Brown*, 121 Mo. 353; 25 S. W. 1108; *Sauer v. Nehls*, 121 Ia. 184; 96 N. W. 759; *Allison Brothers' Co. v. Allison*, 144 N. Y. 21; 38 N. E. 956.

ment is that the evidence must be clear and convincing,³ though it is said also that it must be clear and satisfactory,⁴ "satisfactory,"⁵ "full, clear and decisive,"⁶ "clear and precise,"⁷ "clear, precise and undubitable,"⁸ "clear, cogent," "strong and convincing,"⁹ "clear, positive and convincing,"¹⁰ clear, convincing and satisfactory,¹¹ most clear and convincing,¹² "clear and most satisfactory,"¹³ the "clearest and most satisfactory" evidence,¹⁴ the clearest, strongest and most irrefragable evidence,¹⁵ evidence as strong as if the mistake were admitted,¹⁶ or evidence which leaves "no rational doubt."¹⁷

³ *Bowers v. Ins. Co.*, 68 Fed. 785; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; 33 N. W. 38; *Hunter v. Patterson*, 142 Mo. 310; 44 S. W. 250; *Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.), 38 S. W. 214.

⁴ *Baldwin v. Fence Co.*, 67 Fed. 853; *Hochstein v. Berghauser*, 123 Cal. 681; 56 Pac. 547; *Seeman v. Biemann*, 108 Wis. 365; 84 N. W. 490. "Clear proof" is the requisite in *Seeley v. Baldwin*, 185 Ill. 211; 56 N. E. 1075. It is said that the facts must be "clearly proved" in *New York Life Ins. Co. v. McMaster*, 87 Fed. 63; 30 C. C. A. 532.

⁵ *Ward v. Yorba*, 123 Cal. 447; 56 Pac. 58.

⁶ *Cross v. Bean*, 81 Me. 525; 17 Atl. 710.

⁷ *Liggett v. Shira*, 159 Pa. St. 350; 28 Atl. 218.

⁸ *Sanders v. Sharp*, 153 Pa. St. 555; 25 Atl. 524.

⁹ *Foster v. Schmeer*, 15 Or. 363; 15 Pac. 626.

¹⁰ *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319; 8 S. W. 897.

¹¹ *Home Fire Ins. Co. v. Wood*, 50 Neb. 381; 69 N. W. 941.

¹² *Clark v. Ry.*, 127 Mo. 255; 30 S. W. 121.

¹³ *Habbe v. Viele*, 148 Ind. 116; 45 N. E. 783; rehearing denied, 47 N. E. 1.

¹⁴ *Milligan v. Pleasants*, 74 Md. 8; 21 Atl. 695; *Hollenback's Appeal*, 121 Pa. St. 322; 15 Atl. 616; *Donaldson v. Levine*, 93 Va. 472; 25 S. E. 541.

¹⁵ *Ferring v. Fleischmann* (Tenn. Ch. App.), 39 S. W. 19.

¹⁶ *Ford v. Joyce*, 78 N. Y. 618.

¹⁷ *Rowley v. Flannelly*, 30 N. J. Eq. 613, 614; quoted in *Green v. Stone*, 54 N. J. Eq. 387, 399; 55 Am. St. Rep. 577; 34 Atl. 1099; reversing, 32 Atl. 706; *Hupsch v. Resch*, 37 N. J. Eq. 657, 663.

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